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Preservation is Process: The Designation of 'Dream Garden' as a Historic Object

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PRESERVATION IS PROCESS: THE DESIGNATION OF *DREAM GARDEN* AS A HISTORIC OBJECT

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I. INTRODUCTION

For most people, it is difficult to imagine an object measuring fifteen feet by forty nine feet and weighing over four tons slipping out of town without notice. But that is what almost happened in July, 1998 to *Dream Garden*, a Maxfield Parrish/Louis Comfort Tiffany mural, which has been on display in the lobby of the Curtis Building in Philadelphia since 1916.[1]

Such a disappearance was not difficult for art-conscious Philadelphians to imagine.[2] It happened in 1996 to Ellsworth Kelly's work, *Sculpture For A Large Wall*, an object measuring twelve feet by sixty-four feet installed in the lobby of the former Transportation Building in 1957.[3] Designed specifically for that lobby, the object—a significant work by a significant artist—was Philadelphia's first abstract public sculpture.[4] Kelly considered it "the summation of all the

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1. *See* John George, *Rethink Mural Sale*, PHILA. BUS. J., July 27, 1998, at 38. The author, noting that "plenty of people are rightly upset," said "this piece of art comes as close as any in defining Philadelphia" and its loss would be significant. *Id.* "Removing the mural and shipping it off diminishes us all, reflecting badly on our apparent lack of appreciation of the icons that define us as a city or region. . . . We shudder to think of what gets sold next." *Id.* After more than three years of dispute, the mural received a "surprise reprieve" when a local charitable foundation provided funds which permitted the Pennsylvania Academy of Fine Arts to obtain ownership; the Academy has promised that the mural will remain where it is. Stephan Salisbury, *A Surprise Reprieve for Curtis Mural*, PHILA. INQUIRER, Nov. 6, 2001, at A1 [hereinafter *Surprise Reprieve*].

2. *See The Bigger Picture*, PHILA. INQUIRER, Nov. 10, 1998, at A22. The editorial said the Kelly loss was round one ("loss by knockout") and the *Dream Garden* threat was round two "in the struggle to preserve privately owned artwork that's on public display." *Id.* It characterized "the strategy for preserving public art [as relying] too much on hand-wringing" and said the city "better get moving, for instance, with plans to establish a historic designation for the *Dream Garden* mural—and consider applying it to other works." *Id.*

3. *See* Stephan Salisbury, *Art Lovers Rip Sculpture's Loss*, PHILA. INQUIRER, Nov. 1, 1998, at B1 [hereinafter *Art Lovers Rip*]. What made the loss so "disturbing to local museum and art officials is the belief that removal of this work of art, which leaves a tattered hole at the very center of the city's cultural history and commercial core, could easily have been prevented." *Id.*

4. *See* Edward J. Sozanski, *Taking a Chance on the Abstraction in Everyday Life*, PHILA. INQUIRER, Oct. 17, 1999, at I1 (describing Kelly as "one of the most influential American artists of a generation that includes Jasper Johns, Robert Rauschenberg and Andy Warhol. . . ."). *See also Art Lovers Rip*, *supra* note 3.

> 'I think that we lost (the Kelly) is a tragedy because of its loaded significance for the city and for the whole body of Kelly's work,' said Penny Balkin Bach, executive director of the Fairmount Park Art Association. 'This was the first purely abstract public art in the city. It was Kelly's first use of metal. It was

pieces I'd done before."[5] New York's Museum of Modern Art, where the object eventually landed, considers it a "seminal masterwork."[6] But Philadelphia did not, and therein may lie a reason for the storm which arose over the proposed *Dream Garden* sale. The coincidence in the timing of realizing the Kelly loss and recognizing the threat to *Dream Garden* "heightened local concern over what many now see as an accelerated pillaging of the city's cultural identity."[7]

When the Philadelphia Inquirer broke the story about the impending *Dream Garden* sale, the public reaction prompted then-Mayor Ed Rendell to persuade the prospective buyer, casino owner Steve Wynn, to withdraw from the deal.[8] The city then took steps under the historic preservation provision of the Philadelphia Code to have *Dream Garden* designated as a historic object.[9]

> his first time working in a foundry. It is a trailblazer of great importance. Moving it from its location is truly a loss, because it will never have the same meaning at (the Modern). It can't.'

Art Lovers Rip, *supra* note 3.

5. Edward J. Sozanski, *The Kelly Masterwork That Philadelphia Lost*, PHILA. INQUIRER, Oct. 17, 1999, at I10. The writer said that the sculpture which had "remained in place for nearly 40 years, only to be sold for the pittance of $100,000, then resold . . . for $1 million, still seems outrageous." *Id.* Perhaps even more so was the ignorance of the developer which was renovating the building for a law firm. "Obviously, the building's owner . . . was ignorant of the sculpture's true value, let alone its significance. When it was sold, the building . . . was empty, fenced off and awaiting a new tenant. The sculpture apparently was perceived as extraneous. And Kelly . . . was afraid it would be destroyed." *Id.*

6. Press Release, The Museum of Modern Art, The Museum of Modern Art Given Five New Works by Ellsworth Kelly in the Midst of a Special Exhibition of his Work (Apr. 13, 1999), *available at* http://www.moma.org/docs/press/1999/fF_PO02,C8127.htm.

7. *Art Lovers Rip*, *supra* note 3. *See also* Stephan Salisbury, *'Dream Garden' Still For Sale, Lawyer Says*, PHILA. INQUIRER, Nov. 6, 1998, at B1 [hereinafter *Still for Sale*]. "Critics of the sale deplored what they characterized as cultural plundering of the city's art treasures, and they worried that moving the intricately embedded mural could seriously damage it." *Id.* On another occasion, Philadelphia benefitted from some plundering. *See* Edward J. Sozanski, *Fort Worth's Pain is Phila.'s Gain: Calder's 'Eagle' Soars on Parkway*, PHILA. INQUIRER, Aug. 15, 1999, at F1 (describing Fort Worth's sense of loss when a publically exhibited Calder sculpture was sold and moved to Philadelphia for a temporary showing before being moved to its new home).

8. *See* Stephan Salisbury, *Protected Status For Curtis Mural*, PHILA. INQUIRER, Dec. 1, 1998, at A1 [hereinafter *Protected Status*]. The mayor said the potential buyer "had not realized the local importance of the mural and did not wish to hurt the city. Beyond that, the mayor said . . . the mural was such a significant part of the city's cultural fabric that it should remain here. 'There are things,' the mayor said, 'that you cannot sell.'" *Id.*

9. *See* Stephan Salisbury, *Historic Status Urged For 'Dream Garden'*, PHILA. INQUIRER, Nov. 21, 1998, at B1 [hereinafter *Historic Status*].

> The impending sale of the mural last summer caused a startling public outcry. After casino owner Steve Wynn dropped his anonymity as buyer and withdrew from the deal in the face of the widespread opposition, Mayor Rendell directed the historical commission to consider designating Dream Garden an

The preservation provision "declare[s] as a matter of public policy that the preservation and protection of . . . objects . . . of historic, architectural, cultural, archaeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia."[10] An object is "[a] material thing of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, movable yet related to a specific setting or environment."[11]

This article will track the process of designating *Dream Garden* as a historic object, a process which was not properly completed. The Commonwealth Court's decision on the *Dream Garden* designation has added another chapter to Pennsylvania's confused and convoluted use of the administrative law process to resolve questions growing out of government's regulation of private property. These questions can be resolved, but only if the courts permit the administrative law process to play out. The parties must have and must use this opportunity to build a full and complete record so that a reviewing court will have the benefit of that record in determining whether the process has met constitutional and legislative requirements.

The key to the Commonwealth Court's decision was the court's conclusion that the Philadelphia Historical Commission's "designation of the Dream Garden as an historic object is a final adjudication and thus appealable under Local Agency Law."[12] That conclusion appears to be wrong as a matter of administrative procedure and policy. This article will show that the

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> "historic object" – a previously unused category in the city's preservation ordinance.

Historic Status, supra. See also Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U. L. REV. 111 (1997). "The value of historic preservation goes beyond subjective judgments about which old buildings and neighborhoods are worth saving. Courts have long recognized that historic preservation is an essential tool for local governments to improve the quality of life for their citizens." *Id.* at 143.

10. PHILA. CODE § 14-2007(1)(a) (2001). *See* John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

> Cultural objects nourish a sense of community, of participation in a common human enterprise. Even a single object . . . illustrates humanity's social nature. . . . The social functions of objects testify to our common humanity. They illustrate one's connection with others, express a shared human sensibility and purpose, communicate across time and distance, dispel the feeling that one is lost and alone. . . .

Id. at 349.

11. PHILA. CODE § 14-2007(2)(*l*). Although it was the first object designated under Philadelphia's preservation provision, the *Dream Garden* case stimulated a review and designation of other historically significant objects. *See* Stephan Salisbury, *Preservationists Hail 'Dream Garden' Victory*, PHILA. INQUIRER, Nov. 11, 2001, at H7 [hereinafter *Preservationists Hail*].

12. Estate of Merriam v. Phila. Historical Comm'n, 777 A.2d 1212, 1214 (Pa. Commw. Ct. 2001).

Commission's designation was either an agency action subject to administrative review or was an agency determination not ripe for administrative review until the owner applied for and was denied either a designation rescission or a demolition permit. In both cases, the administrative review would be done by appeal to Philadelphia's Board of License and Inspection Review. Only when that appeal is completed is the matter ready for judicial review.

The *Dream Garden* designation was not a regulatory takings matter, as tempting as it was to make it one. Certainly, the Commonwealth Court succumbed to the temptation and left no doubt that it felt the designation had effected a taking requiring just compensation.[13] As will be seen, this contradicts the Pennsylvania Supreme Court's conclusion, following its analysis of Philadelphia's preservation provision, that "the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth."[14] *Dream Garden* is an object, but its designation must satisfy the same criteria and procedures as a building—its designation is not a taking.[15]

The Commonwealth Court's *Dream Garden* decision also contradicts U.S. Supreme Court precedent which the Pennsylvania Supreme Court "has continually turned to . . . for guidance in its 'taking' jurisprudence, and indeed has

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13. The court held:

> [T]he [Merriam Estate] alleged it has suffered actual and present harm as a result of the Commission's designation. First, the proposed sale of the Dream Garden for nine million dollars collapsed due to the threat of historic designation. Currently, the Estate is prevented from moving or altering the work of art from its present location forestalling any chance of any future sale. Unlike the designation of a building or structure, which can be adapted for other uses, the historical designation of Dream Garden precludes any right of private ownership of the work of art. The Estate has no viable economic use of its property, following designation. It remains a privately owned piece of art in a building owned by a third party. We conclude that this hardship to the Estate establishes this challenge to the Code is ripe for judicial review.

777 A.2d at 1221.

14. United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 620 (Pa. 1993) [hereinafter *United Artists II*].

15. *Id.* at 621. The Commonwealth Court may have confused takings concerns with due process concerns. *See* Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and the Due Process Clauses*, 3 U. PA. J. CONST. L. 885 (2001).

> The purpose of the Takings Clause is not to protect citizens against bad laws—that is, laws that are overbroad, arbitrary, insufficiently justified, economically inefficient, or unfair. Rather, the purpose of the Takings Clause is to prevent government from appropriating property for public purposes without paying compensation. . . . The Due Process Clauses provide protections against unfair laws, both those that take property as well as those that merely regulate it.

Id. at 899.

adopted the analysis used by the federal courts."[16] That analysis stresses the importance of completing the administrative law process before undertaking judicial review of local property-use cases.[17]

Most recently, in *Palazzolo v. Rhode Island*, the U.S. Supreme Court said its precedent stood

> for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.[18]

In an case, the Court had indicated its "reluctance to examine taking claims" if the owner "has not yet obtained a final decision regarding how it will be allowed to develop its property."[19] The factors used to evaluate taking claims "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[20]

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16. *United Artists II*, 635 A.2d at 616.

17. *See generally id.*

18. Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001). For background on *Palazzolo* see Brittany Adams, Note, *From Lucas to Palazzolo: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225 (2001). For a recent review of finality/ripeness decisions see Douglas T. Kendall, et al., *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 URB. LAW. 405 (2001).

19. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190 (1985). *See* Stephen E. Abraham, *Williamson County Fifteen Years Later When is a Takings Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101 (2001). *Compare* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).

> The demand for finality is satisfied by Suitum's claim . . . there being no question here about how the 'regulations at issue [apply] to the particular land in question.' . . . Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.

Id. at 739.

20. *Williamson County*, at 191. A few years ago, I concluded that

> [u]nder the post-*Penn Central* cases, [a] city [designating a landmark] probably would have to answer the following questions: (1) is the governmental interest at stake legitimate?; (2) is there a reasonably close nexus between that governmental interest and the regulatory means chosen?; and (3) does the governmental interest outweigh the burden that the regulation imposes on the property owner? The first two are due process questions focusing on the

In *Palazzolo*, the Court acknowledged that it had "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking."[21] In an earlier case, *Del Monte Dunes*, the Court acknowledged that it "has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . ."[22] However, the Court said that the jury

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> legitimacy of the governmental action. . . . The third question is really the core of a takings analysis, focusing on the harm done to the owner and preventing government from using its coercive powers to acquire the property interest of a citizen under the police power guise of regulating the owner's relationship with others.

John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 105-106 (1996).

21. *Palazzolo*, 533 U.S. at 617. The Court continued:

> First, we have observed, with certain qualifications, . . . that a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause. . . . Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Id. (citations omitted). *See* Keri Ann Kilcommons, Note, *A Survey of Supreme Court Takings Jurisprudence: The Impact of Del Monte Dunes on Nollan, Dolan, Agins and Lucas*, 9 N.Y.U. ENVTL. L.J. 532 (2001).

> The categorical approach to land use regulation separates takings into three types: (1) physical invasions or regulatory activities that effect physical invasions warranting an inverse condemnation action . . . ; (2) exactions and/or title dedications imposed as developmental conditions where (a) an essential nexus between a legitimate state objective and the regulation is lacking, . . . and/or (b) where the potential impacts of the proposed development are not roughly proportional to the scope of the required regulatory conditions . . . ; and (3) economic takings, where inverse condemnation is justified on the grounds that a regulation (a) fails to substantially advance a legitimate public purpose, or (b) denies a property owner of all economically viable land use. . . .

Id. at 562-63.

22. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999). *See* Kilcommons, *supra* note 21, at 533:

> By adding another facet to an already convoluted takings analysis, *Del Monte Dunes* may be perceived as stemming from the Court's inability to discern consistent principles among its land use precedents. The outcome of this case may also be viewed as deriving from the Court's continued reliance on misplaced principles of property law in an era of significantly heightened

instructions in *Del Monte Dunes* were "consistent with our previous general discussions of regulatory takings liability."[23] Those instructions on whether the owner "had been denied all economically viable use of its property"[24] and whether "'the city's decision . . . did not substantially advance a legitimate public purpose'"[25] were predominately factual questions properly given to the jury to decide on the basis of the record developed. In *Dream Garden*, that record did not have a complete chance to develop, and thus any conclusions like those made by the Commonwealth Court were premature.

If that record had been fully and completely developed, it might well have disclosed that there was a taking question regarding *Dream Garden*. The Merriam Estate, which owned *Dream Garden*, also immediately challenged the facial constitutionality of and the extent of the authority delegated to the Historical Commission by the preservation provision, although the Pennsylvania Supreme

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governmental ability to use regulation to skirt Fifth Amendment takings requirements.

Kilcommons, *supra* note 21, at 533.

23. *Del Monte Dunes*, 526 U.S. at 704.

24. *Id.* at 700. The takings instruction approved by the Court was as follows:

'For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.'

Id.

25. *Id.* at 700. The "Public Purpose" instruction approved by the Court was as follows:

'Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest[s] and legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

'The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective.

'Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose, . . . its underlying motives and reasons are not to be inquired into.

Id. at 700-01.

Court precedent offered little, if any, support for such a challenge. But no taking question arose from the city's mere act of using that provision to designate *Dream Garden* as a historic object. The Pennsylvania Supreme Court has clearly held that any challenge to the preservation provision based on the effects of its application to *Dream Garden* had to be based on a fully developed record.[26] The immediate post-designation question is where should that record continue to be developed: in the courts or in the administrative process?

II. THE BEGINNING OF THE PROCESS

While there is some question whether *Dream Garden* is movable, it is clearly related to its specific setting.[27] It was commissioned specifically for that setting by Cyrus Curtis, publisher of the Ladies Home Journal and the Saturday Evening Post, and by Edward Bok, editor of the Ladies Home Journal.[28] Curtis and Bok were convinced of the power of public art to enhance the lives of all and were committed to elevating the public's taste in art.[29] When Curtis purchased an entire city block facing Independence Square for his headquarters, he and Bok knew that the building's proximity to the national site would make it an attraction for visitors as well as a working place for their employees.[30]

Although Maxfield Parrish was not the artist of first choice for the lobby mural, he had completed a large mural for the Curtis Building's public dining

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26. *See, e.g., infra* at section V.

27. *See Protected Status, supra* note 8 (noting expressions of "deep concern over the prospects of removal" without significant damage). Philadelphia was not alone in its concern over a historically significant mural. *See generally* Daniel J. Wakin, *Shedding 7 Coats, A Beauty Emerges On a Hospital Wall,* N.Y. TIMES, June 27, 2001, at B1; Julie V. Iovine, *Aalto Interior to Stay in New York,* N.Y. TIMES, June 28, 2001, at F7; Carol Vogel, *A Familiar Mural Finds Itself Without a Wall,* N.Y. TIMES, July 9, 2001, at A1; Dinitia Smith, *Debating Who Controls Holocaust Artifacts,* N.Y. TIMES, July 18, 2001, at E1; Clifford Krauss, *Argentina Fights to Save Mural by Mexican Painter,* N.Y. TIMES, Aug. 2, 2001, at E2.

28. *See* SYLVIA YOUNT, MAXFIELD PARRISH 1870-1966 (1999). "At the center of Philadelphia's publishing empire, the Curtis company occupied a majestic building on Independence Square, considered at the time to be the most beautiful and modern periodical plant in the world." *Id.* at 97-99. *See also* Diane M. Fiske, *Real Dilemma For Tiffany Dream Garden,* ARCHITECTURE WK., Oct. 18, 2000, at C1, *at* http://www.architectureweek.com/2000/1018/culture_1-1.html.

> The mural covers one wall of the Marble Hall, a gleaming testimonial to the views of Curtis. . . . [He] wrote that the wealthy should not have a monopoly on works of art. He felt that ordinary people had a right to appreciate art "in their workplace and their everyday lives rather than in museums."

Id.

29. *See* Fiske, *supra* note 28.

30. For general history see *The Timeless Art of Maxfield Parrish,* SAT. EVENING POST, Mar./Apr. 2000, at 58 [hereinafter *Timeless Art*]; Fiske, *supra* note 28.

room, a work which became an immediate public hit.[31] This was not surprising since Parrish wanted to be a popular artist, relishing his role in making art accessible to the widest audience.[32] He was "committed to the democratization of art" and became "America's first truly public artist."[33]

This is not to denigrate his talent.[34] Parrish was an "artist of consummate craft, invention, and imaginative appeal, [who] enjoyed a level of popular success unparalleled in the history of art."[35] He saw, ahead of his contemporaries, the

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31. *See* YOUNT, *supra* note 28, at 95-97.

> Parrish expanded his mural painting repertoire in 1911 with, arguably, his most ambitious and significant venture to date—the eighteen panel *Florentine Fete* cycle for the new Curtis Publishing headquarters in Philadelphia. [One] observed that Parrish 'makes no secret of his desire to leave illustrating. He progresses with a deliberate purpose and power that seems to aim at mural decoration with his taste for architectural effects.' To be sure, the artist's early architectural training gave him the requisite skills to establish himself as a fine muralist.

Id.; *See also id.* at 149 n.159.

> Upon completion, the [Curtis Building's] dining room became a popular tourist attraction in Philadelphia, attracting hundreds of visitors on a weekly basis. The [c]ompany was so pleased with [Parrish's] work that, after the untimely death of Edwin Austin Abbey, who was working on a mural for the building's lobby, Bok persuaded Parrish to take over the project.

Id. The dining room mural was eventually sold and moved before Philadelphia had a preservation provision. *Id.*

32. *See id.* at 102. "[I]t was Parrish's willingness to work in a newly expansive art world firmly aligned with consumer culture–'small companies, large corporations, print and lithography businesses, and artists' agents,' who both commissioned work from Parrish and marketed it to a mass audience—that accounted for his tremendous success." *Id.* "With boundless energy and a workmanlike diligence . . . Parrish committed himself to the popularization and democratization of art, viewing beauty as a form of social betterment." *Id.* at 17.

33. Serena Rattazzi, *Foreword* to YOUNT, *supra* note 28, at 9. *See* Holland Cotter, *Lush Idylls in Never-Never Land*, N.Y. TIMES, June 18, 1999, at E29. "[Parrish] genuinely relished his role as popular artist, never viewing himself as a genius painter condescending to do graphic work. ('I'm hopelessly commonplace,' he once said.)." *Id. See also Timeless Art*, supra note 30. "[B]etween the two world wars, Maxfield Parrish was considered the common man's Rembrandt. What Norman Rockwell was to the world of magazine illustration, Parrish was to the unique and flourishing art of fantasy images." *Id.*

34. *See* YOUNT, *supra* note 28.

> Contemporaries heralded his fundamentally "aristocratic genius," "dedicated by choice to democratic ends," and went so far as to lay the "brightest hope for democracy" at his feet on account of his tireless attempts to "bring 'the best' a little nearer to everybody, and everybody a little nearer to 'the best.'"

Id. at 17.

35. Daniel Rosenfeld, *Foreword* to YOUNT, *supra* note 28, at 10.

> Parrish was the first artist to exploit mass marketing in lieu of the art gallery system for the distribution of his work. As a result, he enjoyed extraordinary

worth and the value of aligning his art with the consumer culture.[36] It brought him financial success and helped elevate the general public's reception to and appreciation of art.[37] Parrish struck a particularly resonant chord with a wide audience.[38] He may have been slighted by some aesthetes, but he was embraced by the public.[39] His art worked its way into the general psychology and came close to being universal in its appeal, speaking to all people.[40]

Thus, although not the first choice, Parrish proved to be the right choice for the project which Curtis and Bok intended to be the public focus for what is now a historically designated building.[41] Parrish's collaboration with Tiffany was a critical and popular success.[42] Done on a scale never before attempted, *Dream Garden* is a work which reflected, yet was greater than, the individual talents which worked on it. *Dream Garden* was what Curtis and Bok had dreamed of for their building: a great work of art which was accessible to and loved by the public.[43]

> visibility that was achieved largely outside the fine arts establishment, acquiring the status of both an 'outsider' and one of the best-known and best-loved artists in America.

Rosenfeld, *supra* at 10.

36. Rosenfeld, *supra* note 35, at 10.

37. *Id.*

38. *See* Cotter, *supra* note 33. "But what makes Parrish interesting is that for more than a century Americans have found him interesting." *Id. See also* Rathe Miller, *Public Art: The Inside Story,* PHILA. INQUIRER, Aug. 21, 1998, at 22. "*Dream Garden* seems to engage everyone who sees it . . . ." "'Every time you see it, it has such an impact' . . . 'It's something that stays in your memory, as all good art does.'" *Id.*

39. *See* Bruce Watson, *Beyond the Blue: The Art of Maxfield Parrish,* SMITHSONIAN, 1999, at 52. "Parrish did not imagine paradise. Like his fans who feel beckoned to enter his prints, he lived in it. 'Parrish stirs something deep within people'. . . . You see his light and you understand things about yourself and the world. And you say, 'Oh, he saw these things, too.'" *Id.* at 66.

40. *See* Cotter, *supra* note 33. "Americans have always had a thing for illusionist painters. . . . But Parrish's work also seems to have struck some strong psychological chords." *Id. See also* YOUNT, *supra* note 28, at 16.

> The public's elusive blue landscape turned out to be the "most wanted" painting by focus groups . . . leading [one researcher] to ponder whether this type of work 'is genetically imprinted in us, that it's the paradise within, that we came from blue landscape, and we want it.' As a master of 'ever-deepening blues' whose name became synonymous with a certain hue, Parrish may have achieved . . . the 'dream of modernism . . . to find a universal art' that speaks to all humankind.

Id.

41. *See Historic Status, supra* note 9.

42. Well, maybe not to everyone. *See* Cotter, *supra* note 33. "It is one of those staggeringly elaborate visual trifles, at once delicate and gross, of which Parrish and Tiffany were masters. No one traveling to Philadelphia should miss it. . . . Its future is uncertain." *Id.*

43. *See* Fiske, *supra* note 28; *Timeless Art, supra* note 30. *See also* Trish Boppert, *The Power To Move Us Is Why A Mural Matters,* PHILA. INQUIRER, June 1, 2001, at A31. "Public art sings to us,

And so, for over eighty years, there it has remained—a monumental art work shown in a historically significant public venue.[44] When the Curtis Building was sold to John Merriam in 1968, he obtained ownership of *Dream Garden* which still remained in place.[45] When Merriam sold the building in 1984, he retained ownership of *Dream Garden* which still remained in place.[46] When Merriam died in 1994, his estate, managed by his widow Elizabeth, obtained ownership of *Dream Garden.*[47]

And then it all started. Mrs. Merriam was beneficiary of forty-one percent of the estate, with the remaining fifty-nine percent divided among four Philadelphia area institutions: the University of Pennsylvania, the Pennsylvania Academy of Fine Arts, the University of the Arts, and Bryn Mawr College.[48] However, as trustee, Mrs. Merriam managed the estate assets.[49] For whatever reason, she elected to sell *Dream Garden* in 1998, found a willing buyer in Steve Wynn, and then found herself in controversy.[50]

This time, in contrast to its inertia when the Ellsworth Kelly sculpture was spirited out of town, Philadelphia was not going to let *Dream Garden* go without a fight.[51] It had already enacted legislation to "preserve . . . objects which are important to the education, culture, traditions and economic values of the City."[52]

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moves us, takes us someplace other that the here and now. . . . I used to work in the Curtis Center and spent many a moment in front of the mural, drinking in the hallucinatory, shimmering blue, the dreamlike, surreal quietude." Boppert, *supra.*

44. *See Historic Status, supra* note 9. "The mural was commissioned for the lobby of the Curtis building – which itself was certified in 1974. Since its installation in 1916, the piece has become a familiar public image, one that is associated with the historic building, the historic district and the city." *Id.*

45. *Id.*

46. Jen Darr, *Nightmare Garden*, PHILA. CITY PAPER, June 10, 1999, *available at* http://citypaper.net/articles/061099/news.cb.garden.shtml.

47. *See* Stephan Salisbury, *The Seeds of a New Legal Battle May be Planted in Famed Mosaic,* PHILA. INQUIRER, Nov. 22, 1998, at E4 [hereinafter *The Seeds*]; Darr, *supra* note 46.

48. *Estate of Merriam*, 777 A.2d at 1215.

49. *See generally* Stephan Salisbury, *City Institutions Say Their Hands Are Tied on Mural,* PHILA. INQUIRER, Sept. 19, 1999, at F8.

50. *See generally id. See also Protected Status, supra* note 8. "[One preservation advocate] called the mural 'part of the soul of Philadelphia' . . . [Another] said that removal of the mural would leave the Curtis Center . . . 'like a model with her two front teeth knocked out.'" *Id.*

51. *See generally* Stephan Salisbury, *Institutions Assert Control Over Parrish-Tiffany Mural,* PHILA. INQUIRER, May 29, 2001, at A1 [hereinafter *Institutions Assert Control*]. *See also* Merryman, *supra* note 10, at 355. "The essential ingredient of any cultural property policy is that the object itself be physically preserved. . . . Indeed, from a certain point of view the observation is tautological; if we don't care about its preservation, it isn't, for us, a cultural object." *Id.*

52. PHILA. CODE § 14-2007(1)(b)(.1). The Pennsylvania Supreme Court says that "[a]n ordinance which is properly adopted by the Philadelphia City Council has the force and effect of an act of the Pennsylvania assembly." Pub. Advocate v. Phila. Gas Comm'n, 674 A.2d 1056, 1061 (Pa. 1996). *See also* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government:*

This legislation afforded "the City . . . the opportunity to acquire or to arrange for the preservation" of historic objects.[53] Preservation would "strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values."[54] Preservation would also "foster civic pride in the architectural, historical, cultural, and educational accomplishments of Philadelphia."[55]

This preservation process is managed by a fourteen member Historical Commission.[56] Along with advisory, educational, and rule making responsibilities, the Commission is charged with "designat[ing] as historic those

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The Interaction of Police Power and Property Rights, 75 WASH. L. REV. 857 (2000). "The exercise of police power—governmental action to advance public health, safety, peace, and welfare—has long been a part of the very nature of government itself. . . . Indeed, Aristotle considered the state the highest form of community, existing to achieve the highest good for its citizens. . . ." Talmadge, *supra* at 861.

53. PHILA. CODE § 14-2007(1)(b)(.4). *See* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993).

54. PHILA. CODE § 14-2007(1)(b)(.5).

55. *Id.* § 2007(1)(b)(.6). *See* Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131 (2000).

> Cultural property . . . combines both a concrete element consisting of the physical, empirical embodiment of individual objects as well as a less tangible, symbolic quality. Unlike other forms of property . . . [c]ultural property often embodies the collective identity of a group of people. This notion of duality raises questions as to whether any single individual is capable of being the 'true owner' of cultural property, since it can be viewed on one level as the property of an entire culture.

Id. at 134.

56. *See* PHILA. CODE § 14-2007(3).

> The Mayor shall appoint a Philadelphia Historical Commission consisting of the President of City Council . . . the Director of Commerce, Commissioner of Public Property, the Commissioner of Licenses and Inspections, the Chairman of the City Planning Commission . . . the Director of Housing . . . and eight other persons learned in the historic traditions of the City and interested in the preservation of the historic character of the City.

Id. That group of eight must include "an architect experienced in the field of historic preservation; . . . an historian; . . . an architectural historian; . . . a real estate developer; . . . a representative of a Community Development Corporation; and . . . a representative of a community organization." *Id.* *See also* Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431 (1994).

> Blanket national protection for all public art may not be the solution. Nevertheless, individual works of art . . . can be granted landmark status that would require the owner, whether public or private, to maintain and protect the art work. . . . [O]nly a decision by a body responsible to the public, and including representatives of the artistic community, could impose on the owner the duty to preserve and maintain the art work.

Id. at 464-65.

. . . objects which the Commission determines . . . are significant to the City."[57] However, any designation determination must be made "pursuant to the criteria set forth" in the Code.[58] An "object . . . may be designated for preservation if it"[59] meets criteria such as the following, used by the Historical Commission when it designated *Dream Garden.* The Commission concluded that the work should

> (a) [Have] significant character, interest or value as part of the development, heritage or cultural characteristics of the City, . . . or is associated with the life of a person significant in the past; or,
> (b) [Be] associated with an event of importance to the history of the City . . . ; or,
> . . . .
> (e) [Be] the work of a designer . . . whose work has significantly influenced the historical, architectural, economic, social, or cultural development of the City . . . ; or,
> . . . .
> (h) [Due] to its unique location or singular physical characteristic, represent[ ] an established and familiar visual feature of the . . . City.[60]

The designation of an object is a public process applying legislatively-enacted criteria and procedures.[61] When the Historical Commission considers designating

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57. PHILA. CODE § 14-2007(4)(a).

58. *Id. See also* Albert H. Manwaring, IV, Note, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291 (1990). "Clear designation standards provide fair notice to property owners, serve as guidelines for landmark commission deliberations, and provide a definite standard for judicial review of the commission's actions to determine whether their findings and conclusions are adequately supported by the record." *Id.* at 300, n.49.

59. PHILA. CODE § 14-2007(5).

60. *Id.* The remaining criteria follow:

> (c) Reflects the environment in an era characterized by a distinctive architectural style; or,
> (d) Embodies distinguishing characteristics of an architectural style or engineering specimen; or,
> . . . .
> (f) Contains elements of design, detail, materials or craftsmanship which represent a significant innovation; or,
> (g) Is part of or related to a square, park or other distinctive area which should be preserved according to an historic, cultural or architectural motif; or,
> . . . .
> (i) Has yielded, or may be likely to yield, information important in pre-history or history; or
> (j) Exemplifies the cultural, political, economic, social or historical heritage of the community.

Id.

61. *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

an object, the Philadelphia Code requires it to give at least thirty days notice to "the owner of the property proposed for designation."[62] At the mandated public meeting, "[a]ny interested party may present testimony or documentary evidence regarding the proposed designation."[63] If the Commission determines to designate an object, it "shall send written notice of the designation . . . to the owners, . . . which shall include reason for the designation."[64] After designation, the owner may not, "[u]nless a permit is first obtained from the Department [of Licenses and Inspections] . . . alter or demolish an historic . . . object."[65]

The Historical Commission has adopted rules governing its proceedings.[66] Hearings must be "held on the proposed designation of . . . objects . . . and on applications for permits to alter or demolish."[67] These hearings are public and publicized and are the forums for "formal submission of reports, testimony and recommendations" by interested parties.[68] The Commission has also created three standing committees including a Committee on Historic Designation "to review proposals for the designation of . . . objects . . . and to advise the Commission on their significance [by using] such forms and levels of documentation as established by the Commission."[69] At a regularly scheduled

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> [I]t is crucial that landmark designations avoid the appearance of unpredictability and caprice, and that the standards and procedures . . . be clear from the outset. . . . This need for standards again bespeaks our need for a theory of the public purposes to be served by historic preservation; articulation of those public purposes would give rise to standards, and standards give notice to property owners.

Rose, *supra* at 503.

62. PHILA. CODE § 14-2007(6)(a). Notice of nomination for designation does restrict the owner's use of the object. The Department of Licenses and Inspections "shall not issue any permit for the demolition, alteration or construction of any . . . object which is being considered by the Commission for designation as historic . . . where the permit application is filed on or after the date that notices of proposed designation have been mailed. . . ." *Id.* § 14-2007 (7)(*l*).

63. *Id.* § 14-2007(6)(c).

64. *Id.* § 14-2007(6)(e).

65. *Id.* § 14-2007(7)(a). A similar restriction applies during the period in which designation is being considered. *Id.* § 14-2007(7)(*l*). *See* Colleen P. Battle, Note, *Righting the "Tilted Scale": Expansion of Artists' Rights in the United States,* 34 CLEV. ST. L. REV. 441 (1986). "There is a tradition in the United States of restriction of property rights when the rights of the owner conflict with some important societal interest . . . . [T]here are situations where the interests of society are superior to the private property interests of owners." *Id.* at 464

66. PHILA. CODE § 14-2007(4)(h). The Commission shall "[a]dopt rules of procedure and regulations and establish such committees as the Commission deems necessary for the conduct of its business." *Id.*

67. PHILA. HISTORICAL COMM'N, RULES & REGULATIONS 2.10 (1990) [hereinafter RULES & REGULATIONS].

68. *Id.*

69. *Id.* at 3.4(b). The Committee, which "may consist of members of the Commission and other qualified persons. . . . shall include persons who have knowledge of history, architecture,

Commission meeting, the Committee chair must report and present recommendations for Commission action.[70]

The Commission has established a designation procedure. A person, an organization, or the Commission staff may submit a nomination.[71] The staff then reviews the nomination "for technical and substantive correctness and completeness" and submits it to the Committee on Historic Designation.[72] The Committee, in turn, publicly evaluates the nomination according to Code criteria.[73] It then votes "to recommend the approval or rejection of a nomination and . . . report[s] its recommendation to the Commission at a public hearing."[74] The Historical Commission is responsible for providing general public notice of that hearing and specific "written notice at least thirty (30) days in advance to the owner of the property proposed for designation."[75]

A designation determination may subsequently be amended or rescinded. The latter occurs if:

> 1) the resource has ceased to meet the criteria . . . because the qualities that caused its original entry have been lost or destroyed, 2) additional information shows that the resource does not meet the criteria . . . or 3) error in professional judgement as to whether the resource meets the criteria for listing.[76]

An owner seeking rescission "shall make a written and documented submission to the Commission" establishing one of these three bases.[77]

III. *DREAM GARDEN* ENTERS THE PROCESS

Except for a rescission submission, the *Dream Garden* designation followed this procedure. On November 20, 1998, the Committee on Historic Designation unanimously recommended designation of *Dream Garden* as a historic object.[78]

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cultural resources and planning as well as at least one who represents the perspective of the public." RULES & REGULATIONS, *supra* note 67, at 3.4(b).

70. RULES & REGULATIONS, *supra* note 67, at 4.5.c.

71. *Id.* at 5.2.a.

72. *Id.* at 5.2.c.

73. *Id.* at 5.2.d. However, the rules say the Committee "provides an advisory and technical service to the Commission and its meetings do not constitute public hearings. Nevertheless, opportunity for public participation in these meetings shall be made available and shall be limited only by constraints of time and pertinency." *Id.*

74. *Id.* at 5.2.e.

75. *Id.* at 5.4.a.

76. *Id.* at 5.5.c.1. PHILA. CODE § 14-2007(6)(f) also provides for rescission: "[a]ny designation of a . . . object . . . may be amended or rescinded in the same manner as is specified for designation."

77. RULES & REGULATIONS, *supra* note 67, at 5.5.c.2.

78. *See Protected Status, supra* note 8.

Ten days later, the Historical Commission unanimously adopted this recommendation.[79]

And now the game was truly afoot.[80] The Historical Commission had never before sought to designate an object.[81] As one commentator noted: "[a]n unprecedented action makes outcomes tricky to predict."[82] At best, Pennsylvania's case law provided little illumination. The state supreme court had made a muddle of preservation law in 1991 (*United Artists I*)[83] and 1993 (*United Artists II*),[84] and what has been done since then clarifies matters only a little.[85]

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79. *See Protected Status, supra* note 8.

80. *See* Sameric Corp. v. City of Philadelphia, 142 F.3d 582 (3d Cir. 1998) where the court, discussing a challenge to Philadelphia's preservation provision, emphasized its

> reluctance to substitute our judgment for that of local decision-makers, particularly in matters of such local concern as land-use planning, absent a local decision void of a "plausible rational basis." . . . We decline to federalize routine land-use decisions. Rather, the validity of land-use decisions by local agencies ordinarily should be decided under state law in state courts.

Id. at 596. *See also* Manwaring, *supra* note 58.

> But the "real cutting edge of historic preservation law is at the local level," as municipalities are in the best position to monitor . . . individual historic landmarks. Since the heart of historic preservation lies at the local level, the ability of municipalities to enact and enforce preservation ordinances is essential to protecting our nation's significant interiors.

Id. at 296.

81. *See* Merryman, *supra* note 10.

> [T]here is a *public* interest in cultural property because people care deeply about it for a variety of natural and laudable reasons. Since there is such a degree of public interest, and cultural property touches on so many public concerns, the development of some kind of public policy toward cultural objects is both desirable and unavoidable. All would, of course, prefer a policy that is sensitive to the public interest and, where appropriate, actively protects and advances it.

Id. at 363.

82. *The Seeds, supra* note 47.

83. United Artists Theater Circuit, Inc. v. City of Phila., 595 A.2d 6 (Pa. 1991) [hereinafter *United Artists I*].

84. *United Artists I*, 635 A.2d 612.

85. *See* Daniel T. Cavarello, Comment, *From Penn Central to United Artists' I & II: The Rise to Immunity of Historic Preservation Designation From Successful Takings Challenges,* 22 B.C. ENVTL. AFF. L. REV. 593 (1995). Perhaps muddle is too strong a word; "anomalous" might be gentler. *See The Seeds, supra* note 47. The problem may lie in the conflict inherent to preservation: public interest versus private property. *See* Cindy Moy, Note, *Reformulating the New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving the Big Apple,* 14 CARDOZO ARTS & ENT. L.J. 447 (1996). "[L]andmarks preservation is a contemporary movement that has rapidly gained tremendous influence. Yet, while these efforts have enhanced our cultural resources, they also have yielded a complex set of laws that struggles to balance normative values and descriptive realism." *Id.* at 448.

United Artists I began in 1987 when the Philadelphia Historical Commission designated the Boyd Theater a historic building.[86] The theater owner then filed an action in the Philadelphia Court of Common Pleas seeking, in part, "a declaratory judgment that the Commission was without authority to designate its Boyd Theater building as historic."[87] Prior to a hearing on this facial challenge, the Commission and the owner "agreed that the Commission was a local agency and [that the] suit . . . should be treated as an appeal from the Commission's decision pursuant to . . . [Pennsylvania's] Local Agency Law."[88]

Pennsylvania's Local Agency Law affords anyone "aggrieved by an adjudication of a local agency . . . the right to appeal therefrom to the court vested with jurisdiction" over such matters.[89] An agency is "[a] government agency"; a government agency is "[a]ny Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of any such political subdivision or local authority"; and a local agency is "[a] government agency other than a Commonwealth agency."[90] An adjudication is "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights . . . duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made."[91]

Thus, the parties in *United Artists I* agreed that the Historical Commission was a local agency and that its designation of the Boyd Theater was an adjudication.[92] The owner then had standing to invoke the local agency law and challenge the constitutional and statutory authority of the Commission to designate the

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86. *See United Artists I*, 595 A.2d 6.

87. *Id.* at 8.

88. *Id.* at 8 n.3. This agreement was to have repercussions for the *Dream Garden* designation. As will be seen, Pennsylvania courts have jurisdiction over appeals from agency adjudications. *See Estate of Merriam*, 777 A.2d 1212. The parties agreed that designation was an adjudication. *Id.* However, in its *Dream Garden* decision, the Commonwealth Court said that the Pennsylvania Supreme Court had approved "of an appeal of an historic designation . . . [in] *United Artists I*" and believed that "the Supreme Court would have raised the jurisdictional issue had it disapproved of treating the suit under the Local Agency Law." *Id.* at 1221 n.8. It is possible there was no jurisdictional issue to raise. Agreeing that the designation decision was an adjudication meant that the parties agreed that the issue of whether the Commission had authority—either constitutional or statutory—to designate a site was ripe for judicial review and that the owner had standing to pursue it. The challenge was facial; the cases did not address the designation process questions raised by *Dream Garden*. *But see* Miller & Son Paving, Inc. v. Pa. Historical & Museum Comm'n., 628 A.2d 498 (Pa. Commw. Ct. 1993), *appeal den.*, 641 A.2d 590 (Pa. 1994). "Our jurisdiction to consider Miller's Petition for Review rests on whether the Commission's certification of the nomination is a final adjudication." *Id.* at 500.

89. 2 PA. CONS. STAT. ANN. § 752 (West 2001).

90. *Id.* § 101.

91. *Id. See* John L. Gedid, *The Confusing Legislative and Judicial Treatment of Adjudication in Pennsylvania Administrative Law*, 8 WIDENER J. PUB. L. 195 (1999).

92. *See United Artists I*, 595 A.2d at 8 n.3 (citing 2 Pa. Cons. Stat. § 752).

property as historic.[93] The common pleas court accepted this agreement and, accordingly, treated the matter as an appeal under the local agency law.[94] The matter "was submitted . . . upon the record of the meeting before the Commission and the briefs of counsel."[95] The common pleas court then dismissed the appeal and the Commonwealth Court affirmed.[96] The Pennsylvania Supreme Court granted leave to appeal "to consider, inter alia, the constitutionality of the Commission's actions."[97]

That turned out to be the only question considered. Although characterizing preservation goals as "laudable," the court said "the question is whether the costs associated with Philadelphia's desire to preserve . . . should be borne by all of the taxpayers or whether those costs can be lawfully imposed on the owner of any property the Commission chooses to designate as historic."[98]

The court decided the case "entirely upon Article 1, Section 10 of the Pennsylvania Constitution"[99] which provides that private property shall not "'be taken or applied to public use, without authority of law and without just compensation being first made or secured.'"[100] After designation, the owner of the Boyd Theater had "an affirmative duty to use the property and preserve the premises in the condition and style as dictated by the Commission, at the owner's exclusive expense and without compensation."[101] The court held that the Philadelphia Code provisions permitting designation and imposing such duties "without the consent of the owner, are unfair, unjust and amount to an unconstitutional taking without just compensation. . . ."[102]

That was an extraordinary decision, contrary to every decision in other courts—state or federal, including the United States Supreme Court—which had considered this issue. The three justices who concurred in *United Artists I* (and who would have reversed on non-constitutional grounds) noted that

> the majority opinion herein does not address the holding of the United States Supreme Court decision in *Penn Central*. . . but rather focuses on the dissent. . . . Although *Penn Central* was decided on federal constitutional law . . . [we] do not

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93. *See United Artists I*, 595 A.2d at 8 n.3 (citing 42 Pa. Cons. Stat. § 708).
94. *Id.* at 8.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 10.
99. *Id.* at 11 n.8.
100. *Id.* at 11.
101. *Id.* at 13.
102. *Id.* at 13-14. This conclusion was unique to Pennsylvania. *See* Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69 (1997). "With over 1,000 local, state, and federal preservation laws in force, it is no longer in doubt that the preservation of our Nation's cultural and architectural heritage is necessary in promoting the general welfare of the country." *Id.* at 101-02.

> believe that the language of our state constitution necessarily mandates a different outcome on the issue of "taking."[103]

That was Philadelphia's position in its petition for reconsideration. When the supreme court granted this petition, it directed the parties to reargue "the sole issue of whether the designation of a building as historic is a 'taking' under our Constitution, requiring just compensation."[104] This time around, the court held that it was not.[105]

The court began *United Artists II* by acknowledging that *United Artists I* "stands in contrast to the result reached by the United States Supreme Court in *Penn Central*. . . in which that Court held that historic designation without the consent of the owner is not a 'taking' under the . . . United States Constitution."[106] If *United Artists I* had been decided under federal constitutional law, *Penn Central* would have controlled.[107] The question was whether Pennsylvania's Constitution mandated a different result.

The court answered that question using a four part analysis established in *Commonwealth v. Edmunds*.[108] The first part of the *Edmunds* analysis examines the constitutional texts: "the texts of both constitutional provisions are almost identical for our purposes."[109] The second part examines "the history of the [constitutional] provision, including Pennsylvania case law."[110] That examination revealed that Pennsylvania had "continually turned to federal precedent for guidance in its 'taking' jurisprudence, and indeed has adopted the analysis used by the federal courts."[111]

Following an extensive case law review, the court gleaned

> the following three conditions for determining that state or governmental action does not constitute a taking requiring just compensation:
> 1) the interest of the general public, rather than a particular class of persons, must require governmental action;

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103. *United Artists I*, 595 A.2d at 14 n.1.

104. *United Artists II*, 635 A.2d at 614.

105. *See id.*

106. *Id.*

107. *Id.* at 615. *See also* Rebecca J. Morton, Note, *Carter v. Helmsley-Spear, Inc.: A Fair Test of the Visual Artists Rights Act?*, 28 CONN. L. REV. 877, 908-909 (1996).

> *Penn Central* validated the idea that the visual environment in which we live has far reaching affects on our well being. Controlling how that environment appears has become an affirmative duty of local governments. . . . [M]uch of the art the public sees, functions as an aesthetic component of the city environment in the same way as buildings, parks, billboards, and factories.

Id. at 909.

108. Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).

109. *United Artists II*, 635 A.2d at 615.

110. *Id.* at 616.

111. *Id.*

> 2) the means must be necessary to effectuate that purpose;
> 3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.[112]

As to the first condition, the court said that Pennsylvanians had, in their constitution, specifically empowered government "to act in areas of purely historic concern reflecting a general public interest in preserving historic landmarks which requires this type of legislation."[113] As to the second condition, the court, responding to argument that Philadelphia should use its eminent domain power rather than its historic preservation provision, found this *Penn Central* language instructive:

> The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene.[114]

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112. *United Artists II*, 635 A.2d at 618.

113. *Id.* The constitutional provision is Article I, Section 27.

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I § 27. This has been legislatively reiterated. *See* 37 PA. CON. STAT. ANN. § 102(6). "It is in the public interest for the Commonwealth, its citizens and its political subdivisions to engage in comprehensive programs of historic preservation for the enjoyment, education and inspiration of all the people, including future generations." *Id. See also* Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW 235, 241-242 (1996).

> The importance of leaving behind a legacy to be valued and conserved for present and future generations is generally recognized. These nonrenewable historical resources engender a nation's quality of life, economy, and cultural environment. Cultural property plays an integral role in characterizing and expressing the shared identity and essence of a community, a people and a nation.

Id. at 241.

114. *United Artists II*, 635 A.2d at 618 (quoting *Penn Central*, 438 U.S. at 109 n.6).

Because "[t]here is no other practical means to accomplish the public interest,"[115] the Pennsylvania court concluded that "historic designation is essential to preserve historic landmarks."[116]

As to the third condition, "the unduly oppressive test," the court noted that it had previously upheld "as constitutional regulations that prevent the most profitable use of property."[117] Although the historic preservation designation "could arguably deprive the owner of the most profitable use of his property," the court did "not see the possibility that the owner is wholly deprived of any profitable use."[118] Thus, historic preservation passed the second part of the four part *Edmunds* analysis.

The third part of the *Edmunds* analysis requires a review "of related case law from other jurisdictions."[119] *Penn Central* had been on the books for fifteen years: "no other state has rejected the notion that no taking occurs when a state designates a building as historic."[120] That "widespread acceptance" weighed against any rejection of *Penn Central*.[121]

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115. *United Artists II*, 635 A.2d at 618. *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000). "The premise of a progressive approach to takings law is that ownership is not merely a bundle of rights, but also a social institution that creates bonds of commitment and responsibility among owners and others affected by the owners' properties." *Id.* at 135.

116. *United Artists II*, 635 A.2d at 618. *See* Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033 (1999).

> This longstanding recognition that private property is subject to public interests flows from the fact that property is a social construct and society can legitimately define the extent of private property interests to be limited by social concerns. . . . This includes not only the avoidance of nuisance-like behavior, but also protection . . . as an environmental and social resource.

Id. at 1078.

117. *United Artists II*, 635 A.2d at 618. *See* Cordes, *supra* note 116.

> [T]he Court and commentators have also recognized the notion of 'regulatory risk,' a concept that helps inform the reasonableness of any investment-backed expectations . . . [t]he risk of regulation is part of economic life, which includes the distinct possibility of economic loss. The Court has noted this is particularly true with regard to activities that "[have] long been the source of public concern and the subject of government regulation."

Id. at 1058.

118. *United Artists II*, 635 A.2d at 618. The court did note "[t]here may be circumstances in which the mere designation . . . would constitute a taking due to the extreme financial hardship resulting from such designation." *Id.* at 618 n.3. Although the court had not been presented with such circumstances and did not feel the need to "decide here what level of financial hardship would meet this test," it specifically noted that the Philadelphia Code "provides a vehicle for relief when the designation would cause a substantial hardship." *Id.*

119. *Id.* at 619.

120. *Id.*

121. *Id.*

The fourth part of the *Edmunds* analysis examines "policy considerations, including unique issues of state and local concern, and their applicability within modern Pennsylvania jurisprudence."[122] The court agreed with the city that the Pennsylvania Constitution's "Environmental Rights Amendment reflects a state policy encouraging the preservation of historic and aesthetic resources."[123] The Philadelphia Code's policy and preservation provisions were "consistent with our state policy to preserve historic or aesthetic resources."[124]

All together, this analysis compelled the court in *United Artists II* "to conclude that the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth."[125]

The court then proceeded to address and accept the owner's argument that the Philadelphia Historical Commission "exceeded its statutory authority by designating" the Boyd Theater's interior.[126] The court concluded that the Historical Commission was "not explicitly authorized by statute to designate the interior of the building as historically or aesthetically significant."[127] Since there was "no 'clear and unmistakable' authority to designate the interior, . . . the Commission possesse[d] no such power . . . [and thus] committed an error of law" by acting as if it did.[128] Because the court could not, on the record before

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122. *United Artists II*, 635 A.2d at 619.

123. *Id.* at 620. *See* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II–Environmental Rights and the Public Trust*, 104 DICK. L. REV. 97 (1999).

> Pennsylvania courts have decided constitutional challenges to government regulation by relying in part on the Amendment as authority for state or local action. One line of cases involves protection of privately-owned historic properties. Here, Article I, Section 27 has provided a buffer against the expansion of private property rights in ways that would interfere with protection of the values contained in the first part of the Amendment.

Id. at 158-59.

124. *United Artists II*, 635 A.2d at 620. *See* Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999).

> [R]ecognizing the foundational nature of [aesthetic and cultural] experiences provides a basis for preventing . . . acts the purpose of which is to destroy the value of cultural heritage. The intrinsic value of cultural heritage . . . does suggest the benefits of some public control to ensure the survival of aesthetically significant works not subject to other cultural constraints.

Id. at 346.

125. *United Artists II*, 635 A.2d at 620.

126. *Id.* at 621.

127. *Id.* at 622.

128. *Id.* The court said the Code contained only this reference to a building's interior: "The exterior of every historic building . . . shall be kept in good repair *as shall the interior portions of such buildings, . . . neglect of which cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into disrepair.*" *Id.* The lack of authority over interiors continues to cause problems for preservationists. *See* Stephan Salisbury, *Work on Historic Church Decried*, PHILA. INQUIRER, Nov. 17, 2001, at A1.

it, separate the interior from the exterior designation, it vacated the Commission's entire order.[129] The court's decision went to the Commission's facial authority to act, not to the procedures by which that authority was exercised.

Amazingly, despite the court's explicit language, Philadelphia took no action to amend its preservation provision to authorize interior designations. And that is where matters appeared to rest when the Historical Commission designated *Dream Garden* as a historic object. At that point, the Merriam Estate had several options: it could ask the Commission to rescind the designation; it could apply for a demolition permit, including one based on financial hardship;[130] and, if designation was an agency adjudication, it could seek judicial review using the Local Agency Law.[131] The Estate chose to pursue the latter two options.

IV. THE DEMOLITION PERMIT PROCESS

The Philadelphia Code's preservation provision says demolition includes "the removal of a[n] . . . object from its site. . . ."[132] However, to demolish a designated object, the owner needs a permit from the Department of Licenses and Inspections (L&I).[133] Before L&I can issue that permit, it must forward the demolition permit application to the Historical Commission for review.[134] At the

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> In an action that has left the preservation and architectural communities aghast, major interior features of the historically certified Church of the Savior in West Philadelphia have been dismantled, sold off or obliterated, destroying what many art historians regard as the finest surviving Victorian church interior in the region, if not the nation.

Salisbury, *Work on Historic Church Decried, supra.*

129. *United Artists II*, 635 A.2d at 622. The court said it was not

> possible for us to vacate only the portion of the Order which designates the interior. We do not have before us any evidence regarding what interior portions support the exterior, nor can we separate the rationale and evidence which referred only to the exterior of the Boyd Theater from that of the interior in order to review its sufficiency. Thus, we are constrained to vacate the entire order of the Commission.

Id. at 622.

130. *See infra* at section IV.

131. *See infra* at section V.

132. PHILA. CODE § 14-2007(2)(f).

133. *Id.* § 14-2007(7)(a). *See* Scott H. Rothstein, Comment, *Takings Jurisprudence Comes In From the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105 (1994).

> [A] property owner can no longer *reasonably* expect to be able to destroy or significantly alter an historically or architecturally significant exterior or interior without prior approval, and any investment made contingent upon such destruction cannot create a protected interest. At the same time, property owners must be assured of due process in the landmark designation process.

Id. at 1134-35.

134. PHILA. CODE § 14-2007(7)(c).

same time, the owner must "submit to the Commission the plans and specifications of the proposed work . . . and such other information as the Commission may reasonably require."[135] If the owner claims that the "object cannot be used for any purpose for which it is or may be reasonably adapted" or claims that the application is based "in whole or in part, on financial hardship," the owner must submit additional information and agree to fund further studies.[136]

After L&I forwards the demolition permit application, the Historical Commission has sixty days to "determine whether or not it has any objection to the proposed . . . demolition."[137] Under Commission rules, the owner must demonstrate that "the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return and that other potential uses of the property are foreclosed."[138]

When the demolition permit application is received, the Historical Commission staff reviews it "for its completeness and . . . conduct[s] a preliminary assessment of the completeness of any supplemental material."[139] Any "incomplete application and clearly deficient submission" is returned.[140] An accepted application is referred to the Architectural Committee which "serves in an advisory capacity to the Commission which takes formal actions and decisions on permit applications."[141] After the Committee completes its review, it "forwards its recommendations in the form of a report at the next meeting of the Commission."[142]

At that meeting, the owner, along with any "[i]nterested organizations and persons . . . [has an] opportunity to appear . . . to present testimony" concerning the proposed demolition.[143] However, the Commission "will consider no information . . . in reaching its decision unless it has been substantially presented in writing at least seven (7) days before the close of the sixty (60) day review period or the postponement period."[144] After the Commission issues its decision, "[a]ny person aggrieved may appeal" to the Board of License and Inspection Review (Review Board).[145]

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135. PHILA. CODE § 14-2007(7)(e).

136. *Id.* § 14-2007(7)(f).

137. *Id.* § 14-2007(7)(g).

138. RULES & REGULATIONS, *supra* note 67, at 7.1.

139. *Id.* at 7.3.c.

140. *Id.*

141. *Id.* at 7.3.d.

142. *Id.*

143. *Id.* at 7.3.g.

144. *Id.* at 7.3.h. The Commission must, "[w]ithin sixty (60) days of the receipt of an application . . . determine to approve the application, object to the application, or defer action on it for a period not to exceed six (6) months." *Id.* at 7.1.

145. *Id.* at 7.3.m. *See also* PHILA. CODE § 14-2007(10). "Any person aggrieved by the issuance or denial of any permit reviewed by the Commission may appeal such action" to the Review Board.

An owner's demolition permit application may be based, in whole or in part, on financial hardship caused by historic designation.[146] In that case, the owner again "must demonstrate that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return and that other potential uses of the property are foreclosed."[147] The owner also "has an affirmative obligation in good faith to attempt the sale of the property, to seek tenants for it, and to explore potential reuses for it."[148] In addition, the Philadelphia Code authorizes the Historical Commission to "require the owner to conduct, at the owner's expense, evaluations or studies, as are reasonably necessary in the opinion of the Commission, to determine whether the . . . object has or may have alternative uses consistent with preservation."[149] The Commission's rules describe what such an evaluation or study must entail.[150]

The Historical Commission will refer a hardship-based demolition permit application to both its Architectural Committee and its Committee on Financial Hardship.[151] It also, with certain confidentiality restrictions, makes the materials

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PHILA. CODE § 14-2007(10).

146. RULES & REGULATIONS, *supra* note 67, at 7.5.a. (citing PHILA. CODE § 14-2007(7)(f), (j)).

147. *Id.*

148. *Id.*

149. PHILA. CODE § 14-2007(7)(f)(.7).

150. RULES & REGULATIONS, *supra* note 67, at 7.5.b.3. Stating that "[a]t a minimum, this shall include" the following information:

> 1. [t]he information specified in Section 7.5.b.2 . . .;
> 2. identification of reasonable uses or reuses for the property within the context of the property and its location;
> 3. rehabilitation cost estimates for the identified reasonable uses or reuses, including the basis for the cost estimates;
> 4. a ten-year pro forma of projected revenues and expenses for the reasonable uses or reuses that takes into consideration the utilization of tax incentives and other incentive programs;
> 5. estimates of the current value of the property based upon the ten-year projection . . . and the sale of the property at the end of that period, and
> 6. estimates of the required equity investment including a calculation of the Internal Rate of Return based on the actual cash equity required to be invested by the owner.

Id.

151. The Architectural Committee was created "to review submissions and to advise the Commission on their appropriateness." *Id.* at 3.4.a. The Committee members must be "professionals who have knowledge of and experience with historic resources and who represent a breadth of perspective." *Id.* The Chair "shall be the 'architect experienced in the field of historic preservation' appointed to the Commission." *Id.* The Committee on Financial Hardship was created "to review applications, submissions and evidence under the several financial hardship provisions . . . of the Philadelphia Code." *Id.* at 3.4.c. The members "shall include the Chairman of the Commission, the Developer member . . . the Chair of the City Planning Commission . . . the Director of the Office of Housing and Community Development . . . the Architectural Historian

submitted available to "community organizations, preservation groups, other associations and private citizens" who may wish to comment on the application.[152]

After receiving the Committee recommendations and the public comments, the Historical Commission can take several actions regarding a demolition permit application.[153] If it "has no objection, [L&I] shall grant the permit. . . ."[154] If it "has an objection, [L&I] shall deny the permit."[155] If it "acts to postpone the proposed . . . demolition . . . [L&I] shall defer action . . . pending" the Commission's final determination.[156] The Commission "may . . . defer action on a permit application for a designated period not to exceed six months . . . [d]uring [which] time . . . [it] shall consult with the owner, civic groups, public and private agencies, and interested parties to ascertain what may be done by the City or others to preserve the . . . object."[157] If appropriate, the Commission "shall make recommendations to the Mayor and City Council."[158]

No matter what action the Commission elects to take on a demolition permit application, it must first "afford the owner an opportunity to appear . . . to offer any evidence the owner desires . . . concerning the proposed . . . demolition."[159] No matter what action it elects to take, the Commission must consider certain Code criteria,[160] "[t]he Commission shall inform the owner in writing of the

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and the Architect." RULES & REGULATIONS, *supra* note 56, at 3.4.c. The Commission Chair "shall appoint the Chair of this Committee." *Id.*

152. RULES & REGULATIONS, *supra* note 56, at 7.6.c.

153. PHILA. CODE § 14-2007(7)(g).

154. *Id.* at (7)(g)(.1).

155. *Id.* at (7)(g)(.2).

156. *Id.* at (7)(g)(.3).

157. *Id.* at (7)(h). *See Preservationists Hail, supra* note 11.

> As far as preservationists and city officials are concerned, the *Dream Garden* case demonstrates the value of the historic preservation ordinance, which provided time and space for a resolution to emerge. They argue that the settlement, with millions of dollars changing hands, also shows that designation of an object . . . does not rob that object of material value.

Id. See also A 'Dream' Come True, PHILA. INQUIRER, Nov. 9, 2001, at A26. "As things turned out, certifying the mural as historic bought vital time—a tactic that might prove useful in future bids to spare treasured public art." *Id.*

158. PHILA. CODE § 14-2007(7)(h).

159. *Id.* § (7)(g)(.3).

160. *Id.* § (7)(k). The criteria are:

> (.1) the purposes of this section;
> (.2) the historical, architectural or aesthetic significance of the . . . object;
> (.3) the effect of the proposed work on the . . . object and its appurtenances;
> (.4) the compatibility of the proposed work . . . with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings and the streetscape; and,
> (.5) the design of the proposed work.

reasons for its action."[161] However, the Commission is constrained if it elects to approve a demolition permit application. The application cannot be approved "unless the Commission finds that issuance of the permit is necessary in the public interest, or . . . that the . . . object cannot be used for any purpose for which it is or may be reasonably adapted."[162]

The Philadelphia Code provides that "[a]ny person aggrieved by the issuance or denial of any permit reviewed by the Commission may appeal such action" to the Review Board.[163] The Commission Rules specifically refer to this section when discussing demolition permit applications; the Rules, like the Code, are silent on the procedure to be followed after an object is designated.[164]

The Review Board has established very few regulations. They grant an opportunity for an appeal hearing to "any person aggrieved . . . by any notice, order or other action as a result of any City inspection" which directly affects the person.[165] The "person appealing, the interested City agencies and other persons who may be affected by the outcome of said appeal" may present "[e]vidence germane to the subject of the appeal" and may present and cross-examine witnesses.[166] The Review Board's decision will be "based on the papers filed of record, the testimony, and [the] argument made on behalf of the parties."[167]

PHILA. CODE § 14-2007(7)(k). This section also provides that

> (.7) in specific cases as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement . . . would result in unnecessary hardship so that the spirit of this . . . [section] shall be observed and substantial justice done . . . the Commission shall by majority vote grant an exception from the requirements. . . .

Id.

161. PHILA. CODE § 14-2007(7)(g)(.3).

162. *Id.* § (7)(j).

163. *Id.* § (10).

164. RULES AND REGULATIONS, *supra* note 67, at 7.3.m.

165. BOARD OF LICENSE AND INSPECTION REVIEW, CITY OF PHILA. *Regulations—Appeal Procedure*, #1 (Apr. 7, 1953) [hereinafter BOARD REGULATIONS].

166. *Id.* #9.

167. *Id.* This decision appears to be based on a *de novo* hearing with no indication of what deference, if any, should be given the expertise and experience of the Historical Commission. There is no legislatively determined standard of review as there is in the Local Agency Law. *See* Kendall, *supra* note 18, at 430-31.

> Although the discretion vested in administrative appellate tribunals with authority over land-use permits varies from jurisdiction to jurisdiction, the function of most appellate administrative bodies is more than purely remedial. Most . . . have some degree of discretion to require modification of a project or approve it with additional conditions not imposed by the lower body. Thus, most takings cases are ripe only after an appeal to the administrative appellate body.

Id. at 431.

Following designation of *Dream Garden* as a historic object, the Merriam Estate elected not to seek rescission. If it had, the Estate could have argued that "additional information shows that [*Dream Garden*] does not meet the criteria" for designation or that there was an "error in professional judgment as to whether [*Dream Garden*] meets the criteria" for designation.[168] The Estate had other choices. If the Historical Commission's designation determination was considered a final agency adjudication, the Estate could appeal to Philadelphia's Court of Common Pleas under Pennsylvania's Local Agency Law.[169] The Estate could also apply to L&I for a demolition permit (hardship or otherwise).[170] As we have seen, L&I would refer the application to the Commission; the Commission would refer it to committees; the committees would make recommendations, and the Commission would issue a decision.[171] The Estate could then appeal that decision to the Review Board where the statute and the case law indicate it could have challenged the designation itself in addition to supplementing the record.[172]

V. THE WORKINGS OF THE LOCAL AGENCY LAW

The process of an appeal to the Review Board most closely fits Pennsylvania's Local Agency Law's definition of an adjudication.[173] The Review Board's

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168. RULES & REGULATIONS, *supra* note 67, at 5.5.c.1.

169. *See Estate of Merriam*, 777 A.2d at 1217.

170. *See infra* at section V.

171. *Id.*

172. *See* 2 PA. CONS. STAT. ANN. § 754(a).

> A party who proceeded before a local agency . . . shall not be precluded from questioning the validity of the . . . local ordinance or resolution in the appeal, but if a full and complete record . . . was made such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

Id. § 753(a). *See, e.g.*, Neshaminy Water Res. Auth. v. Commonwealth Dep't of Envtl. Res., 513 A.2d 979, 982 (Pa. 1986); Costanza v. Commonwealth Dep't of Envtl. Res., 579 A.2d 447, 450 (Pa. Commw. Ct. 1990).

173. *See* Gedid, *supra* note 91, at 226-227.

> Various judges and justices are interpreting the Administrative Agency Law definition of adjudication in widely disparate, contradictory and confusing ways. Yet, in Pennsylvania[ ] . . . indeed in every administrative procedure code, it is surely necessary to have a clear, predictable, easy-to-apply definition of adjudication. To fail to do so creates inefficiency, unnecessary appeals and confusion. Such problems defeat the administrative goals of efficient, speedy adjudication, and they also undermine public confidence in the administrative system.

Id.

decision would be a "final order . . . by an agency affecting personal or property rights. . . ."[174] The administrative process would have run its course.[175] At that point, an aggrieved party "who has a direct interest in such adjudication" could seek court review.[176]

What the reviewing court does is determined by the state of the record brought before it. The Local Agency Law encourages, but does not require, the recording of testimony or the making of a full and complete record.[177] The Philadelphia Code only requires the Historical Commission to "[k]eep minutes and records of all proceedings, including records of public meetings during which proposed historic designations are considered."[178] The Commission Rules say "[e]ach public hearing and meeting . . . shall be recorded as established by law."[179] This applies to "public hearings on the designation of . . . objects . . . as historic . . . ."[180]

The Local Agency Law does require that all agency adjudications "shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail."[181] The Philadelphia Code says the Historical Commission "shall send written notice of the designation . . . to the owners of each . . . object . . . which shall include reason for the designation."[182] The Commission must also "inform the owner in writing of the reasons for its action" on a demolition permit application.[183] The Review Board's regulations say that it "shall render its decision based on the papers filed of record, the testimony, and argument made on behalf of the

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174. 2 PA. CONS. STAT. ANN. § 101.

175. *See* City of Philadelphia v. Bd. of License & Inspection Review, 669 A.2d 460 (Pa. Commw. Ct. 1995).

> Neither the [Philadelphia] Charter nor the [Philadelphia] Code provides any procedural step to be taken by the City or the citizens before seeking judicial review of the [Review] Board's decisions. Hence, the [Review] Board's decisions constituted final determinations of the appeals and therefore "adjudications" under Section 752 of the Law subject to judicial review.

Id. at 463-64.

176. 2 PA. CONS. STAT. ANN. § 752.

177. *Id.* § 553. "All testimony may be . . . recorded and a full and complete record may be kept of the proceedings." *Id.* If the local agency does not do this, "such testimony shall be . . . recorded and a full and complete record . . . shall be kept at the request of any party agreeing to pay the costs thereof." *Id. See also* Damico v. Zoning Bd. of Adjustment, 643 A.2d 156, 161 (Pa. Commw. Ct. 1994).

178. PHILA. CODE § 14-2007(4)(i).

179. RULES & REGULATIONS, *supra* note 67, at 4.3.

180. *Id.* at 5.4.b.

181. 2 PA. CONS. STAT. ANN. § 555.

182. PHILA. CODE § 14-2007(6)(e).

183. *Id.* § (7)(g)(.3).

parties" and "[a] copy of the decision shall be sent to the persons entitled to notice of the hearing."[184]

A reviewing court can confront two record situations. In the first, "a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal *de novo*, or may remand the proceedings to the agency for the purpose of making a full and complete record," or for further disposition."[185] The preferred choice is a remand to permit the agency to complete the record—the court may not remand to the agency for a *de novo* hearing.[186]

If, however, the local agency made a full and complete record, "the court shall hear the appeal . . . on the record certified by the agency."[187] It is crucial that the court have "a complete and accurate record of the testimony taken so that the appellant is given a base upon which he may appeal, and also, that the appellate court is given a sufficient record upon which to rule on the questions presented."[188]

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184. BOARD REGULATIONS, *supra* note 165, at #9, 10.

185. 2 PA. CONS. STAT. ANN. § 754(a).

186. *See* Frey v. Zoning Bd. of Adjustment of City of Pittsburgh, 459 A.2d 917 (Pa. Commw. Ct. 1983). "If a local agency . . . has made inadequate factual findings, the reviewing court normally can and should remand the matter to the agency to obtain the essential factual determinations." *Id.* at 919. *See also* Bruno v. Zoning Bd. of Adjustment of City of Philadelphia, 664 A.2d 1077, 1079 (Pa. Commw. Ct. 1995); Cook v. Pennsylvania Dep't of Agric., 646 A.2d 598, 602 (Pa. Commw. Ct. 1994). A remand will be ordered to insure a proper process even if the remand will not change the result. *See* City of Philadelphia, Bd. of License and Inspection Review v. 2600 Lewis, Inc., 661 A.2d 20, 23 (Pa. Commw. Ct. 1995). An incomplete record remand is not an opportunity for a new hearing. *See* Sparacino v. Zoning Bd. of Adjustment, City of Philadelphia 728 A.2d 445 (Pa. Commw. Ct. 1999).

> [O]nce the trial court determines that the record before the local agency is incomplete, the court has discretion to determine the manner of implementing a deficient record before the local agency: the court may either hear the appeal de novo itself or remand the matter to the agency for *implementation* of the deficient record or any further disposition of the case. . . . [T]he trial court is not authorized to remand for a de novo proceeding on the basis that the record before the local agency is incomplete.

Id. at 447.

187. 2 PA. CONS. STAT. ANN. § 754(b).

188. City of Philadelphia v. Bd. of License and Inspection Review, 590 A.2d 79, 86 (Pa. Commw. Ct. 1991), *appeal denied* 600 A.2d 540 (Pa. 1991). *See also* Manwaring, *supra* note 58, at 307 n.85.

> A comprehensive written record including written submissions, transcripts of oral testimony, and property evaluation documents provides a sound basis for the historic designation decision. . . . This record should be used to issue both written findings of fact and conclusions setting forth how the designation relates to the preservation criteria to satisfy the procedural due process requirement that the commission's decision be supported by the record.

When presented with a full and complete record, the court's scope of review is legislatively limited. The court must affirm the agency unless it finds that the agency violated constitutional rights, the agency made a harmful error of law, the agency failed to follow legislatively dictated practice and procedure, or that the agency failed to establish a necessary finding by substantial evidence.[189]

When the Merriam Estate appealed the Historical Commission's denial of its hardship-based demolition permit application to the Review Board, the Estate had an opportunity to supplement the Commission's record by presenting additional evidence germane to the appeal, presenting and cross-examining witnesses, and by presenting arguments. Had the process continued to completion, the Estate would have been entitled to a written decision on its appeal.[190] It could have appealed that adjudication to the Court of Common Pleas.

VI. REVIEWING A PERMIT APPLICATION ADJUDICATION

However, precedent did not favor the Estate's chances if this path was taken. Precedent clearly favors the agency over the owner. For example, the owner in *First Presbyterian Church* challenged a city's denial of "a permit, for the demolition of a structure on the Church's grounds."[191] The structure stood in a designated historic district.[192] The church acknowledged not only "the historical and architectural value of [the structure], but also the facial constitutional validity of" the underlying legislation.[193] However, the church claimed that the city's denial

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Manwaring, *supra* note 58, at 307 n.85.

189. *See* 2 PA. CONS. STAT. ANN. § 754(b).

190. The parties have apparently agreed to postpone a final decision. *See* Stephan Salisbury, *Mural Hearing Delayed as Legal Entanglements Mount*, PHILA. INQUIRER, May 31, 2001, at D3. *See Sameric Corp.*, 142 F.3d at 598 (plaintiff, challenging a designation under the Philadelphia Code, applied for a demolition permit but had not completed its appeal to the Board of License and Review). The court concluded that the claim was not ripe because the plaintiff had not obtained a final decision.

> We again stress the importance of the finality requirement and our reluctance to allow the courts to become super land-use boards of appeals. Land-use decisions concern a variety of interests and persons, and local authorities are in a better position than the courts to assess the burdens and benefits of those varying interests. . . . Judicial review of the City's denial of Sameric's application for a demolition permit would be inappropriate because it would permit Sameric to have denied the City the opportunity to render a final decision regarding how to interpret and apply the ordinance.

Id.

191. First Presbyterian Church of York v. City Council of City of York, 360 A.2d 257, 258 (Pa. Commw. Ct. 1976).

192. *Id.* at 259.

193. *Id.*

of its demolition permit application was "in the circumstances, confiscatory and a deprivation of its property rights without due process of law."[194]

The church's application and appeal had gone through the mill twice, an early example of Pennsylvania's convoluted administrative law process.[195] Ultimately, the Commonwealth Court agreed with the Common Pleas Court that "the test to be applied is that of whether the refusal of the permit to demolish went so far as to preclude the use of [the structure] for any purpose for which it was reasonably adapted."[196] Both courts concluded that the church "having failed to show that a sale of the property was impracticable, that commercial rental could not provide a reasonable return or that other potential uses of the property were foreclosed, had not carried its burden of proving a taking without just compensation."[197]

The burden of proving an uncompensated taking is heavy. The property owner in *Weinberg v. Pittsburgh Historic Review Commission* can attest to this.[198] The owner sought a demolition permit for a historically designated house.[199] He bought the house for $175,000 "fully aware of the historic designation and the restrictions on renovations and demolition but . . . did not secure an estimate of the cost of renovation."[200] After spending $36,000 on exterior repairs and being denied a mortgage for further renovation, the owner applied for a demolition permit.[201] After extensive hearings, which included a cost analysis of renovation versus demolition, the Historic Commission found no economic hardship.[202] On

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194. *First Presbyterian Church of York*, 360 A.2d at 259.

195. *See id.* at 259-60.

196. *Id.* at 261.

197. *Id.* In further support of its conclusion that "the property owner must establish that the regulation precludes use of the property for any purpose for which it is reasonably adapted," the court said

> pertinent reference may be made to familiar Pennsylvania cases employing substantially the same test to applications for use variances—that is, that such a variance must be granted if the property in question cannot be used or sold for any purpose permitted by the applicable zoning regulations but that it should be denied if the showing is merely that the property could be more gainfully used or sold for a purpose not allowed by such regulations.

Id.

198. *See* Weinberg v. City of Pittsburgh, Pittsburgh Historic Review Comm'n, 651 A.2d 1182 (Pa. Commw. Ct. 1994).

199. *Id.*

200. *Id.* at 1183.

201. *Id.*

202. *Id.* at 1185. According to the court, the Commission did not find economic hardship,

> on the basis of . . . testimony [of the owner's realty expert] the owners could recoup their investment by selling the property as is . . .; they could renovate the property for their home, an option where economic considerations were of secondary importance; they could renovate the building for sale as a single

appeal, the common pleas court reversed, finding that the Commission had mischaracterized testimony of the owner's realty expert and, as a result, had made a crucial finding which was unsupported by substantial evidence.[203]

The Commonwealth Court affirmed. It began by defining substantial evidence as "such evidence as a reasonable mind might deem adequate to support a conclusion."[204] It also acknowledged that generally, government may regulate private property:

> [r]easonable restrictions may be imposed upon private property to preserve the public interest in historic landmarks, . . . so long as, inter alia, the means are not unduly oppressive upon the property holder, considering the economic impact of the regulation and the extent to which the government physically intrudes upon the property.[205]

If that economic impact becomes too great, preservation may cease being "a proper exercise of the police power."[206]

The preservationists argued that an owner "who purchases an historic structure with knowledge of the restrictions, . . . creates his own hardship."[207] In answer, the Commonwealth Court found "no evidence . . . that the property was purchased as a speculative investment at an excessive price in hope of changing the historic structure designation in order to reap a large profit."[208] Granted, the owner "should have engaged an architect and a contractor to get an estimate of

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> family house and might or might not recover their costs; or they could renovate the building as a two unit residence and sell, in which case they probably would not be able to recoup their costs.

Weinberg, 651 A.2d at 1185.

203. *See id.*

204. *Id. See also* Mulberry Market, Inc. v. City of Philadelphia, Bd. of License and Inspection Review, 735 A.2d 761 (Pa. Commw. Ct. 1999).

> In a substantial evidence inquiry we simply inquire whether there is such relevant evidence of record which a reasonable person might accept as adequate to support a conclusion. . . . Furthermore, in a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the factfinder, rather, the pertinent inquiry is whether there is any evidence which supports the factfinder's factual finding. . . . It is solely for the factfinder to assess credibility and to resolve conflicts in the evidence. . . . In addition, it is solely for the factfinder, to determine what weight to give to any evidence.

Id. at 767.

205. *Weinberg*, 651 A.2d at 1185.

206. *Id.* at 1186.

207. *Id.* at 1187.

208. *Id.*

the cost of renovation, but such oversight can hardly be equated with assuming the risk of making a highly speculative investment."[209]

The Historic Commission had found that the owner could sell the existing property for an amount over the purchase price.[210] However, the Commonwealth Court found "no competent evidence that the property could be sold as is" for a profit.[211] From the record, the court felt it "clear that a reasonable purchaser would not buy this property if expert opinion shows he would suffer a substantial financial loss due to the cost of renovation."[212]

Finally, the Historic Commission found that the owner "might be able to renovate the building as a single family residence and recoup his costs."[213] However, in the Commonwealth Court's reading of the record, it said the owner's expert "was of the firm opinion that the fair market value" after renovation would result in at least a $100,000 loss.[214] The court found "there was no substantial evidence that the cost of renovating the property would not exceed the value of the property after renovation."[215] On the basis of the record presented, "it is not economically feasible for the present owners . . . to undertake such costly renovation."[216]

This was a decision very favorable to the property owner. It was, however, not to stand, despite the Commonwealth Court's (and the common pleas court's) conclusion that the record lacked substantial evidence to support the Historic Commission's decision. There was yet another court waiting to review that record.

The Pennsylvania Supreme Court granted leave to appeal "in order to review the standard used by the lower courts in determining that [the owners] met their burden of proving that they would suffer economic hardship as a result of the Commission's action."[217] After a detailed review of the Commission record and the two levels of appeal, the supreme court disagreed "with the conclusion of the lower courts that the record does not support the Commission's decision to deny a certificate of appropriateness."[218] The supreme court's review of that record disclosed "support for the Commission's finding that [the owners] failed to prove that it would be impracticable or impossible to sell their property."[219] The court, in language favorable to designation, saw

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209. *Weinberg*, 651 A.2d at 1187.
210. *Id.*
211. *Id.*
212. *Id.* at 1187-88.
213. *Id.* at 1188.
214. *Id.*
215. 651 A.2d at 1188.
216. *Id.*
217. City of Pittsburgh v. Weinberg, 676 A.2d 207, 208 (Pa. 1996).
218. *Id.* at 211.
219. *Id.* at 212.

> no reason to delve any further into the Commission's decision. . . . Despite the thorough review by the trial court and Commonwealth Court of other testimony and evidence presented at the [Commission] hearing, our inquiry need not proceed beyond the point of our determination that [the owners] did not meet their burden of proving that it was impracticable or impossible to sell their property. . . . [The record] suggests that [the owners] could conceivably realize a profit if they sold the property. In any event, [they] have not demonstrated that they have been 'deprived of any profitable use' of the property.[220]

This was the final decision and one very favorable to the agency and to preservation. It emphasized the owner's obligation to build the necessary record, an obligation which is significant to the *Dream Garden* designation process.

Two months later, the Pennsylvania Supreme Court revisited *Weinberg*. The owner in *Park Home v. City of Williamsport* applied for a permit to demolish a historically designated structure.[221] Following an unsuccessful trip through the administrative process—Historical Architectural Review Board to City Council Historic Preservation Committee to City Council—the owner, using the Local Agency Law, appealed to common pleas court.[222] That court then ordered the city council "to render an adjudication containing findings of fact as well as the reasons relied upon in making its decision."[223] Following that, the court, apparently still dissatisfied with the state of the record, held a *de novo* hearing at which evidence was presented.[224]

Following that hearing, the common pleas court affirmed the city council's denial of the demolition permit application.[225] The Commonwealth Court affirmed as did the Supreme Court, using this standard of review:

> [w]hen a trial court conducts a *de novo* hearing from a local agency appeal and additional evidence is taken, the scope of review of an appellate court is limited to a determination of whether the court committed an error of law or an abuse of discretion. . . . Based on this standard, we find that the trial court properly determined that Council's refusal to issue a demolition permit did not constitute an unlawful taking.[226]

The court, citing *Weinberg*, said the owner "did not meet its burden of proving that it has been denied any profitable use of the property."[227]

If Philadelphia's Review Board had eventually upheld the Historical Commission's denial of the Merriam Estate's demolition permit application, the

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220. *Weinberg*, 676 A.2d at 212-13.
221. Park Home v. City of Williamsport, 680 A.2d 835 (Pa. 1996).
222. *Id.*
223. *Id.* at 836.
224. *Id.*
225. *Id.*
226. *Id.* at 837.
227. *Id.*

Weinberg and *Park Home* decisions, coupled with *United Artists II* and *First Presbyterian Church*, would have meant that the Estate would have faced a substantial burden if it elected to appeal to the courts. The Estate would have had an opportunity to build a record before the Historical Commission; obtain a second level of agency review and record building before the Review Board; and have access to a judicial review process permitting constitutional and procedural challenges. However, as those four cases indicate, the standard of review strongly favors affirming the agency action. It appears the same should be true of a designation determination.

VII. REVIEWING A DESIGNATION DETERMINATION

The Philadelphia Code's demolition permit procedure for historical objects—application, committee review and recommendation, commission review and decision, and Review Board appeal and decision—most closely fits the Local Agency Law's definition of an adjudication reviewable by the courts.[228] The procedure for reviewing the Historical Commission's designation determination is not so clear. Neither the Code nor the Commission Rules specifically refer to an appeal process for that action.

However, section 5-1005 of the Philadelphia Home Rule Charter does require the Review Board to "provide an appeal procedure whereby any person aggrieved by . . . any . . . action as a result of any City inspection, affecting him directly, shall upon request be . . . afforded a hearing thereon. . . ."[229] At that hearing, the Review "Board shall hear any evidence which the aggrieved party or the City may desire to offer, shall make findings and render a decision in writing."[230] The annotation to this section says the Review Board's decision is "to be binding upon the administrative agency of the City involved, subject, of course, to such further right of appeal to the courts as may exist."[231]

The Commonwealth Court examined this process in *City of Philadelphia v. Board of License and Inspection Review*.[232] The appeal involved four Review Board decisions reversing city agency actions.[233] The City appealed to the common pleas court which "quash[ed] the appeals for lack of the City's standing."[234] That court concluded that "the City was not aggrieved by the Board's decisions and that the Board's decisions were not appealable adjudications."[235]

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228. 2 PA. CONS. STAT. ANN. § 101. *See also supra* notes 78 and 146.

229. PHILADELPHIA HOME RULE CHARTER § 5-1005 (1981) (originally enacted Apr. 17, 1951) [hereinafter HOME RULE CHARTER].

230. *Id.*

231. *Id.* at § 5-1005 annots.

232. *City of Philadelphia*, 669 A.2d at 460.

233. *Id.*

234. *Id.* at 462.

235. *Id.* at 462.

In reversing, the Commonwealth Court said that the City and its departments were persons and the Review Board was an agency for purposes of the Local Agency Law. "[T]hus, the City's right to obtain judicial review of the Board's decisions . . . depends upon whether the City has a 'direct interest' in and is 'aggrieved' by the Board's decisions, and whether the Board's decisions constitute 'adjudications.'"[236] The agencies involved, which had "statutorily invested functions, duties and responsibilities, [also had] a legislatively conferred interest in such matters and therefore has a standing to challenge the adverse decisions."[237]

After repeating the Local Agency Law's definition of adjudication, the court explained that an agency action "is an adjudication if its decision or refusal to act leaves a complainant with no other forum in which to assert his or her rights."[238] Since neither the Philadelphia Charter nor Code "provides any procedural step to be taken . . . before seeking judicial review of the [Review] Board's decisions . . . [those] decisions constituted final determinations of the appeals and therefore 'adjudications' . . . subject to judicial review."[239]

In this case, the city agencies, while conducting their assigned duties, had denied permits or issued violation notices. The actions were regulatory, not adjudicatory. The Review Board's decision was the adjudication. The Historical Commission's designation determination was also an adjudication since it was an agency action of a regulatory nature subject to Review Board appeal.

New York, which has led the way in historical preservation law, says a designation decision is an adjudication.[240] It considers it "well-settled that 'a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community.'"[241] A designation decision "'is an administrative determination'" that, once the administrative procedure is complete, "'must be upheld if it has support in the record, a reasonable basis in law, and is not arbitrary or capricious.'"[242] A reviewing court "'may not substitute its judgment for that of the administrative body.'"[243]

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236. *City of Philadelphia*, 669 A.2d at 462.

237. *Id.* at 463.

238. *Id.*

239. *Id.* at 463-64.

240. Canisius Coll. v. City of Buffalo, 629 N.Y.S.2d 886, 887 (App. Div. 1995), *appeal denied* 634 N.Y.S.2d 443 (N.Y. 1995). *See also* Farash Corp. v. City of Rochester, 713 N.Y.S.2d 423 (App. Div. 2000).

241. *Canisius Coll.* 629 N.Y.S.2d at 887.

242. *Id.*

243. *Id.* That standard of review would be the same if the designation. determination was found to be quasi-judicial. *See* Handicraft Block Ltd. P'ship v. City of Minneapolis, 611 N.W.2d 16 (Minn. 2000). The Minnesota Supreme Court described three factors comprising the framework for determining if proceedings are quasi-judicial or quasi-legislative. "'[T]he three indicia of quasi-judicial actions can be summarized as follows: (1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision

An example of how this process works is *Shubert Organization, Inc. v. Landmarks Preservation Commission.*[244] The owners challenged the Commission's designation of twenty-eight theaters, some of which were "landmarked as to interior as well as exterior."[245] Pursuant to the city's initiative, the Commission had selected numerous theaters "for potential designation" and undertook a prolonged public process which accumulated much information, written and oral.[246] The Commission's designations were reviewed by a higher administrative agency and then appealed to the court.[247]

The court said that after "[c]onsidering the wealth of analyses and reports, as well as anecdotal testimony, provided to the . . . Commission prior to the subject designations, it appear[ed] to be beyond serious challenge that a reasonable basis existed for the designations . . . upon a consideration of the statutory criteria."[248] The court thus concluded that "the administration determination was based on substantial evidence, was not arbitrary and capricious and did not violate the law."[249]

The owners in *Shubert*, like the Merriam Estate, also challenged the constitutionality of the preservation provision.[250] The court said that since *Penn Central* "clearly ruled that the application of the Landmarks Law does not affect a taking of the property, the constitutional challenge thereby is resolved."[251] The owners had also failed to demonstrate that the law, as applied to their theaters, "denies them essential use of their property."[252] The owners claimed that they were "deprived of any economic use of their property" by the designation decision.[253] However, the court said that "in the absence of final agency action on applications . . . for renovations or alterations, the matter is not ripe for review."[254]

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regarding the disputed claim.'" *Handicraft Block Ltd. P'ship*, 611 N.W.2d at 20. The designation process had four levels of review culminating in a final decision by the city council. *Id.* at 18 n.1. On remand, the Minnesota Court of Appeals described its task as determining "'whether [the city council] . . . erred as a matter of law, issued a decision unsupported by substantial evidence, or acted arbitrarily or capriciously.'" Handicraft Block Ltd. P'ship v. City of Minneapolis, No. C2-98-2237, 2000 Minn. App. LEXIS 994, at *3 (Minn. App. Sept. 19, 2000).

244. Shubert Org., Inc. v. Landmarks Pres. Comm'n of the City of New York, 570 N.Y.S.2d 504 (App. Div. 1991), *appeal denied* 579 N.Y.S.2d 651 (N.Y. 1991), *cert. denied* 504 U.S. 946 (1992).

245. *Id.* at 506.

246. *Id.* at 505.

247. *Id.* at 505-06.

248. *Id.* at 507.

249. *Id.*

250. *Shubert Org., Inc.*, 570 N.Y.S. at 508.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

In Philadelphia, as in New York, the Commission's designation determination is subject to further review. The Philadelphia Code says "[a]ny designation . . . may be amended or rescinded in the same manner as is specified for designation."[255] The Historical Commission's rescission procedure can correct designation errors including an "error in professional judgment as to whether the resource meets the criteria for listing."[256] The owner may also apply for a demolition permit, including one based on financial hardship resulting from designation, which, if approved, could authorize removal of the object.[257] What is uncertain is how to characterize a designation determination—is it an adjudication or an agency action?

VIII. IS DESIGNATION AN ADJUDICATION?

The Merriam Estate did not choose to seek rescission. Instead, it focused its attack on the designation itself with the hope, perhaps, of forcing the Commission to defend that determination rather than having to establish its right to a demolition permit. If the Historical Commission's designation of *Dream Garden* was an adjudication, then Pennsylvania's Local Agency Law describes the review process.

But there is the rub—was designation an adjudication subject to a court appeal or was it an agency determination subject to a Review Board appeal? Both the Commission's Rules and the Philadelphia Code specifically say an aggrieved party may appeal the Commission's action on a demolition permit application to the Review Board; however, the Rules and the Code are silent regarding a designation determination.[258]

The Review Board's appeal procedure is required by Section 5-1005 of the Philadelphia Home Rule Charter.[259] That section mandates "an appeal procedure whereby any person aggrieved . . . by any notice, order or other action as a result of any City inspection, affecting him directly" may obtain "a written statement of the reasons" and be afforded an appeal hearing at which further evidence may be presented.[260] The Charter defines inspection as "any inspection, test or

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255. PHILA. CODE § 14-2007(6)(f).

256. RULES & REGULATIONS, *supra* note 67, at 5.5.c.1(3).

257. PHILA. CODE § 14-2007(7)(k)(.7).

258. RULES & REGULATIONS, *supra* note 67, at 7.3.m; PHILA. CODE § 14-2007(10).

259. HOME RULE CHARTER, *supra* note 229, at § 5-1005.

260. *Id.* The official annotation says the Review Board was:

> created for the purpose of affording citizens, adversely affected by the exercise of licensing and inspection powers vested in City agencies, an orderly procedure, in conformity with due process, for the review of action taken against them. Decisions of the Board are to be binding upon the administrative agency of the City involved, subject, of course, to such further right of appeal to the courts as may exist.

examination . . . to which any property is subject under any statute, ordinance or regulation which it is the duty . . . of any . . . commission to enforce."[261] The accompanying annotation says "'[i]nspection' is defined in the broadest possible sense of the examination or testing of property . . . subject to regulation by statute or ordinance. . . ."[262] The Charter gives "[e]very . . . commission . . . the power to make such inspections as are incident to or necessary for the performance of its functions. . . ."[263] This applies to the Historical Commission.

It is not facile to conclude that the Historical Commission's designation of an object results from the examination of the object, a legislatively mandated function. The Philadelphia Code assigns the Historical Commission the "powers and duties" to "designate . . . objects which the Commission determines, pursuant to [Code] criteria . . . are significant to the City."[264] To apply those criteria, the Commission examines a nomination to determine whether the object has the appropriate cultural, political, economic, social, or historical qualities meriting designation.[265]

An examination is an inspection. That is evidenced by what must be examined when an object is nominated for designation. The Commission's Rules require that nominations, which "may be prepared by any person or organization or by the Commission staff," must include:

> the current and historic names of the resource, its location, its classification, its owner, . . . a description of its boundaries, entry on any existing survey, a categorization of its condition, a narrative description of its physical appearance, a categorization of its significance by period and subject, . . . builder or creator if known, a narrative statement of its significance consistent with the [Code]

HOME RULE CHARTER, *supra* note 229, at § 5-1005 annots.

261. *Id.* at § 5-1001(b).

262. *Id.* at § 5-1001 annots.

263. *Id.* at § 8-412. The annotation to this section refers the reader to the annotation following § 5-1002. Paragraph 4 of that annotation reads, in part, as follows: "[w]hile the centralization of all inspection functions in the Department . . . is the ultimate goal sought, if feasible, . . . as a practical matter this could not be accomplished at once. . . . Pending such transfer, each [commission] vested with enforcement powers . . . [is] to continue to perform inspection functions." *Id.* § 5-1002 annots. ¶ 4.

264. PHILA. CODE § 14-2007(4)(a).

265. *Id.* § 14-2007(5). *See* Manwaring, *supra* note 58.

> The objectives of preservation laws that have been recognized by the courts as promoting the public welfare include: 1) enhancing the beauty of the community for the pleasure and enrichment of the citizens, 2) increasing property values, 3) stabilizing the tax base, 4) attracting tourists . . . 5) revitalizing urban areas, and 6) fostering civic pride, as well as educating the citizens in the cultural, historical, and architectural heritage of the community.

Manwaring, *supra* note 58, at 311-12.

> criteria . . ., bibliographical references, . . . photographs . . ., color slides, and the name and address of the preparer of the form.[266]

The Commission staff reviews these "nominations for technical and substantive correctness and completeness" and, if satisfied, forwards them to the Committee on Historic Designation.[267]

That Committee was established "to review proposals for the designation of . . . objects . . . and to advise the Commission on their significance" using "such forms and levels of documentation as established by the Commission."[268] The Committee "report[s] its recommendation to the Commission at a public hearing."[269] If the Commission designates the object, it notifies the owner and any person appearing at the public hearing who requested notification.[270] The notice "shall include [the] reason for the designation."[271]

If the Historical Commission's designation determination results from an examination included in the term inspection (defined by the Philadelphia Home Rule Charter "in the broadest possible sense of the examination . . . of property . . . subject to regulation by . . . ordinance"),[272] then the Commission's notice of designation can be appealed to the Review Board: "[A]ny person aggrieved . . . by any notice . . . as a result of any City inspection, affecting [him] directly," shall upon request be afforded an opportunity to appeal.[273] Therefore, the Historical Commission's designation of *Dream Garden* was a determination following an inspection, not a final decision; therefore, it was not an adjudication as contemplated by the Local Agency Law, and was not directly appealable to common pleas court. That analysis is textually supported and is consistent with a policy of permitting the local administrative law process full play before resorting to the courts so that the reviewing court will have as complete a record as possible to use for evaluating claims, including those of a constitutional dimension.[274]

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266. RULES & REGULATIONS, *supra* note 67, at 5.2.a.

267. *Id.* at 5.2.c.

268. *Id.* at 3.4.b.

269. *Id.* at 5.2.e.

270. *Id.* at 5.4.a.

271. PHILA. CODE §14-2007(6)(e).

272. HOME RULE CHARTER, § 5-1001(b) annots.

273. BOARD REGULATIONS, *supra* note 165, at #1.

274. The United States Supreme Court recently reiterated the importance of permitting local authority "the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo*, 533 U.S at 620. The owner must follow "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion . . . including the opportunity to grant any variances or waivers allowed by law." *Id.* at 620-21. *See also* Chauncey L. Walker & Scott D. Avitabile, *Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819 (1995).

> [B]y clearly defining designation criteria at the legislative level, demanding definitive proof based upon scholarly research at the nomination level, and

IX. BUT WHAT DO THE CASES SAY?

The above analysis is close to the analysis used by the common pleas court in dismissing the Merriam Estate's direct appeal of the Historical Commission's designation of *Dream Garden*. After the Commission's designation determination on December 28, 1998, the Estate filed a notice of appeal in common pleas court.[275] On December 20, 1999, the court quashed the appeal for reasons explained in an opinion issued August 1, 2000.[276] The court, citing Section 5-1005 of Philadelphia's Home Rule Charter, said that provision "provides a forum for the [Estate] to assert its rights."[277] The Estate had not exhausted available administrative remedies and, as a consequence, had not received an adjudication permitting judicial review under the Local Agency Law.[278]

In reversing, the Commonwealth Court concluded that "neither the Charter nor the Code sanctions the Board as the proper forum for an appeal from the designation of an object as historic."[279] Contrary to the textual analysis described in Section VII, the court concluded that "the Code does not provide any authority for an inspection in advance of historic designation."[280] If there is no inspection, there is no appeal, at least not to the Review Board.[281] Since the Commonwealth Court found there was no post-designation administrative process available, it concluded that the Historical Commission's designation of *Dream Garden* was an adjudication directly appealable to common pleas court.[282]

In contrast, the common pleas court, citing the Commonwealth Court's decision in *Miller & Son Paving*,[283] said this court "has held that the requirement to exhaust administrative remedies applies to historic designations specifically."[284] The owner in *Miller & Son* contested a Pennsylvania Commission's certification

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> adhering to strict procedures at the administrative level, the possibility of a disingenuous nomination succeeding in thwarting a landowner's intended, legitimate use of his or her property will be significantly reduced.

Walker & Avitabile, *supra* at 840.

275. *Estate of Merriam*, 777 A.2d at 1216.

276. *Id.* at 1217.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1218.

281. *Id.*

282. *Id.* at 1219.

283. Miller & Son Paving, Inc. v. Pennsylvania Historical & Museum Comm'n, 628 A.2d 498 (Pa. Commw. Ct. 1993), *appeal denied* 641 A.2d 590 (Pa. 1994).

284. *Estate of Merriam*, 777 A.2d at 1217.

to the National Park Service of a historical district nomination.[285] The owner had property within the nominated district.[286]

The *Miller & Son* court concluded that the Pennsylvania "Commission does not issue final orders" and therefore, the request for state judicial review should be quashed.[287] Because the Pennsylvania Commission's nomination was subject to National Park Service review, the court said the owner "had an available remedy under federal regulations and the actions of the Commission in approving and certifying the nomination to the National Park Service do not constitute a final appealable order subject to our jurisdiction, but are merely recommendations which require subsequent final action by a federal agency."[288] Because the Commission's action "was not final and because [the owner] did not exhaust the federal administrative remedies which were available," the court lacked jurisdiction to hear the appeal.[289]

Although it did not have to, the *Miller & Son* court also considered the owner's assertion that "the Commission's approval of the nomination . . . where [the owner had] objected to inclusion of its property within the district constitutes a taking" under the Pennsylvania Constitution.[290] In rejecting the owner's claim, the court, relying on its own precedent, said that

> [i]f viable economic use of the property remains, there is no taking; and even if there might eventually be a takings claim, 'if there exists by statute or regulation an administrative procedure by which the landowner could obtain viable economic use of his property, a takings challenge is not ripe until the administrative remedy has been exhausted.'[291]

In *Miller & Son*, "[n]ot only was the action of the Commission here not final, but there is also no indication that the Commission's action precluded viable economic use of [the] property."[292]

The case quoted in *Miller & Son*, *Gardner v. Department of Environmental Resources*, provides a glimpse into Pennsylvania's often protracted administrative law process.[293] The owners claimed that an agency's "new regulations deprived them of their right to surface mine the coal they owned" in a state park, thus entitling them to just compensation.[294] The court said the owners "bear the burden of showing that no administrative remedy exists or that none is applicable in this

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285. *Miller & Son Paving*, 628 A.2d at 499-500.

286. *Id.*

287. *Id.* at 499.

288. *Id.* at 501.

289. *Id.* at 502.

290. *Id.* at 500.

291. *Id.* at 502 (quoting Gardner v. Dep't of Envtl. Res., 603 A.2d 279, 282 (Pa. Commw. Ct. 1992)).

292. *Id.*

293. Gardner v. Commonwealth Dep't of Envtl. Res., 603 A.2d 279 (Pa. Commw. Ct. 1992).

294. *Id.* at 282.

case."[295] The agency, "on the other hand, need not show conclusively that a variance might be granted, but merely that a reasonable interpretation of the statutes and regulations admits to the possibility of an administrative remedy."[296] Because the agency could show that a variance procedure arguably was available, the owners had not exhausted administrative remedies and their claim was not ripe.[297]

Three years later, the same parties were back before the Commonwealth Court.[298] Again, the "central issue . . . [was] whether the taking claim was ripe for adjudication or whether the [owners] must first exhaust their administrative appeals of the [agency's] variance denial."[299] This time, the court concluded that the agency's decision to deny the variance was a final decision, in part because the parties, like the parties in *United Artists I*, agreed to accept it as such.[300] The court said exhaustion is "concerned with agency autonomy, requiring resort to administrative processes so as to assure that agency decision making is not unduly disrupted."[301] The exhaustion requirement would apply if the owners disputed the variance denial.[302] However, they agreed that the denial was correct; their claim was only over the effects of that denial.[303] According to the court, there was no administrative procedure left to disrupt.[304] The owner's claim had become one for compensation for the damage which allegedly occurred when the variance was denied.[305]

In its *Dream Garden* decision, the common pleas court cited *Miller & Son* which discussed *Gardner* which, in turn, discussed *Machipongo Land & Coal Company*.[306]

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295. *Gardner*, 603 A.2d at 282-83.

296. *Id.* at 283.

297. *Id.* The court said that under existing regulations, the agency had:

> the authority to issue permits within a state park if the proposed surface mining is remining of previously mined lands, and land and water conservation benefits will result from that operation. Because some of the land which is subject to Landowners' mining rights has already been affected by mining operations, Landowners must file the application for a variance to determine if a permit will be issued to mine some or all of their coal. This will determine if a de facto taking has occurred, and if it has, the extent of that taking.

Id.

298. Gardner v. Commonwealth Dep't of Envtl. Res., 658 A.2d 440 (Pa. Commw. Ct. 1995).

299. *Id.* at 444.

300. *Id.* at 446. The Department and the [owners] "entered a 'Consent Adjudication' stipulating, in pertinent part," that the owners could appeal the Department's variance denial "as a final action of the Department." *Id.* at 443.

301. *Id.* at 445.

302. *Id.*

303. *Id.*

304. *Id.* at 446.

305. *Id.* at 447.

306. Machipongo Land & Coal Co., Inc. v. Commonwealth Dep't of Envtl. Res., 648 A.2d

a decision which grew out of one and spawned two further appellate decisions. In *Machipongo I*, the Commonwealth Court faced with "several questions of jurisdiction over pre-enforcement challenges to [agency] regulations," concluded that it "was without jurisdiction to hear the case" but also "concluded that the administrative remedies available to [the owners] inadequately addressed" the particular claim.[307] The court therefore transferred the appeal to another agency it considered "more technically competent" in such claims.[308]

In *Machipongo II*, the supreme court reversed. It began by distinguishing *Gardner I* where:

> the Commonwealth Court held only that the trial court properly ruled that there appeared to be a reasonable administrative remedy still available, and that, therefore, the injured party must first exhaust those remedies before challenging the matter in court. Here, a specific finding was made . . . that there were *no* reasonable administrative remedies available; thus, *Gardner* is inapplicable.[309]

Since this Commonwealth Court finding was not challenged as being "inherently unreasonable" or as "an abuse of discretion," the supreme court agreed that the owners "lacked a reasonably sufficient administrative remedy . . . and that they need not, in this instance, further pursue administrative relief."[310]

That left the question of who did have jurisdiction to hear the owner's appeal in what was characterized as an eminent domain proceeding. The Commonwealth Court, based on its reading of the Pennsylvania Supreme Court's decision in *Arsenal Coal*, had transferred jurisdiction to the agency it believed "possessed ancillary jurisdiction to rule on" an eminent domain question.[311] However, the supreme court said *Arsenal Coal* dealt only with questions of pre-enforcement review of a regulation; the agency selected by Commonwealth Court was legislatively limited to post-enforcement review. "Therefore, absent any [departmental] enforcement action, the [agency] is without any legislatively-conferred jurisdiction over this matter. . . . In turn, the Commonwealth Court's attempt to transfer the case . . . was in error because the judiciary does not possess the power to expand the legislatively-defined jurisdiction of administrative agencies."[312] Since the Commonwealth Court itself "does not have original jurisdiction over eminent domain takings claims," the supreme court

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767 (Pa. 1994) [hereinafter *Machipongo II*]. *See* Michael A. Kauffman, *Machipongo Land and Coal Co., Inc. v. Department of Environmental Resources: Additional Takings Protection for Coal Estates Under the Pennsylvania Constitution?*, 8 WIDENER J. PUB. L. 721 (1999).

307. *Machipongo II*, 648 A.2d at 768 (*Machipongo I* is found at 624 A.2d 742 (Pa. Commw. Ct. 1993)).

308. *Id.*

309. *Id.* at 769.

310. *Id.*

311. *Id.* at 770 (citing Arsenal Coal Co. v. Dep't of Envtl. Res., 477 A.2d 1333 (Pa. 1984)). *Arsenal Coal* is discussed *infra* at 63.

312. *Id.*

remanded the matter to "the court of common pleas of the county in which the property is located."[313]

Two years later in *Machipongo III*, the supreme court vacated, in part, its opinion in *Machipongo II* and ordered the matter remanded to the Commonwealth Court.[314] The supreme court now said that the legislature "clearly specified that the designation of an area as unsuitable for surface mining under these circumstances constitutes an exercise of the Commonwealth's police powers."[315] In response to the owners' claim that the agency action "amounts to a *de facto* taking, and *de facto* takings are cognizable under the Eminent Domain Code," the court said the owners "ignore[d] what has long been an acknowledged distinction in this Commonwealth between a taking which occurs pursuant to the Commonwealth's exercise of its police powers and the exercise of its eminent domain power."[316]

That long-established distinction was important to maintain.[317] The Supreme Court said police power and eminent domain power should not be confused:

> [p]olice power involves the regulation of property to promote health, safety and general welfare and its exercise requires no compensation to the property owner, even if there is an actual taking or destruction of property, while eminent domain is the power to take property for public use, and compensation must be given for property taken, injured or destroyed.[318]

In this case, the legislature expressly stated that the contested designation was "an exercise of the Commonwealth's police power . . . promot[ing] the public welfare."[319] Thus, the Supreme Court's previous remand based on eminent

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313. *Machipongo II*, 648 A.2d at 770.

314. Machipongo Land and Coal Co., Inc. v. Commonwealth Dep't of Envtl. Res., 676 A.2d 199 (Pa. 1996) [hereinafter *Machipongo III*].

315. *Id.* at 202.

316. *Id.*

317. *See* Cordes, *supra* note 116.

> [O]ur legal system has long recognized that private property interests are subject to broader public uses. This has been referred to at times as the social function or social obligation of property, indicating that property ownership must be seen in a broader social setting with responsibilities as well as rights.

Id. at 1077.

318. *Machipongo III*, 676 A.2d at 202 (quoting Redevelopment Auth. of Oil City v. Woodring, 445 A.2d 724, 727 (Pa. 1982)).

319. *Id.* The court specifically noted that it was:

> only passing upon the proper forum for this action. We recognize that sometimes a state action taken pursuant to its police powers can go too far and constitute a *de facto* taking requiring the state to provide just compensation. . . . However, we believe that a decision on whether the taking in this case went too far is a question best left for the Commonwealth Court since an adequate record has not yet been developed on this issue.

Id. at 203 n.3.

domain law was incorrect and jurisdiction properly rested with the Commonwealth Court.[320]

More than two years after the Supreme Court's remand and more than five years after its initial decision, the Commonwealth Court issued its decision in *Machipongo IV*, addressing the owners' claim that "they have been deprived of their right to surface mine their coal in the designated area and, therefore, have been denied all economical use of that land."[321] The Department had filed a motion for summary judgment.[322] In denying the motion, the court ultimately concluded that "genuine issues of material facts still remain as to whether the Commonwealth's designation of [the owners'] property as unsuitable for mining resulted in a taking. . . ."[323]

In addition to describing the path of a matter wending its way through Pennsylvania's convoluted administrative law process, the *Machipongo* quartet offers some guidance in deciding whether the Philadelphia Historical Commission's designation of *Dream Garden* was an adjudication permitting direct appeal to the common pleas court. The cases do reflect a preference for exhausting available administrative remedies and the need for a full and complete factual record. However, another line of cases establishes a policy favoring a conclusion that a designation determination is an agency action, not an adjudication, and therefore is not immediately ready for court review.

X. IS *DREAM GARDEN* RIPE FOR COURT REVIEW?

In *Dream Garden*, the Commonwealth Court concluded, without a full textual and policy analysis, that "the [Philadelphia] Code confers no authority on the Commission to conduct an inspection in connection with historic[al] designation or to appeal an historic designation."[324] The court made no reference to Section 8-412 of Philadelphia's Home Rule Charter which gives "[e]very . . . commission

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320. *Machipongo III*, 676 A.2d at 203.

321. Machipongo Land and Coal Co., Inc. v. Commonwealth Dep't of Envtl. Res., 719 A.2d 19, 23 (Pa. Commw. Ct. 1998) [hereinafter *Machipongo IV*].

322. *Id.* at 21.

323. *Id.* at 30. The dissent concluded that the owners had:

> produced some evidence that the value of their property has been reduced. But mere reduction in value does not demonstrate a taking. . . . [T]he petitioners have not come close to adducing evidence that they have been denied the economically viable use of their property and, therefore, have failed to show that their property has been taken by the Commonwealth. . . .

Id. at 31. *See also* Kauffman, *supra* note 306. Kauffman says the *Machipongo IV* "majority appears to have provided more protection to the Coal Owners than United States Supreme Court precedents have afforded in the past." *Id.* at 731. He concluded that "[t]his unique treatment seems unlikely given the Supreme Court of Pennsylvania's past rulings, which closely follow the precedent of the Supreme Court of the United States." *Id.* at 732.

324. *Estate of Merriam*, 777 A.2d at 1219.

. . . the power to make such inspections as are incident to or necessary" for performing its functions.[325] On the basis of an incomplete analysis, the court found that Pennsylvania's Local Agency Law applied, that the exhaustion of remedies rule did not apply, and that the case was ripe for review.

The court said the exhaustion rule did not apply since "no reasonable administrative remedy is available because the Code simply does not provide any statutory appeal from the designation of an object as historic."[326] As to finding the appeal ripe, the court relied on its decision in *Rouse & Associates*[327] in concluding that the Merriam Estate "has suffered actual and present harm as a result of the Commission's designation."[328]

The court, without acknowledging that it was the Estate's burden to provide record support for the following, noted that

> the Estate is prevented from moving or altering the work of art from its present location forestalling any chance of any future sale. Unlike the designation of a building or a structure, which can be adapted for other uses, the historical designation of Dream Garden precludes any right of private ownership of the work of art. The Estate has no viable economic use of its property, following designation. It remains a privately owned piece of art in a building owned by a third party. We conclude that this hardship to the Estate establishes this challenge to the Code is ripe for judicial review.[329]

The court also concluded that it was "futile for the Estate to seek a permit from the Commission to alter or move Dream Garden."[330]

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325. HOME RULE CHARTER § 8-412. *See also* HOME RULE CHARTER definition of "Inspection," *supra* note 229.

326. *Estate of Merriam*, 777 A.2d at 1220.

327. Rouse & Assoc. v. Pennsylvania Envtl. Quality Bd., 642 A.2d 642 (Pa. Commw. Ct. 1994).

328. *Estate of Merriam*, 777 A.2d at 1221. *See also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

> Under 'prudential ripeness principles,' which the [Supreme] Court devised for application to regulatory takings claims and to no others, landowners must overcome a complex and difficult set of hurdles in order to obtain federal court review. Claims often will not be heard at all. The adjudication of conceptually straightforward regulatory takings claims may take a decade or longer.

Id. at 977-78.

329. *Estate of Merriam*, 777 A.2d at 1221. As events demonstrated, the court's unsupported conclusion was wrong. The estate retained a multimillion dollar economic use of its property. *See Surprise Reprieve, supra* note 1.

330. *Estate of Merriam*, 777 A.2d at 1221. The court's futility analysis, or lack of it, can be compared to Robert S. Payne, *The Current State of Regulatory Takings in Supreme Court Jurisprudence: A Look at City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 11 VILL. ENVTL. L.J. 349 (2000).

> Four different possible standards can show futility and allow an exception to the finality requirement. First, the Supreme Court has acknowledged that the

It is questionable whether the Commonwealth Court's decision in *Rouse* supports its decision regarding *Dream Garden*. The owner in *Rouse* contested an agency action which increased the level of protection afforded a waterway.[331] This occurred after the owner had obtained conditional approval to develop its property from another agency.[332] The owner had standing to challenge the new agency action because it had a "substantial, direct and immediate" interest in the level of waterway protection.[333] Its development of property proximate to the waterway was conditioned by the first agency "on [the owner's] construction and operation of a sewage treatment plant" using the waterway for treatment purposes.[334] If valid, the intervening agency action regarding the waterway "virtually ensures that [the owner] will not be permitted to construct the [sewage] treatment plant"[335] and thus could not develop its property.

Although the owner had not been subject to an enforcement action, the court found the owner's claim ripe for review for two reasons.[336] First, the owner's allegations regarding the pre-enforcement effect of the regulation "when accepted as true, demonstrate the existence of actual, present harm."[337] Second, the owner

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> finality requirement does not force the landowner to 'pursue a development application through piecemeal litigation or unfair procedures.' Second, futility can be shown if the plaintiff can establish that further applications 'would cause such excessive delay that the property would lose its beneficial use.' Third, the Supreme Court has found a submission and rejection of two plans sufficient to ripen a takings claim. Fourth, the Ninth Circuit 'excused as futile a landowner's failure to apply for a variance that the local government was powerless to grant.' If the case meets any of these four example[s] of futility, then the finality requirement can be excused.

Payne, *supra* at 358.

331. *See Rouse*, 642 A.2d at 643-44.

332. *Id.* at 643.

333. *Id.* at 644.

334. *Id.* at 645.

335. *Id.*

336. *Id.* at 646.

337. *Id.* Following are the allegations:

> a. Rouse would be required to spend endless amounts of time and money to prepare plans and applications and submit them for its proposed treatment plant. They would then be processed by DER when DER has already predetermined that a treatment plant . . . [will adversely affect] existing water quality and, therefore, would not be issued a permit.
>
> b. Rouse would be forced to await an administrative determination . . . before being able to obtain a judicial review of the validity of the regulation and the viability of the permit application.
>
> c. Rouse would have to spend tremendous sums of money for final land development plans . . . because DER will not process . . . permits until final land development plans have been approved.
>
> d. Rouse cannot proceed with its development or sell its development because

was "placed in a unique position" because the zoning board refused to allow the owner to connect to existing sewage disposal system; instead, it required the owner to construct its own sewage treatment plant.[338] This requirement forced the owner "to be more immediately concerned with the water quality requirements" for the waterway.[339] Although noting that an administrative appeal process was available, the court concluded that "even in the pre-enforcement context, this remedy does not adequately protect [the owner's] interests."[340]

The Commonwealth Court in *Rouse* also concluded that the exhaustion of administrative remedies doctrine was inapplicable.[341] In addition to having alleged "actual, present harm from the promulgation of [the] regulation," the owner also raised what appeared to be facial "constitutional due process and equal protection challenges to [the] regulatory scheme of designating the water quality standards for waterways."[342] The court had "consistently held that the exhaustion of administrative remedies is not required where a statutory scheme's constitutionality or validity is being challenged."[343]

There were two significant conditions in *Rouse* which permitted a pre-enforcement review of an agency regulation. First, when the new regulation was promulgated, the owner had already obtained conditional development approval from another agency.[344] The contested regulation intervened in a completed agency process and, if upheld, virtually ensured that the owner could not proceed as permitted by the completed process.[345] Second, the owner mounted what was a facial constitutional challenge to the entire regulatory scheme under which the new regulation was imposed.[346] Such challenges do not need to wait for the administrative process to run.[347] These are challenges to the existence of an agency's authority, not to the agency's exercise of existing authority.

In relying on *Rouse*, the *Dream Garden* court failed to place that decision in a historical context, a context which could easily change the *Dream Garden* result. The progenitor is the Pennsylvania Supreme Court's decision in *Arsenal Coal*. The owner there raised a pre-enforcement challenge to "a comprehensive recodification of regulations governing the anthracite" coal industry.[348] This was

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of the uncertainty of the sewer proposal.

Rouse, 642 A.2d at 646.

338. *Id.*

339. *Id.* at 647.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Rouse*, 642 A.2d at 645.

345. *See id.* at 646-47.

346. *Id.* at 647.

347. *Id.*

348. Arsenal Coal Co. v. Commonwealth Dep't Of Envtl. Res., 477 A.2d 1333, 1334-35 (Pa. 1984).

a facial challenge "grounded in a claim that the regulations were promulgated in excess of the statutory authority by which the regulatory agency is empowered to enact such regulations."[349] The court emphasized the following: (1) "the effect of the challenged regulations upon the industry regulated";[350] (2) the resulting "ongoing uncertainty in the day to day business operations of an industry which the [legislature] clearly intended to protect from unnecessary upheaval";[351] and (3) the "penalties and impediments to the operation of the anthracite industry" which would result from individualized post-enforcement review.[352] These "direct and immediate" effects on the industry created a hardship sufficient "to establish the justicability of the challenge in advance of enforcement."[353]

Two years later, the supreme court revisited *Arsenal Coal* in deciding that a local water resource authority "was not entitled to pre-enforcement relief" from new state agency regulations.[354] The supreme court said the local authority's "action is premature and not ripe for decision,"[355] agreeing with the Commonwealth Court that

> the regulations are not self-effectuating. The status quo will continue until [the agency] upon application or reapplication for a permit . . . evaluates the water quality of the stream in question and imposes appropriate . . . limitations based upon its evaluation. The eventual impact of the amended regulations . . . is at this point in time uncertain. It is not direct or immediate. . . . [Therefore] the statutory review process is an adequate and appropriate remedy and this Court must refrain from exercising its equitable jurisdiction.[356]

The court said the local authority simply disagreed with the agency's new regulation; it had not suffered any immediate adverse consequence.[357] The authority would have several post-enforcement remedies available to it,

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349. *Arsenal Coal*, 477 A.2d at 1338.

350. *Id.* at 1339.

351. *Id.* at 1340.

352. *Id.*

353. *Id.* at 1339. The dissenting justice was unpersuaded that it was good policy to permit the companies to appeal in front of an actual application of the regulations.

> Granted that to the extent any particular regulation might exceed the statutory authorization it would be invalid, under these circumstances I think it is unwise as a matter of judicial policy to allow the Appellants to proceed on a bare assertion that the program *as a whole* is invalid. The Appellants should present specific reasons as to each regulation, demonstrating why it is invalid, to the Environmental Hearing Board whose function it is to review Department action based on regulations as applied to specific cases.

Id. at 1342.

354. Neshaminy Water Resources Authority v. Commonwealth Dept. of Envtl. Res., 513 A.2d 979 (Pa. 1986).

355. *Id.* at 982.

356. *Id.* at 981.

357. *Id.*

administrative and judicial, if it still thought the agency was mistaken.[358] In contrast, the challenge in *Arsenal Coal* was to the agency's authority to make the regulation at all, a regulation which had an immediate, injurious industry-wide effect.[359]

The Commonwealth Court's decision in *Rouse* was also sandwiched by two of its own decisions which again raise questions about *Rouse*'s applicability to *Dream Garden*. The petitioners in *Concerned Citizens of Chestnuthill Township* sought reversal of agency regulations reclassifying the level of protection afforded a local waterway.[360] Their petition included "challenges to the facts and the law supporting the . . . designation, claims that the upgrade will have deleterious economic, social and political effects, and allegations of procedural and notification defects in the rulemaking process which resulted in the reclassification."[361] Since there was "a statutory remedy providing for review [of the agency's action,] . . . the question . . . [was] whether in the pre-enforcement context, this remedy is an adequate, satisfactory alternative to the equitable action" in Commonwealth Court.[362]

The court, citing *Arsenal Coal*, said the "statutory, post-enforcement review is adequate unless the regulation causes actual, present harm."[363] Therefore,

> unless the regulation itself is self-executing, there is no harm done . . . until the [agency] takes some action to apply and enforce its regulations, in which case the normal post-enforcement review process is deemed an adequate remedy. The regulation itself may be challenged in the context of an appeal to the [board] of a[n] [agency] action, such as issuing an order, permit, license or other decision applying the contested regulation.[364]

The court distinguished *Arsenal Coal* as involving "fifty-five coal mine operators and producers challeng[ing] a . . . regulation which directly and immediately affected the anthracite industry . . . [and which] had industry-wide impact, resulting in ongoing uncertainty in the day-to-day business operations of an industry."[365] That industry "would have had to expend substantial sums to comply with the regulation, and if individual companies chose to refuse to comply and test the regulation by appealing, for example, a denial of a permit to

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358. *Neshaminy Water Resources*, 513 A.2d at 981.

359. *Arsenal Coal*, 477 A.2d at 1335.

360. Concerned Citizens of Chestnuthill Township v. Dep't of Envtl. Res., 632 A.2d 1 (Pa. Commw. Ct. 1993).

361. *Id.* at 2.

362. *Id.* at 3.

363. *Id.* The *Rouse* court distinguished *Concerned Citizens* by saying "Rouse claims that it is immediately, directly, and actually impacted and that it will suffer a hardship . . . ." *Rouse*, 642 A.2d at 646.

364. *Concerned Citizens*, 632 A.2d at 3.

365. *Id.*

operate, . . . then the whole anthracite industry would suffer."[366] It was these effects "'upon the industry regulated [which produced] direct and immediate . . . hardship [sufficient] to establish the justiciability of the challenges in advance of enforcement.'"[367]

The effects in *Concerned Citizens* were different. The regulation there did not require the petitioner "to take any immediate action or risk [agency] sanctions for non-compliance."[368] That situation was "not the type of direct, immediate harm contemplated by *Arsenal Coal* for which there is no adequate remedial review process."[369] In fact, the post-enforcement process was adequate "because litigants may immediately challenge the validity of the regulation itself as a matter ancillary to the harm they claim occurred due to the *application* of the regulation to their interests."[370] This was "an adequate and more efficient, because less speculative, statutory alternative to invoking this Court's original jurisdiction."[371]

Concerned Citizens was the earlier Commonwealth Court decision sandwiching *Rouse*; *Duquesne Light* was the later.[372] In *Duquesne Light*, the court rejected an attempt to gain pre-enforcement review of agency regulations regarding emission requirements.[373] The court said that unlike *Arsenal Coal* where the petitioners "were immediately subject to the regulations upon their promulgation, Duquesne is not immediately subject to the regulations here. In fact, Duquesne is subject to the regulations only *after* Duquesne applies for an operating permit . . . incorporating the . . . requirements."[374]

In reaching its decision, the court likened the case to *Costanza v. Department of Natural Resources*.[375] In *Costanza*, the petitioners challenged "the implementation of . . . regulations involving the issuance of permits for the agricultural utilization of sewage."[376] As the *Duquesne Light* court explained it, although the agency in *Costanza*

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366. *Concerned Citizens*, 632 A.2d at 3.

367. *Id.* (quoting *Arsenal Coal*, 477 A.2d at 1339).

368. *Id.*

369. *Id.* In *Rouse*, the court characterized the petitioner's claim in *Concerned Citizens* that "the redesignation . . . would have deleterious economic, social, and political effects is far more remote and anticipatory" than Rouse's claim. *Rouse*, 642 A.2d at 646-647. The petitioners "did not have any pending subdivision or land development plan, the approval of which was tied to the existence" of a certain agency designation. *Id.* at 647.

370. *Concerned Citizens*, 632 A.2d at 4.

371. *Id.*

372. Duquesne Light Co., Inc. v. Commonwealth Dep't of Envtl. Res., 724 A.2d 413 (Pa. Commw. Ct. 1999).

373. *Id.* at 417-18.

374. *Id.* at 417.

375. *Costanza*, 579 A.2d 447.

376. *Id.* at 448.

> had issued letters clearly indicating its intention to apply the regulations to new permit applications, and petitioners alleged immediate harm because the [agency] would reject petitioners' filed applications for failure to comply with the regulations, this court held that, because the [agency] had not yet acted on the applications, the alleged harm was speculative and not immediate.[377]

The same applied to the petitioner in *Duquesne Light*, at least until the agency issued an operating permit incorporating the requirements.[378] After that, the petitioner had "an adequate administrative remedy because it can challenge the regulations" by appeal to a statutorily designated board.[379]

The *Duquesne Light* court, after likening the case to *Costanza*, distinguished it from *Rouse*. The court said that, unlike *Rouse*, "Duquesne makes no factual allegation that it immediately must spend substantial amounts of money simply to apply for a permit in order to secure a determination from the [agency] that would give rise to an appeal to the [board]."[380] Furthermore, Rouse's business operations, like those of the coal companies in *Arsenal Coal*, "were affected immediately by the regulations which prevented Rouse from proceeding" with its development.[381]

There was nothing like that in *Duquesne Light*; on the record before it, the court simply could not "conclude that Duquesne has suffered the requisite direct and immediate harm to justify a pre-enforcement challenge to the regulations."[382]

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377. *Duquesne Light*, 724 A.2d at 418. Both *Duquesne Light* and *Costanza* cited Grand Cent. Sanitary Landfill, Inc. v. Commonwealth Dep't of Envtl. Res., 554 A.2d 182 (Pa. Commw. Ct. 1989) where the court again distinguished *Arsenal Coal*:

> Grand Central fails to allege any specific instance where it is currently in violation of the contested regulations. This failure is important because Grand Central, in an attempt to bring this case under the ambit of *Arsenal*, alleges that it is immediately and directly harmed by the regulations. However, absent any allegation by Grand Central that it is currently in violation of the regulations, or is immediately threatened by specific circumstances, the direct and immediate harm contemplated by our Supreme Court in *Arsenal* is nonexistant.

Grand Central, 554 A.2d at 184. The court believed that "until [the agency] specifically acts regarding Grand Central's application for permit modification, there is no need to consider whether the regulations will in fact adversely affect Grand Central." *Id.* at 185.

378. *Duquesne Light*, 724 A.2d at 418.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 419. In a note, the court said it was "difficult to accept Duquesne's arguments that it should be allowed to pursue a pre-enforcement challenge because its administrative remedies are inadequate when Duquesne has failed to allege that it has taken the first step, i.e., a permit application, to pursue its administrative remedies." *Id.* at 418 n.14. In *Dream Garden*, the Estate is trying to have it both ways. It is claiming that an administrative appeal process is unavailable while, at the same time, applying for a demolition permit which, as did happen, allowed it to pursue an administrative appeal.

Thus, the question in *Dream Garden* was whether the Merriam Estate had suffered such harm justifying a pre-enforcement challenge to the Historical Commission's designation determination.

XI. LET THE PROCESS RUN

Assuming that there is no Review Board appeal of the Philadelphia Historical Commission's designation determination, the question would be whether the Merriam Estate has suffered the requisite direct and immediate harm by the designation of *Dream Garden* as a historical object to justify a pre-enforcement challenge to it.[383] However, the question should have been moot. The Estate had begun and should have been required to complete the available administrative appeal process, a process which arguably permits a post-enforcement challenge to the designation determination.[384]

The Estate had, and used, an opportunity to present evidence and argument before the Historical Commission and its Architectural and Financial Hardship Committees.[385] It had, but did not use, an opportunity to apply for rescission of the designation. It had, and used, an opportunity to apply for a demolition permit (including one based on hardship) which, if granted, would have permitted removing *Dream Garden* from the Curtis Building lobby.[386] The Historical Commission denied the application and the Estate started the available administrative appeal process to challenge that denial.[387]

That process should have gone forward. That is where the issues, including designation, were truly joined. Again, New York provides an example. In *Committee to Save the Beacon Theater*, the key issue was whether the Landmarks Preservation Commission's vote "indicating its approval of certain alterations to

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383. *See* Marilyn Phelan, *The Current Status of Historical Preservation Law in Regulatory Takings Jurisprudence: Has the Lucas 'Missile" Dismantled Preservation Programs?*, 6 FORDHAM ENVTL. L.J. 785 (1995).

> For constitutional purposes, the relevant question can no longer be solely whether governmental preservation regulation has interfered in some minimal manner with the owner's use of his or her private historical property. An intelligible takings inquiry must ask whether the extent of the interference is so exacting as to constitute a compensable taking in light of the owner's alternative uses for the property.

Id. at 814; *See Arsenal Coal Co.*, 477 A.2d at 1339.

384. *See Estate of Merriam*, 777 A.2d at 1217-18.

385. *See id.* at 1220 n.7

386. *Id.*

387. For a brief history of the twin tracks the *Dream Garden* matter has taken, see Stephan Salisbury, *Mural's Historic Status Attacked*, PHILA. INQUIRER, Feb. 17, 1999, at B1; Stephan Salisbury, *City Panel Says Don't Move Mural*, PHILA. INQUIRER, Oct. 8, 1999, at B3; Stephan Salisbury, Historical Panel Rejects Permit to Remove Mosaic, PHILA. INQUIRER, Oct. 22, 1999, at B1; Stephan Salisbury, *'Dream Garden" Hearing Set For Today*, PHILA. INQUIRER, Mar. 7, 2001, at E1.

the interior of the Beacon Theater . . . constitutes a reviewable 'final determination' . . . making the issues . . . 'ripe' for judicial review."[388] Seven years after the Commission designated the theater's interior, the owner applied for permission to make significant interior alterations.[389] This application "aroused intense public interest. Hundreds of letters were received by the Landmarks Commission. . . . [It] considered testimony by architects, engineers, acoustical consultants, heating, ventilation and air conditioning specialists, a scenic designer, architectural historian, and representatives of various preservationist groups."[390] The Commission subsequently "voted to grant [the application] provided that certain conditions were satisfied" by the owner.[391]

An interested preservation group appealed the Commission's action. The appeals court said it was required "first, to determine whether the issues presented are 'appropriate for judicial resolution' and second, to 'assess the hardship to the parties if judicial relief is denied.'"[392] The first determination "looks to whether the [agency's] action is final, that is, whether the agency has arrived at a 'definitive position' on the issue inflicting 'an actual, concrete injury' or whether the action relies on factors as yet unknown."[393] The second determination "requires an evaluation of whether withholding (or granting) judicial review will result in hardship to either of the parties, as well as its potential effect on the agency and its program."[394]

The court concluded that "in the absence of the issuance of a Certificate of Appropriateness, finality is lacking."[395] The court noted that the Commission's notice of approval (which imposed "conditions . . . satisfaction of which must precede eventual issuance of the Certificate") specifically said the notice was not a final action.[396] Moreover, the Commission's notice "had neither a 'direct' or 'immediate' impact upon the parties."[397] As to the owners, "the ultimate issuance of a Certificate is dependent upon their own performance."[398] As to the objecting preservation group, "it was not aggrieved since work could not be commenced until issuance of the Certificate and the grant of a building permit," actions which could never happen.[399] Therefore, the case was premature—"'[t]he policy underlying the dismissal for prematurity . . . before a final and binding

388. Comm. to Save the Beacon Theater v. City of New York, 541 N.Y.S.2d 364, 365 (App. Div. 1989).

389. *See id.* at 365-66.

390. *Id.* at 366.

391. *Id.*

392. *Id.* at 368.

393. *Id.*

394. *Save the Beacon Theater*, 541 N.Y.S. at 368.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 369.

determination is to preclude the initiation of litigation that may thereafter become academic."[400]

This is like *Dream Garden*. If the designation determination was not an agency action appealable to the Review Board, then it remained an action the consequences of which are not realized until the Merriam Estate applied for rescission or applied for a demolition permit or was subject to an L&I enforcement action. The result of a designation determination is to maintain the *status quo* until the owner fails to maintain that status or until the owner applies to change that status. However, as to the sole question of the designation determination, the Estate—unsuccessfully in common pleas court, successfully in Commonwealth Court—argued that neither the Philadelphia Home Rule Charter nor the Philadelphia Code provided a "procedure . . . for any administrative review of the designation of an object as historic."[401] As seen earlier, there is a reasonable textual and policy analysis showing that such review is available; if such review is available, then the Historical Commission's designation determination is not an adjudication subject to immediate judicial review under Pennsylvania's Local Agency Law. Adjudication would result only after any Review Board decision of an appeal of the designation determination.

Even if the Commission's *Dream Garden* designation was not subject to immediate administrative review, the question is whether it caused such immediate harm as to warrant a court's undertaking pre-enforcement review. Is a designation determination the equivalent of the *Arsenal Coal* regulation? Are its effects so direct, immediate, and harmful as to warrant bypassing the normal application/decision/review process? Under Pennsylvania law, such a bypass operation is warranted only by the affected party's clear demonstration that circumstances warrant such extraordinary action.[402]

The Commonwealth Court's *Dream Garden* decision does not withstand this analysis. A key to the court's decision was its agreement with the Merriam Estate's argument that "no reasonable administrative remedy is available because the [Philadelphia] Code simply does not provide any statutory appeal from the designation of an object as historic."[403] That simply is not accurate. Moreover, in the same paragraph where this language appears, the court noted that

> the Estate did seek a permit to remove Dream Garden from the lobby of the Curtis Building and was denied that permit. Moreover, The Commission's Committee on Financial Hardship found that the Estate had failed to demonstrate that the denial of the permit resulted in a financial hardship to the Estate.[404]

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400. *Save the Beacon Theater*, 541 N.Y.S.2d at 369.
401. *Estate of Merriam*, 777 A.2d at 1217.
402. *See, e.g.*, *Arsenal Coal*, 477 A.2d at 1338-39.
403. *Estate of Merriam*, 777 A.2d at 1220.
404. *Id.* at 1220 n.7.

What the court failed to acknowledge was that the Estate's appeal of both denials to the Review Board afforded it another record building opportunity and arguably afforded the Review Board an opportunity to revisit the Historical Commission's designation determination.[405]

Until that process is complete, the Estate has not suffered a legally cognizable harm from the Commission's designation of *Dream Garden*.[406] The Pennsylvania Supreme Court, in the clearest of its statements about historic preservation, has said that designation is a permissible regulation.[407] It has also said that the property owner bears the heavy burden of demonstrating that this regulation so immediately and so severely affects the property that the regulation should be reviewed even before it is enforced.[408] This is a matter of record demonstration, not mere pleading allegation or appellate speculation.

Except in the extraordinary case like *Arsenal Coal*, where the regulation had an immediate and industry-wide pre-enforcement effect, the owner carries its burden by following the applicable administrative procedure and building the appropriate record.[409] The *Dream Garden* record, as it now stands, would not support the finding necessary for pre-enforcement review of the designation determination. The Commonwealth Court, without affording the administrative process an opportunity to finish, made several significant outcome determinative conclusions.[410] It is possible that these conclusions are accurate, but that cannot be known until a full and complete record is made.

A clear indication of the court's misunderstanding of the administrative process is its statement that "the Commission has forced the Estate to first seek a permit to move the Dream Garden before providing judicial review of the decision to designate."[411] The Commission did not force anything. That is the process. The Commission followed the legislation passed to preserve Philadelphia's historical resources.[412] That legislation is an appropriate exercise of the police power. All property owners are subject to the reasonable regulation of the property they own, even if that regulation prevents the most profitable or most immediate return from that property.

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405. *Estate of Merriam*, 777 A.2d at 1212.

406. *See id.*

407. *See id.*

408. *See id.*

409. *See id.* at 1219-20.

410. *See id.* at 1212.

411. *Id.* at 1220.

412. *See* Fiske, *supra* note 28, where City Attorney Mark Zecca is quoted regarding the *Dream Garden* situation. "'It would be sad if the public were only allowed to have access to their history of art or architecture if a municipality could pay for it. After all, the architecture and art named as historically significant does belong to the public.'" *Id. See also* Cotter, *supra* note 33. "Examination [of a work] is always a smart idea: art is packed with information, often hidden, about who made it, who valued it and why. Appreciation is trickier. Nostalgia, which is what Parrish's work is about, is a powerful emotion, feel-good seductive but also potentially dangerous. . . ." *Id.*

Philadelphia has a particular need for measures to protect its public art which, in one author's definition, "is broadly understood to include visual works of any medium . . . which are displayed in a location accessible to the public."[413] There is no doubt that *Dream Garden* is considered by many, including the institutions which are beneficiaries of the Merriam Estate,[414] to be public art, even though privately owned.[415] *Dream Garden* has significant existence value for Philadelphia, value which is inherent in and represented by the work, whether or not the work is viewed by great numbers of people.[416]

Dream Garden is unique in not only being a work of art accessible to the public, but also a work of art which is part of the architecture of a historically designated building.[417] *Dream Garden* is central to and embedded in the interior architecture

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413. Vera Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, 201 n.1 (1999). *See* Miller, *supra* note 38.

> Philadelphia is blessed with the largest collection of public art in the country. The city's long history, the noblesse oblige of the private benefactors, and the Percent for Art programs have given us a plethora of [outdoor art]. . . . Public art indoors is another matter. 'People are less likely to discover it by surprise.'

Miller, *supra* note 38, at 22.

414. These institutional beneficiaries were so taken aback by the public reaction and negative publicity that they "have publically declared that they want the glistening glass mosaic to remain in Philadelphia – even if it means relinquishing all claims to it." *Still For Sale*, *supra* note 7. They may not have to give up their claims. *See* Stephan Salisbury, *Death of Estate's Executor Could Affect Fate of Mural*, PHILA. INQUIRER, Apr. 4, 2001, at B1; Stephan Salisbury, *Another Legal Squabble Over a Historic Mosaic*, PHILA. INQUIRER, Apr. 18, 2001, at B1; *Institutions Assert Control*, *supra* note 51.

415. *See Dare We Dream?*, PHILA. INQUIRER, Sept. 16, 1998, at A20:

> How lucky it would be if the averted sale of the famous *Dream Garden* mosaic were to awaken Philadelphia to the need to keep watch over other works of public art in private hands. . . . [The Estate beneficiaries] have a clear duty to preserve this artistically significant and beloved piece of city history.

Id.

416. *See* Daphna Lewinsohn-Zamir, *The "Conservation Game": The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 748 (1997). "[E]xistence value, by definition, is independent of whether a building's main cultural worth lies in its exterior or interior. To the extent existence value is significant, it expands the pure public good aspects of the conservation of buildings." *Id.* at 748. *But see* Rothstein, *supra* note 133, at 1131.

> If an interior has the same relation to the public as an exterior, i.e., remains in plain view to the general public, there can be no doubt that preservation serves aesthetic, cultural, historical and economic interests. If an interior has never been, or has only incidentally been, accessible to the public . . . it can be argued more strongly that no public interest has developed in the interior . . . [and its preservation] has little or no bearing [on those interests].

Id.

417. *See The Seeds*, *supra* note 47.

> 'What's interesting about the Curtis building is that the space where the mural is located is a public lobby,' Pregmon [a preservation lawyer] said. 'So again,

of that building. The key question is "whether it is entitled to the same protections as historic architecture under the strong local historic preservation code."[418] Its fate rested in that determination.[419]

The compounding factor is that *Dream Garden*, a privately owned work in a public lobby, was created and placed to bring art to the public. Curtis and Bok wanted it to be where it is for that purpose.[420] It was not intended to be moved. It was intended to be, as it has become, an object of cultural importance to Philadelphia. *Dream Garden* would lose meaning, and Philadelphia would suffer a cultural loss, if it was separated from its specific context.[421]

It remains astonishing that Philadelphia still has not amended its preservation provision to authorize the designation of historic interiors. That might have made *Dream Garden* an easier decision. In 1965, New York City enacted what has proven—especially following the Supreme Court's validation in *Penn Central*—to be a widely emulated historic preservation law.[422] In 1973, the city amended that law "to expand the [Landmark] Commission's jurisdiction by authorizing designation of interior landmarks and by charging the Commission with promoting the use of interior landmarks 'for the education, pleasure and welfare of the people of the city.'"[423] In 1989, the Commission designated the world-

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> the question is, where does the public interest stop? Is it necessarily at the front door and the vestibule? [*United Artists II*] didn't say it had to stop at the front door. It stops when the private interest outweighs the public interest.'

The Seeds, *supra* note 47. But,

> '[a]lthough [*Dream Garden*] is located within a private building,' Sklaroff [a Historical Commission member] said, 'it is public art in a public space. It's different from the work of a great master that resides in someone's living room. The public interest can be far greater in a space like the Curtis lobby . . . than in someone's living room or the lobby of a theater."

Id.

418. *See* Fiske, *supra* note 28 *See also* Morton, *supra* note 107. "Movable works of art do not impinge on any other piece of property; their preservation is rarely dependent upon their environment. But when a work has become incorporated into a building, there are more complex issues of competing interests." *Id.* at 884-85.

419. The Third Circuit came to this conclusion when analyzing Philadelphia's preservation provision. *See Sameric Corp.*,142 F.3d at 586 n.1. "We use the term 'building' throughout this opinion because the case involves a building. However, our discussion of the designation of a building under the ordinance also encompasses the designation of structures, objects, complexes of buildings, and districts which, for the most part, are treated equally under the ordinance." *Id.*

420. *See supra* notes 27-43 and accompanying text.

421. *See* Merryman, *supra* note 10, at 356. "Physical preservation of discrete objects themselves may not be enough. Every cultural object is to some extent a part of a larger context from which it draws, and to which it adds, meaning. Separated from its context . . . the object and the context both lose significance." *Id.*

422. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108-09 (1978).

423. Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 623 N.E.2d 526, 528 (N.Y. 1993).

famous Seagram Building, its outdoor plaza, its lobby, and the interior of the Four Seasons Restaurant which is housed in the building.

The owner of the Seagram Building had proposed designation of everything but the restaurant interior which the owner characterized as "'ordinary commercial space' that has not been dedicated to public use."[424] The owner asked the court

> to distinguish between a restaurant and "inherently" public interiors, such as railroad stations, lobbies and theaters, which are intrinsically dedicated to public use by their public assemblage purpose. [The owner] asserts that the Four Seasons interior has no distinctively public purpose, . . . and that permitting designations such as this will adversely impact the real estate and economy of New York City.[425]

The court rejected this "asserted distinction, which on its face is a difficult one."[426]

The court began by noting that the asserted distinction was not part of the preservation legislation.[427] Consistent with that legislation, "the relevant inquiry thus becomes an objective one of whether the interior is habitually open or accessible to the public at large."[428] If so, the interior, "regardless of its intended purpose, falls within the ambit of the statute" even if it might "be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors."[429] The Commission had the authority and established the record warranting designation of the restaurant interior.

The owner then argued that the designation did not include "items appurtenant" to the restaurant's interior.[430] The parties agreed that "the Commission's jurisdiction over interior landmark designations extends only to 'interior architectural features.'"[431] The owner argued this "extends only to items that qualify as fixtures at common law [which would exclude the] designation of

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424. *Teachers Ins. & Annuity*, 623 N.E.2d at 529. Interestingly, although the owner opposed designation of the restaurant interior, "the restaurant operators themselves proposed to the Commission that the restaurant interior also be considered for landmark status." *Id.* at 527.

425. *Id.* at 529.

426. *Id.*

427. *Id.* at 529-30.

428. *Id.* at 530. The Commission was

> authorized to landmark an interior 30 or more years old that is 'customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.'

Id. at 529.

429. *Teachers Ins. & Annuity*, 623 N.E.2d at 530.

430. *Id.*

431. *Id.*

the hanging sculptures, walnut bar, metal draperies, decorative metal railings and ceiling panels."[432]

The court rejected this argument. It said the preservation provision "unambiguously states that interior architectural features are composed of the 'architectural style, design, general arrangement and components of an interior.'"[433] The court deferred to the Commission's expertise in applying that provision; the Commission had "found that each of the designated items was created and installed at [architect] Philip Johnson's direction as an integral element of the design of the interior."[434] The Commission had drawn "a rational distinction between items integral to the design of the interior space, and items that merely enhance the restaurant's ambiance."[435]

XII. CONCLUSION

Had Philadelphia given the Historical Commission the authority to designate interiors, the lobby of the Curtis Building, with its own historical significance, would surely be nominated, a nomination enhanced by the presence of *Dream Garden*, undeniably "an integral element of the design of the interior."[436] However, the Commission is only delegated authority over the object.

Yet, there is no reason to afford the object any lesser protection than that afforded historic buildings. The Philadelphia Code treats them the same. If a building can be an element of cultural identity, so can an object.[437] The criteria are the same, the procedures are the same, the standards of review are the same, the benefits are the same.[438]

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432. *Teachers Ins. & Annuity*, 623 N.E.2d at 530.

433. *Id.* at 530-531.

434. *Id.* at 531.

435. *Id.* It is possible that New York will have an opportunity to confront its own mural problem. *See* Vogel, *supra* note 27 (discussing the fate of a 28 foot high and 55 foot wide mural designed for the lobby of the former Pan Am building and executed by Josef Albers, a significant artist who "has had a continuing influence in many fields of art, industrial design and architecture."). Albers and the building's principal architect, Walter Gropius, were also significant Bauhaus masters. *Id.*

436. *Teacher's Ins. & Annuity*, 623 A.2d at 531.

437. *See* Merryman, *supra* note 10, at 349:

> An art historian explains that works of art and, by extension, other cultural objects, 'tell[ ] us who we are and where we came from.' The need for cultural identity, for a sense of significance, for reassurance about one's place in the scheme of things, for a 'legible' past, for answers to the great existential questions about our nature and our fate—for all these things, cultural objects provide partial answers.

Id. at 349.

438. *See* Gerstenblith, *supra* note 56, at 463. "[T]here may well come a point when the public should be able to decide what is to be protected and how, especially for those works to be displayed

The intensity of the public reaction to the *Dream Garden* threat gives credence to the city's policy determination that such objects are "public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia."[439] They are significant to cultural identity and pride. *Dream Garden* has become, as Curtis and Bok hoped it would, a work of art with "a unique power to transform the way we interact with out environment."[440] As such,

> then the recognition of some form of special protection . . . seem[s] compelling. Works bearing this unique power, after all, need to be preserved if they are to continue to serve this function for us and for our descendants; if we destroy or alter them, future generations will not be able to share this experience.[441]

The *Dream Garden* designation is enhanced by its being accessible to the public but withdrawal of the access should not alter the designation. The owner of a historically significant object cannot by such conduct alter its significance and need to be preserved.[442] *Dream Garden* has, since 1916, been open to the public

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in public and to be maintained by the public or by the owner." Gerstenblith, *supra* note 46, at 463. *See also* Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177 (2001).

> In order to maintain and promote the public interest in our cultural heritage, a legal regime specifically targeted at preservation of art objects should be developed. Historic preservation laws are a viable model upon which such a statutory framework could be based. It is important to bear in mind, however, that preservation law and use regulation have traditionally been applied to real property. Movable art objects might pose a unique challenge.

Id. at 198.

439. PHILA. CODE § 14-2007(1)(a).

440. Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 36 (1997). I believe this preservation can be done with respect to all the competing interests.

> Our built environment can be a rich environment, capable of inspiring wonder and surprise, capable of awakening memory and recollection, capable of sustaining our present and fueling our future. The significant structures of that environment will be those that we admire and enjoy, those that capture the spirit of the place where we work and live. . . . The problem is that many of them are privately owned. Preservation asks the owner to forgo future development in the name of a greater good and without direct compensation. This calls for a regulatory regime sensitive to both private rights and public needs, capable of careful thought and credible decisions, and capable of controlling change. The system validated in *Penn Central* is sensitive to both procedural and substantive rights. It burdens the landowner no more than any other necessary aspect of living in a civilized community.

John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 43-44 (1996).

441. Cotter, *supra* note 440, at 36-37.

442. *See* Manwaring, *supra* note 58, at 322.

> The preservation of interiors is reasonably related to the accomplishments of

for the public's enjoyment and edification. It has "become a part of the cultural, aesthetic, historic, and economic fabric"[443] of Philadelphia. As such, the city can properly act to preserve it for all, even in the face of private ownership.[444]

Preservation is process. Once society makes the basic policy decision that certain representations of its heritage merit preservation, even if in private possession, then individual application of that policy must reflect a full and complete administrative law process. Only in completion of that process can we—the owner, the agency, the public, and the courts—be assured of receiving an accurate picture of what is at stake, including the values being advanced. Only in completion of that process can we be assured that all parties have had the appropriate notice and opportunity to respond at both the determination and the appeal levels. Only in completion of that process can we be assured that constitutional and legislative limitations have been respected. Only in completion of that process can we be assured that the application of the preservation provision has not, in fact, taken the owner's property without just compensation.[445] Let the process run.

> landmark objectives, even when public access may be limited, as many private uses afford the public the opportunity to view, appreciate, and thereby, benefit from these significant assets. This principle is still applicable even if public access is banned, because the opportunity to preserve our cultural, historical, and architectural resources for the benefit of future generations may be lost forever.

See Manwaring, *supra* note 58, at 322.

443. *See* Rothstein, *supra* note 133, at 1132. "[T]he issue is not so much whether an interior *will be* open to the public, but whether it *has been* open to the public and has become a part of the cultural, aesthetic, historic and economic fabric of a community." *Id.*

444. *Id.*

445. *See* Miller & Son Paving, Inc. v. Plumstead Township, 717 A.2d 483 (Pa. 1998). The Supreme Court found that the Commonwealth Court "erred in holding that a township zoning ordinance, which was found unconstitutional . . . automatically effected a compensable temporary *de facto* taking of the landowner's property." *Id.* at 484. "The Commonwealth Court erroneously confused the legal concepts applicable to takings claims and regulation validity issues." *Id.* at 486. The validity issue "involves the determination of whether a governmental action is encompassed within its scope of power." *Id.* at 486 n. 6. That is a legal question. The takings issue "is whether the governmental action effectively deprived the landowner of all beneficial use of his property, regardless of whether the action . . . was a valid exercise of governmental power." *Id.* This is a fact question.