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Foreword, Preservation Law Symposium: Re-Inventing the Past

Thomas J Reed

FOREWORD

This issue of *The Widener Law Symposium Journal* is about preservation of the man-made or built environment. On November 9, 2001, Widener University School of Law and Preservation Delaware, Inc. jointly sponsored a Preservation Law Symposium. The joint program was graced by the presentation of Professor David Bederman of Emory University School of Law on maritime archeological preservation. Professor Roberta Mann of Widener University School of Law offered a penetrating analysis of the impact of federal tax incentives for historic preservation and Professor John Nivala of Widener University School of Law grappled with the legal implications of attempts by public authorities to preserve interior works of art located in historic structures.

Paul W. Edmondson, Esq., the Chief Counsel of the National Trust for Historic Preservation and W. Thompson Mayes, Esq., of the National Trust Legal Staff made excellent presentations on historic preservation litigation and the role of the National Trust in the general Federal scheme for preservation of the man-made environment. Phillip Hoon, Esq., of Chestertown, Maryland and John F. Murphy, Esq., of Baltimore, Maryland chaired a group discussion on the challenge to regulated growth facing a small Eastern Shore community's historic district by the intrusion of a "big box" store into a non-contiguous neighborhood sharing the same two lane highway as the historical area.

Bayard Marin, Esq., the President of the Quaker Hill Foundation of Wilmington, Delaware, Katie Hearn, Esq., of Struever Bros., Eccles & Rouse, Inc. of Baltimore, and Walter S. Rowland, Esq., former President of Preservation Delaware, Inc., of Wilmington, Delaware were the hosts of a second discussion group on successful ways to plan for historic preservation in the 21st century urban environment. Professor David Bederman of Emory Law School and Peter Hess, Esq., of Wilmington, Delaware co-hosted a marine archeological and preservation discussion group that was the prelude to Professor Bederman's presentation to the entire group.

The symposium played to a full house of lawyers, architects, planners and public-spirited citizens. It was my very great pleasure to moderate the principal sessions and to take part in the Chestertown, Maryland discussion group. It is an even greater pleasure for me to set out a brief summary of the high quality articles that are included in this issue.

Maritime Preservation Law: Old Challenges, New Trends[1] is another addition to Professor Bederman's long list of publications on maritime law and underwater archeological protection by public authorities. Professor Bederman asserts that it is time to take stock of the degree of public control over underwater archeological sites and to look for a better way to protect the public interest in the underwater man-made environment.[2] He begins by reviewing salvage law for

1. David J. Bederman, *Maritime Preservation Law: Old Challenges, New Trends*, 8 WIDENER L. SYMP. J. 163 (2002).

2. *See id.* at 163.

the landlubber. More particularly, Bederman analyzes the sub-specialty of historical artifact salvage.[3] In the United States, there are two sources of historical artifact salvage regulation—the Abandoned Shipwreck Act (ASA) and the traditional law of finds, which permits the salvor to acquire property rights in salvaged artifacts superior to all but the true owner of the shipwreck.[4] Each system has its benefits and limitations. The ASA applies only to shipwrecks in U.S. coastal waters or inland waters and awards title to abandoned shipwrecks to the states.[5] The law of finds controls salvage from vessels not abandoned and all off-shore wrecked vessels located beyond the three mile jurisdictional limit.[6] Professor Bederman points out that the U.S. Courts of Appeals have issued conflicting rulings on the application and reach of the ASA.[7] The Fourth Circuit Court of Appeals, for example, has ruled that it will recognize a shipwreck as abandoned only when the ship owner executes an express declaration of abandonment.[8] The other circuits have not required an express abandonment.[9] These inconsistent interpretations of the ASA are enough to give a case the legal "bends" to potential historic salvage divers.

The law of maritime salvage and of finds applies to shipwrecks not deemed abandoned.[10] Traditionally, the law of salvage required as a condition precedent to a salvor's award, a finding that the vessel was in peril before it was salvaged.[11] Arguably, a shipwreck that has been undisturbed on the sea floor for two centuries does not readily qualify as a vessel "in peril" because someone wants to salvage it and recover a salvor's award.[12] International conventions and treaties also affect the conservation and exploitation of underwater sites in ways that differ from U.S. domestic law and traditional maritime salvage law. Ultimately, conflicting systems of law affecting shipwrecks do not promote conservation of these sites and do not assist intelligent archeological evaluation of important underwater sites. Professor Bederman offers a unique solution to this dilemma of inconsistent and varying measures of state control over underwater archeological sites and artifacts.

In *Tax Incentives for Historic Preservation: An Antidote to Sprawl?*,[13] Professor Roberta Mann from Widener University School of Law, and a Director of

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3. Bederman, *supra* note 1, at pt. II.

4. *Id.*

5. *Id. See also* 43 U.S.C. §§ 2101-2106 (1994).

6. Bederman, *supra* note 1, at 165.

7. *Id.* at 165.

8. *Id.* at 166. *See also* Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678, 686-88 (E.D. Va. 1999) (relying upon Columbus-Am. Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992)).

9. Bederman, *supra* note 1, at 166.

10. *Id.* at 166.

11. *Id.* at 167.

12. *Id.*

13. Roberta F. Mann, *Tax Incentives for Historic Preservation: An Antidote to Sprawl?*, 8 WIDENER L. SYMP. J. 207 (2002).

Preservation Delaware, Inc., reminds us that every business decision has tax consequences. Efficiency requires that limited economic resources be allocated with tax consequences in mind. Professor Mann's article examines how the structure of income tax policy in the United States inhibits or promotes suburban sprawl. She pays particular attention to the pieces of the tax policy puzzle that were intended to encourage redevelopment of inner-city urban space by means of National Register designation. Congressional tax policy is in conflict and is inconsistent with state land use policy. States encourage suburban sprawl through the balkanized municipal system of land use controls and lenient policies on conservation of open spaces. Professor Mann points out that suburban sprawl leads to immense environmental costs to the state in terms of increased automobile exhaust pollution, depletion of ground water supplies, destruction of wildlife habitat, and the loss of jobs that depend on forestry and fishing.[14] In addition, this leapfrogging production of subdivisions across the suburban landscape produces cultural destruction, fragmentation of social life, anomie, and prohibitively long school bus rides for children attending schools many miles from their homes.[15]

Understanding the tax policy embodied in the Internal Revenue Service tax code is key to encouraging inner-city revitalization.[16] Professor Mann identifies the economic benefits of historic preservation to the community as a whole, but also acknowledges that the business decision to restore or conserve the inner-city man-made environment has significant economic disincentives. In order to provide solutions, Professor Mann dissects the wavering Internal Revenue Code Historic Preservation Tax Credit and examines how Congressional whimsy changed the Historic Preservation Tax Credit over the past 26 years.[17]

Preservation is Process: The Designation of Dream Garden as a Historic Object[18] is Professor John Nivala's essay on the story of the City of Philadelphia's efforts to prevent the sale of *Dream Garden*, Maxfield Parrish's 1916 Tiffany glass interior mural by the estate of J.H. Merriam to an Atlantic City casino owner. Professor Nivala gives us a chronicle of the legal maneuvering of the Historical Commission of the City of Philadelphia and the Merriam estate that resulted in a Commonwealth Court decision finding the mural to be an historical artwork of independent value apart from the structure in which it was located. The Dream Garden dilemma raised a number of core issues that affect all forms of public preservation law, according to Professor Nivala. Does a municipal corporation have the power delegated to it from the state to protect interior spaces? Was the imposition of special preservation controls on the mural by the City a taking of

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14. Mann, *supra* note 13, at pt. II.a.

15. *Id.* at pt. II.b.

16. *See id.* at pt. IV.b.

17. *See id.*

18. John Nivala, *Preservation is Process: The Designation of Dream Garden as a Historic Object*, 8 WIDENER L. SYMP. J. 237 (2002).

private property without just compensation? Has all this been laid to rest because three private foundations came to the City's rescue and purchased Dream Garden for $3,000,000 just before the deadline for filing an appeal from Commonwealth Court to the Pennsylvania Supreme Court? Professor Nivala provides the answers to these questions and gives the reader a thorough background in the constitutional law of taking for a public purpose that supports his answer and his thesis.

Sherri Braunstein's student note, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks*,[19] is a second companion piece to Professor Bederman's article. Braunstein examines the major points of collision between maritime salvors and powerful state interests. The salvors' interests lie in efficient and profitable exploitation of an underwater site for its economic value. A state's interest is in conflict. Not only does a state have a legitimate public interest in protecting its underwater maritime heritage, the state also stands to profit from issuing exploitation permits to salvors, since they must share the wealth of their artifacts with the state as silent partners.

Braunstein asserts the Abandoned Shipwreck Act raises significant constitutional issues between shipwreck owners, salvors, and the states. The Eleventh Amendment to the Constitution prohibits a citizen of the United States from suing one of the fifty states in the federal courts.[20] On the other hand, the Constitution grants exclusive jurisdiction over the navigable waters of the United States in admiralty to the U.S. District court sitting in admiralty.[21] Braunstein demonstrates how the mass of litigation surrounding the Abandoned Shipwreck Act may preclude both the efficient management of historic underwater sites by the state and the proper regulation by the federal judiciary.

Avoiding the "Disneyland Façade": The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures[22] is Robert Mallard's companion piece to Professor Nivala's lead article. Mallard picks up the theme of the nature and extent of lawful regulation of the interiors of historic sites and structures, which is, he assures us, an emerging and troubling aspect of preservation law. His view is that interior regulation of historic sites and structures is entirely justified by the Fourteenth Amendment and properly drafted, because it is not an unconstitutional taking of property rights. He recognizes that substantial opposition to comprehensive interior regulation exists, but justifies this regulation by reason of the historical and cultural loss of interior architectural features due to thoughtless gutting and rebuilding of interiors of historic

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19. Sherri J. Braunstein, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks*, 8 WIDENER L. SYMP. J. 301 (2002).

20. *See* U.S. CONST. amend. XI.

21. *See* U.S. CONST. art. III § 2.

22. Robert W. Mallard, *Avoiding the "Disneyland Façade": The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures*, 8 WIDENER L. SYMP. J. 323 (2002).

structures.

Margaret England's note, *Regionalism and Historic Preservation: How History is Given Greater Weight in Different Regions of the Country*,[23] required extensive fieldwork. England gathered local historic preservation ordinances from four U.S. cities of similar population in four different regions of the country and compared the degree of regulation of sites, structures and objects, and the means afforded affected property owners to challenge what the property owner perceived as a negative administrative decision by the local historic preservation regulatory body. Not surprisingly, England found a wide variation in standards for establishing historic preservation controls in the first instance and great inconsistency in the granting of variances from historic district controls. Her research encourages a paraphrase of former Speaker of the House, Thomas P. "Tip" O'Neil's remark about politics, historic preservation, is in the last instance, local.

The feature student contribution to this issue is the Survey of Historic Preservation Law co-authored by David S. Johnston, Sandra G. McLamb, Deirdre O'Shea and Joe P. Yeager. Only one other law review has produced a comprehensive survey of preservation law, and that work is handicapped because it is dated.

Part I of the survey begins with Joe P. Yeager's overview, *Federal Preservation Law: Sites, Structures and Objects*,[24] relating to surface preservation of historic sites and structures from the Antiquities Act of 1906 through the latest amendments to the National Historic Preservation Act proposed by Congress. This piece reviews the federal legislative efforts to provide for some form of coherent national historic preservation policy, backed by funded programs to encourage preservation. Yeager points out several instances in which federal policy is inconsistent and in conflict with respect to preservation issues.

Part II, *Federal Maritime Preservation Law*,[25] Deirdre O'Shea discusses federal maritime preservation law, serving as one of two companion pieces to Professor Bederman's lead article. Federal maritime site preservation dates back to the Antiquities Act of 1906, but became a major concern after World War II when self-contained underwater breathing apparatus became widely available to civilian recreational divers. Her discussion of the special statutes enacted by Congress to restrain the plundering of underwater sites since 1962, and the relationship of the National Historic Preservation Act of 1966 to maritime preservation is a sound background to this area of the law.

Part III, *Native American Sites and Structures Law*,[26] David S. Johnston reviews

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23. Margaret F. England, *Regionalism and Historic Preservation: How History is Given Greater Weight in Different Regions of the Country*, 8 WIDENER L. SYMP. J. 347 (2002).

24. Joe P. Yeager, *Federal Preservation Law: Sites, Structures and Objects*, 8 WIDENER L. SYMP. J. 383 (2002).

25. Deirdre O'Shea, *Federal Maritime Preservation Law*, 8 WIDENER L. SYMP. J. 417 (2002).

26. David S. Johnston, *Native American Sites and Structures Law*, 8 WIDENER L. SYMP. J. 443

the conflict between the interests of indigenous Native American people and the United States with respect to Native American archeological sites. Nominally protected by such statutes as the Antiquities Act of 1906 and the Religious Freedom Restoration Act, Johnston tells us that native American sacred sites are invaded by recreational mountain climbers, trail riders and all terrain vehicles to the detriment of the holy significance of these sites. Johnston shows how far short well-intentioned federal legislation falls of recognizing and protecting sacred areas related to Native American religious mythology, and how innocent invasion of these sites by the majority community may destroy the sacred site without any evil intentions.

Finally, in Part IV, *State and Local Preservation Law*,[27] Sandra McLamb concludes the survey with a hard look at state-created historic preservation law. McLamb asserts that state preservation is the most important point of conflict between those who wish to preserve historic sites and structures, and those who believe that concerns over history and culture should give way to economic demands for progress. McLamb reminds us that public regulation of historic sites and structures began on the local level via traditional land use planning tools decades before the United States took any particular interest in preserving sites and structures not located on federal lands.

McLamb notes that the point of departure for contemporary regulation of historic sites and structures was the Supreme Court's 1978 decision in *Penn Central Transportation Co. v. New York City*.[28] The majority opinion cleared the way for rational restrictions on site development in order to preserve historic sites or structures without the need for just compensation for the affected property owner. Since *Penn Central*, most commentators have assumed that the police power of the state, delegated to a municipal corporation, permits such a regulation to further the public interest so long as the regulation does not go too far towards a total appropriation of all private property rights.

McLamb also surveys the state-created registers of historic sites and structures mandated by the National Historic Preservation Act of 1966 and the impact these state-wide registers and restrictions have on demolition of registered sites and structures. Register listing for those states that maintain active state-wide registers independent of the National Register of Historic Places is a condition precedent to relief from property tax and qualification for grants in aid. Finally, McLamb examines the conflict between religious congregations and historic preservation legislation.

Thomas J. Reed
Faculty Chairperson

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27. Sandra G. McLamb, *State and Local Preservation Law*, 8 WIDENER L. SYMP. J. 463 (2002).

28. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).