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Assessing Economic Hardship Claims Under Historic Preservation Ordinances

Historic preservation ordinances in effect around the country often include a process for administrative relief from preservation restrictions in situations of "economic hardship." Under typical economic hardship procedures, an applicant may apply for a "certificate of economic hardship" after a preservation commission has denied his or her request to alter or demolish a historic property protected under a preservation ordinance. In support of an application for relief on economic hardship grounds, the applicant must submit evidence sufficient to enable the decisionmaking body to render a decision. The type of evidence required is generally spelled out in preservation ordinances or interpreting regulations. The burden of proof is on the applicant.

The exact meaning of the term "economic hardship" depends on how the standard is defined in the ordinance. Under many preservation ordinances economic hardship is defined as consistent with the legal standard for an unconstitutional regulatory taking, which requires a property owner to establish that he or she has been denied all reasonable beneficial use or return on the property as a result of the commission's denial of a permit for alteration or demolition.

Requests for relief on economic hardship grounds are usually decided by historic preservation commissions, although some preservation ordinances allow the commission's decision to be appealed to the city council. In some jurisdictions, the commission may be assisted by a hearing officer. A few localities have established a special economic review panel, comprised of members representing both the development and preservation community.

Economic Impact

In acting upon an application for a certificate of economic hardship, a commission is required to determine whether the *economic impact* of a historic preservation law, as applied to the property owner, has risen to the level of *economic hardship*. Thus, the first and most critical step in understanding economic hardship is to understand how to evaluate economic impact.

Commissions should look at a variety of factors in evaluating the economic impact of a proposed action on a particular property. Consideration of expenditures alone will not provide a complete or accurate picture of economic impact, whether income-producing property or owner-occupied residential property. Revenue, vacancy rates, operating expenses, financing, tax incentives, and other issues are all relevant considerations. With respect to income-producing property, economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return. This approach allows a commission to focus on the "bottom line" of the transaction rather than on individual expenditures.

In addition to economic impact, the Supreme Court has said that "reasonable" or "beneficial use" of the property is also an important factor. Thus, in evaluating an economic hardship claim based on the constitutional standard for a regulatory taking, commissions will need to consider an owner's ability to continue to carry out the traditional use of the property, or whether another viable use for the property remains. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the landmark decision upholding the use of preservation ordinances to regulate historic property, the Supreme Court found that a taking did not arise because the owner could continue to use its property as a railroad station.

The Supreme Court has also said that the applicant's "reasonable investment-backed expectations" should be taken into consideration. Although the meaning of this phrase has not been delineated with precision, it is clear that "reasonable" expectations do not include those that are contrary to law. Thus, an applicant's expectation of demolishing a historic property subject to a preservation ordinance at the time of purchase, or likely to be subject to a preservation ordinance, would not be "reasonable." Also pertinent is whether the owner's objectives were realistic given the condition of the property at the time of purchase, or whether the owner simply overpaid for the property. Under takings law, government is not required to compensate property owners for bad business decisions. Nor is the government required to guarantee a return on a speculative investment.

Commissions may also be able to take into account whether the alleged hardship is "self created." Clearly relevant is whether the value of the property declined or rehabilitation expenses increased because the owner allowed the building to deteriorate.

Application of the takings standard in the context of investment or income-producing property is usually fairly straightforward. The issue can be more complex, however, in situations involving hardship claims raised by homeowners. In the context of home-ownership, it is extremely difficult for an applicant to meet the standard for a regulatory taking, that is, to establish that he or she has been denied all reasonable use of the property. Even if a commission insists that houses be painted rather than covered with vinyl siding, and windows be repaired rather than replaced, the applicant can still live in the house. The fact that these repairs may be more costly is not enough. Even if extensive rehabilitation is required, the applicant must show that the house cannot be sold "as is," or that the fair market value of the property in its current condition plus rehabilitation expenditures will exceed the fair market value of the house upon rehabilitation. *See City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996). It is also important to note that "investment-backed expectations" are different in the context of home ownership; owners often invest in home improvements or renovations without the expectation of recouping the full cost of the improvement in the form of increased property value.

In addressing hardship claims involving historic homes, commissions must be careful to be objective and consistent in their approach. Otherwise, a commission may undermine the integrity of its preservation program and raise due process concerns as well. Ideally, grant money, tax relief, and other programs should be made available to historic homeowners who need financial assistance.

Special standards for economic hardship may apply to nonprofit organizations. Because these entities serve charitable rather than commercial purposes, it is appropriate to focus on the beneficial use of their property, rather than rate of return, taking into account the particular circumstances of the owner (*i.e.*, the obligation to serve a charitable purpose.) In such situations, hardship analysis generally entails looking at a distinct set of questions, such as: the organization's charitable purpose; whether the regulation interferes with the organization's ability to carry out its charitable purpose; the condition of the building and the need and cost for repairs; and whether the organization can afford to pay for the repairs, if required? (Note, however, that while consideration of financial impact may be appropriate, a non-profit organization is not entitled to relief simply on the basis that it could raise or retain more money without the restriction.)

The Proceeding

Under a typical hardship process, the applicant will be required to submit specific evidence in support of his or her claim. Once a completed application has been filed, a hearing will be scheduled, at which time the applicant generally presents expert testimony in support of the economic hardship claim on issues such as the structural integrity of the historic building, estimated costs of rehabilitation, and the projected market value of the property after rehabilitation. Once the applicant has presented its case, parties in opposition or others may then present their own evidence. The commission may also bring in its own expert witnesses to testify. As noted above, the burden of proof rests on the property owner.

In hearing economic hardship matters, commissions must be prepared to make a legally defensible decision based on all the evidence presented. In the event of conflicting expert testimony, which is often the

case in economic hardship proceedings, the commission must be prepared to weigh the evidence, making specific findings on the relative credibility or competency of expert witnesses.

In evaluating the evidence, the commission should ask itself five distinct questions:

1) **Is the evidence sufficient?** Does the commission have all the information it needs to understand the entire picture, or is something missing. The application is not complete unless all the required information has been submitted. If additional information is needed, ask for it.

2) **Is the evidence relevant?** Weed out any information that is not relevant to the issue of economic hardship in the case before you. Commissions may be given more information than they need or information on issues that are not germane to the issue, such as how much money the project could make if the historic property were demolished. The property owner is not entitled to the highest and best use of the property.

3) **Is the evidence competent?** Make an assessment as to whether the evidence establishes what it purports to show.

4) **Is the evidence credible?** Consider whether the evidence is believable. For example, ask whether the figures make sense. A commission will need to take into consideration the source of the evidence and its reliability. (If the evidence is based on expert testimony, the commission should determine whether the expert is biased or qualified on the issue being addressed. For example, it may matter whether a contractor testifying on rehabilitation expenditures actually has experience in doing historic rehabilitations.)

5) **Is the evidence consistent?** Look for inconsistencies in the testimony or the evidence submitted. Request that inconsistencies be explained. If there is contradictory evidence, the commission needs to determine which evidence is credible and why.

In many instances the applicant's own evidence will fail to establish economic hardship. However, in some situations, the question may be less clear. The participation of preservation organizations in economic hardship proceedings can be helpful in developing the record. Commissions should also be prepared to hire or obtain experts of their own. For example, if a property owner submits evidence from a structural engineer that the property is structurally unsound, the commission may need to make an independent determination, through the use of a governmental engineer or other qualified expert, as to the accuracy of that information. It may be impossible to evaluate the credibility or competency of information submitted without expert advice.

The record as a whole becomes exceedingly important if the case goes to court. Under most standards of judicial review, a decision will be upheld if it is supported by substantial evidence. Thus, in conducting administrative proceedings, it is important that evidence provides a true and accurate story of the facts and circumstances and that the commission's decision is based directly on that evidence.

EVIDENTIARY CHECKLIST

The following checklist is a useful tool for local commissions and other regulatory agencies considering economic hardship claims:

1. **Current level of economic return**

- Amount paid for the property, date of purchase, party from whom purchased, and relationship between the owner of record, the applicant, and person from whom property was purchased;
- Annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years, and depreciation deduction and annual cash flow before and after debt service, if any, during the same period;
- Remaining balance on the mortgage or other financing secured by the property and annual debt-service, if any, during the prior three years;
- Real estate taxes for the previous four years and assessed value of the property according to the two most recent assessed valuations;
- All appraisals obtained within the last two years by the owner or applicant in connection with the purchase, financing, or ownership of the property;
- Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other;
- Any state or federal income tax returns relating to the property for the last two years.

2. **Any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents regarding:**

- any real estate broker or firm engaged to sell or lease the property;
- reasonableness of price or rent sought by the applicant;
- any advertisements placed for the sale or rent of the property.

3. **Feasibility of alternative uses for the property that could earn a reasonable economic return:**

- Report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any buildings on the property and their suitability for rehabilitation;
- Cost estimates for the proposed construction, alteration, demolition, or removal, and an estimate of any additional cost that would be incurred to comply with the requirements for a certificate of appropriateness;
- Estimated market value of the property: (a) in its current condition; (b) after completion of the proposed alteration or demolition; and (c) after renovation of the existing property for continued use;
- Expert testimony or opinion on the feasibility of rehabilitation or reuse of the existing structure by an architect, developer, real estate consultant, appraiser, and/or other real estate professional experienced in historic properties and rehabilitation.

4. **Any evidence of self-created hardship** through deliberate neglect or inadequate maintenance of the property.

5. **Knowledge of landmark designation or potential designation at time of acquisition.**

6. **Economic incentives and/or funding** available to the applicant through federal, state, city, or private programs.

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ECONOMIC HARDSHIP

Providing for Economic Hardship Relief in the Regulation of Historic Properties

by Julia H. Miller*

This article is the first in a three-part series on the issue of economic hardship. Part 1, published below, provides an overview on the economic hardship review process, highlighting basic questions such as why should economic hardship provisions be included in a historic preservation ordinance, and what does "economic hardship" mean. Part 2, to be published early next year, will discuss alternative standards for measuring economic hardship and offer guidance on how to evaluate those standards, with particular emphasis on the constitutional standard for a regulatory taking. Finally, Part 3, to be published in mid-1997, will focus on the process for considering economic hardship claims. It will explore fundamental issues such as who should consider economic hardship claims, the importance of building a record, and who has the burden of proof.

PART 1. Administrative Relief From Economic Hardship: An Overview

Preservation of historic resources, whether an individual building, historic neighborhood, or archaeological site, has come to be viewed as an important community objective. In an era marked by rapid change, the need to protect familiar buildings and other visual links to the past has never been more apparent. Historical, architectural, cultural and archaeological structures and sites play a key role in helping a community define what it is, and what it would like to be.

While alternative forms of preservation may exist, protection of historic resources is primarily achieved by regulating privately-owned property through local ordinances. These laws generally provide for the

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identification or designation of important resources, accompanied by specific controls limiting how those properties may be changed. Permission to alter or demolish designated resources is generally conferred by a historic preservation commission or other review board in the form of a "certificate of appropriateness."[1]

Protecting historic resources has consistently been upheld as a legitimate use of governmental authority, commonly referred to as "the police power."[2] In *Penn Central Transportation Co. v. City of New York*, the U.S. Supreme Court observed that protection of historic, architectural, and culturally significant structures and areas through historic preservation controls is "an entirely permissible governmental goal."[3] Numerous studies have shown that the regulation of historic properties through local ordinances often benefits individual communities through increased property values, tourism, and overall economic stability.[4]

On the other hand, historic preservation laws, as with other forms of land use regulation, directly affect individual property owners. Historic preservation laws generally impose restrictions on changes to property, which can result in increased expenditures or foregone opportunities. While many historic property owners benefit from local preservation laws, in some cases the impact of a specific action may be so severe that administrative relief should be provided. This is especially true when a constitutional "taking" might otherwise result.[5]

This article focuses on the situation where the impact of historic preservation controls on a particular piece of property is unfairly burdensome. It attempts to explain how local communities can address hardship claims, and at what point relief from historic preservation controls should be made available. It explores a range of issues such as: how to assess the economic impact of the regulation on the property; when does economic

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[1]*See, generally*, Tersh Boasberg, Thomas A. Coughlin and Julia H. Miller, *Historic Preservation Law and Taxation*, Ch. 7 (Matthew Bender 1986); Richard A. Roddewig, "Preparing a Historic Preservation Ordinance," *PAS Report No. 374* (American Planning Ass'n 1983).

[2]A survey of state court decisions in this area is set out at 10 PLR 1117 (1991).

[3]438 U.S. 104, 129 (1978).

[4]*See, generally*, Donovan D. Rypkema, *The Economics of Historic Preservation: A Community Leader's Guide* (National Trust for Historic Preservation 1994); Government Finance Research Center; *Government Finance Research Center, The Economic Benefits of Preserving Community Character: Case Studies from Fredericksburg, Virginia and Galveston, Texas* (National Trust for Historic Preservation 1991); and *Virginia's Economy and Historic Preservation: The Impact of Preservation on Jobs, Business and Community* (Preservation Alliance of Virginia 1995).

[5]Note, however, that the U.S. Supreme Court stated in *Penn Central* that the fact that a landmarks law may have "a more severe impact on some landowners than others" does not mean, "in itself . . . that the law effects a 'taking.'" 438 U.S. at 133.

impact result in "economic hardship;" how should "economic hardship" be defined; how and when should economic hardship claims be considered; who has the burden of proving hardship; and what opportunities should be made available to the community to alleviate hardship once established.

I. Affording Administrative Relief

All property owners are protected from overly burdensome regulations through the Fifth Amendment to the U.S. Constitution, made applicable to the states under the Fourteenth Amendment (and through corresponding state provisions). The Fifth Amendment prohibits the taking of private property for public use without just compensation.[6] Commonly referred to as the "takings clause" or the "just compensation clause," this provision has been interpreted by the U.S. Supreme Court to require compensation when a regulation goes so far as to deny an owner the "economically viable use of his property."[7]

Economic hardship provisions provide assurance to property owners that relief is available in situations where the impact of a particular action proves to be especially harsh.

So why should relief from "economic hardship" be provided at the administrative level? Despite the protection afforded individual property owners through the federal and state constitutions, a steadily increasing number of jurisdictions are opting to incorporate "economic hardship procedures" into individual laws, including historic preservation ordinances. The reasons for this are fairly straightforward.

First, administrative proceedings addressing economic hardship concerns help to avoid litigation. They offer an opportunity for communities and property owners to hammer out the issues and resolve any differences in a less formal and inherently less expensive forum that is not hindered by rules of evidence and procedural limitations. Economic hardship provisions enable communities to address fundamental issues of fairness on an individual basis.

A second and related reason is that economic hardship review helps to assuage concerns expressed by property owners over the potentially adverse impact of historic preservation regulation. Economic hardship provisions provide assurance to property owners that relief is available in situations where the impact of a particular action proves to be especially harsh.

Economic hardship review also provides communities with the opportunity to put alternative plans together. In the event that a property owner is able to demonstrate economic hardship, a community can explore

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[6]The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."

[7]*Agins v. City of Tiburon*,447 U.S. 255, 260 (1980); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987). For a detailed discussion of the takings standard articulated by the U.S. Supreme Court, see J. Kayden, "Historic Preservation and the New Takings Cases; Landmarks Preserved," 14 PLR 1235 (1995).

alternative actions to alleviate that hardship. A community may be able to provide relief through tax incentives, zoning variances, and other means. Demolition would proceed only if an acceptable alternative could not be developed.[8]

Fourth, consideration of hardship concerns at the administrative level can enhance a local community's ability to protect individual properties if challenged in court. Courts generally afford review boards considerable deference in reviewing administrative decisions. Under most administrative review acts, judicial review is limited to the record made at the administrative hearing, and a decision must be upheld if supported by "substantial evidence."[9] If there is a reasonable basis in the record for the decision then it must be permitted to stand.[10]

Correspondingly, economic hardship review helps to limit the number of cases ultimately decided under constitutional grounds. The general rule of thumb is that takings claims may not be considered until a decision is final.[11] Thus, a property owner is required to utilize the economic hardship

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[8]In Chicago, for example, a finding of economic hardship must be accompanied by a plan to relieve economic hardship. Sections 21-88 through 92 of the Chicago Municipal ordinance provides that the plan—

> may include, but is not limited to, property tax relief, loans or grants from the City of Chicago or other public or private sources, acquisition by purchase or eminent domain, building code modifications, changes in applicable zoning regulations including a transfer of development rights, or relaxation of provisions of this ordinance sufficient to allow reasonable beneficial use or return from the property.

If the economic hardship relief plan developed by the Chicago Landmarks Commission, and reviewed and modified, as necessary, by the Finance Committee of the City Council, is not approved within 30 days, the plan will be deemed denied and the applicant's permit will be approved.

[9]Most jurisdictions require either the application of a "rational basis" or "substantial evidence" standard of review. However, in practice, the distinction between the two standards are often blurred.

[10]*See, e.g. International College of Surgeons v. City of College*, No. 91 C 1587 (N.D. Ill. Dec. 30, 1994)[14 PLR 1087 (1995)], in which a federal district court, addressing both a takings claim and economic hardship claim, reviewed the takings claim under a *de novo* standard of review and reviewed the economic hardship claim in accordance with the standard of review set forth under the Illinois Administrative Review Act. This standard asks whether the contested action was "arbitrary or capricious" or "against the manifest weight of the evidence." *See, also, Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)(substantial evidence supported the local agency's determination that the owner had failed to establish "unreasonable economic hardship.")

[11]"As applied" takings claims are not ripe for review until all avenues of administrative relief have been pursued. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer and Frates v. County of*

process before challenging the constitutionality of a particular action in court.[12]

This is important for at least two reasons. First, economic hardship review at the administrative level can help to avoid the payment of compensation, assuming that a taking would otherwise have been found if the issue had been litigated in court. Second, it allows reviewing courts to resolve challenged actions on statutory rather than constitutional grounds, thereby limiting the impact of potentially damaging decisions.[13]

II. Assessing Economic Impact

Economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return.

Assuming that a process for considering economic hardship should be made available, the question then becomes: at what point do the economic *impacts* of local preservation laws rise to the level of economic *hardship*? The first and most critical step in answering this question is to understand fully what is meant by "economic impact." In other words, how does one measure the true impact of a particular action on a particular piece of property in objective terms?

Experts in this area most frequently look at the individual factors addressed by real estate developers, appraisers, and lenders in valuing property or a particular investment. Consideration of expenditures alone will not provide a complete or accurate picture of the overall impact of a specific course of action. Revenue, vacancy rates, operating expenses, financing, tax incentives and other issues are all relevant considerations.[14]

Economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return.[15]

Yolo, 477 U.S. 340 (1986).

[12]Economic hardship provisions can also help to obviate facial challenges since a permit must be granted under the ordinance if the owner would be denied any viable economic use for his or her property.

[13]In *BSW Development Group v. Dayton Board of Zoning Appeals*, No. 13218 (Ohio Ct. App. May 7, 1993)[12 PLR 1065], the Ohio Court of Appeals elected to resolve a challenge to the denial of permission to demolish a historic warehouse on administrative rather than constitutional grounds, stating that "it is well established that a court is not permitted to pass upon the constitutionality of a statute unless such a determination is necessary to its decision."

[14]For a detailed discussion on the factors which are typically considered in evaluating real estate opportunities, *see* Donovan Rypkema, "The Economics of Rehabilitation," *Information Series* No. 53 (National Trust for Historic Preservation 1991).

[15]Property value is derived from four sources: cash (net proceeds from rents after expenses), appreciation (ability to sell property for amount greater than paid), amortization (reduction of debt/increased equity in property), and tax savings (through mortgage deductions, depreciation, deferred income, tax credits and other incentives available to historic property owners). *Id.* at 1.

Alternative courses of action are then evaluated by comparing anticipated "rates of return." This methodology allows the administrative review body to focus on the "bottom line" of a proposed transaction rather than individual expenditures. It also provides a useful gauge for measuring the appropriateness of a particular action by comparing the expected rate of return with long-term investment rates, such as the going rate for U.S. Treasury bonds.[16]

"Reasonable" or "beneficial" use is also a critical factor. Historically, economic impact has been measured in such situations by looking at the owner's ability to continue and carry out the traditional use of the property[17] or whether a "viable use" for the property remains.[18] Thus, for example, it may be difficult to establish economic hardship in situations where a house may continue to serve as a personal residence, or be converted into office space.[19]

A number of other factors frequently are taken into consideration in addressing the issue of economic impact in the context of historic property regulation. It may be appropriate to consider what efforts have been undertaken to sell or rent the property at issue or the feasibility of alternative uses.[20] The owner's prior knowledge of the restrictions[21] (actual

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[16]Richard J. Roddewig, "Responding to the Takings Challenge," *PAS Report No. 416* (National Trust for Historic Preservation/American Planning Ass'n 1989), pp. 16-17.

[17]In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978), the fact that the owner could continue to use the property as a railroad terminal weighed heavily in the court's analysis on the issue of whether New York's denial of permission to construct an office tower on the landmarked building resulted in an unlawful taking.

[18]*See, e.g., Shubert Organization, Inc. v. Landmarks Preservation Commission*, 570 N.Y.S.2d 504 (1991), *appeal dismissed*, 78 N.Y.2d 1006 (1991), *cert. denied*, 112 S.Ct. 2289 (1992)[11 PLR 1071]("no prohibition against [the owners] receiving economic benefit from continuing use of the buildings as theaters.")

[19]The issue can become more complicated, for example, in situations where the condition of the property is so poor that extensive renovations are required to make the property habitable. In such instances, it may be necessary to consider both "economic feasibility" and "viable use" in evaluating a hardship claim. For example, in *City of Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086], the owners (albeit unsuccessfully) had sought to overturn a commission decision denying permission to demolish a historic house on the grounds that the cost of renovation would exceed the fair market value of the house.

Note also that some communities have been successful in alleviating potential economic hardship concerns by rezoning historic residential property to allow limited office use or by preventing property from falling into disrepair through "demolition by neglect" provisions. For further discussion on this issue, see "Oliver Pollard, "Minimum Maintenance Provisions: Preventing Demolition by Neglect," 8 PLR 2001 (1989).

[20]*See, e.g., Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086].

or constructive) are sometimes factored in along with the reasonableness of the owner's "investment-backed expectations."[22] The fact that the hardship alleged has been "self-created" may also be deemed relevant.[23]

Special considerations also come into play in assessing the impact of a particular regulatory action on non-profit organizations. Because these entities serve charitable rather than commercial purposes, it becomes appropriate to look at beneficial use rather than reasonable return and to take into consideration the individual circumstances of the property owner. For example, a hardship analysis will generally entail looking at a distinct set of factors such as: what is the organization's charitable purpose, does landmark designation interfere with the organization's ability to carry out that purpose, what is the condition of the building and the need and cost for repairs, and finally, can the organization afford to pay for the repairs, if required.[24] Note, however, that while consideration of the financial impact of a particular action on a non-profit organization may be appropriate, a non-profit organization is not entitled to relief simply on the basis that it would otherwise earn more money.[25]

Economic hardship is not synonymous with economic impact.

III. Defining Economic Hardship

Once the nature and degree of the impact is understood, the next step is to determine whether that impact is so severe that it amounts to "economic hardship." Economic hardship is not synonymous with economic impact. The term economic hardship is purely legal. Its meaning is derived from statutes and cases interpreting those statutes. In some jurisdictions the term "economic hardship" may be the equivalent of the

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[21]*Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1080]; *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)[14 PLR 1197].

[22]*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[23]*Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1085](owner paid more than fair market value for property and failed to obtain estimate for renovation costs prior to purchase.)

[24]Section 25-309a(2)(c) of New York City's landmark preservation ordinance, for example, provides that hardship may be established by demonstrating, among other things, that the structure at issue "has ceased to be adequate, suitable, or appropriate for use for carrying out both (1) the purposes to which it had been devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes." The judicial equivalent of this statutory standard was upheld by the U.S. District Court for the Southern District of New York in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 1103 (1991).

[25]*See, e.g. Rector, Warden, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990)[10 PLR 1041].

constitutional standard for a regulatory taking.[26] In other jurisdictions, the term may mean something entirely different.[27] In a few jurisdictions, a term other than "economic hardship" may be used,[28] but in all situations it is important to understand that economic hardship applies to the property not the property owner.[29] The particular circumstances of the owner independent of the property in question should be irrelevant to the question of whether the property at issue can realize a reasonable return on investment, or whether a viable use of the property remains.[30]

The term "economic hardship," or its equivalent, can mean whatever a local jurisdiction has prescribed it to mean, subject to state enabling law.[31]

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[26]In Chicago, for example, an applicant may apply for an economic hardship exception on the basis that the denial of the permit to construct, alter or demolish property protected under the ordinance will result in "the loss of all reasonable and beneficial use of or return from the property." Chicago, Ill. Municipal Code § 21-68.

[27]In New York City, the term "reasonable return" is defined as "a net annual return of six per centum of the valuation of an improvement parcel" where "net annual return" includes "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year." Mortgage interest and amortization is specifically excluded from the calculation, but a 2 percent allowance for depreciation of the assessed value of the property may be included, unless the property in question has already been fully depreciated. The test year is generally the most recent full calendar or fiscal year. *See generally*, New York City Landmarks Preservation Ordinance § 25-302v.

[28]For example, Portland, Maine, provides relief from "economic hardship" (Portland City Code, ch. 14, art. IX § 14-660), while St. Louis, Missouri, affords protection against "unreasonable beneficial use or return." St. Louis, Mo. Ordinance § 24.12.440.

[29]Note, however, that with respect to non-profit organizations, an alternative standard may apply, making it appropriate to look at the special circumstances of the property owner.

[30]Local jurisdictions may provide alternative forms of relief, unrelated to "economic hardship" claims, to assist property owners in individual cases where maintenance of historic properties imposes exceptional burdens on a property owner with special needs or economic circumstances. Relief, for example, may be provided through direct financial aid, "in kind" assistance, or income or property tax abatement. For example, it may be appropriate to provide an elderly historic homeowner with assistance in painting or otherwise maintaining his or her property.

[31]The enabling statute for local landmark ordinances in Illinois provides, for example:

> The denial of an application for a building demolition permit by reason of the operation of this Division, or the denial of an application for a building permit to add to, modify, or remove a portion of any building by reason of the operation of this Division, or the imposition of any regulation solely by reason of the provisions of this Division . . . shall not constitute a taking or damage for a public use of such property for which just compensation shall be ascertained and paid, unless the denial of a permit application or imposition of a regulation, as the case may be, deprives the

As a general rule, however, a high showing of hardship is required to justify overriding a commission determination. The impact must be substantial.[32] Otherwise, the application of the historic preservation ordinance could become administratively infeasible, and the underlying objectives of the preservation ordinance—to save historic resources—would not be met.

As a result, hardship claims generally arise only when permission for major alterations or the demolition of historic property has been denied.[33] While lesser alterations may have an economic impact on a property owner (aluminum siding, rear addition, re-roofing), it is unlikely that the resulting impact will rise to the level of a legally cognizable economic hardship.

IV. Other Miscellaneous Issues

A number of other issues relate to the question of economic hardship, apart from the issue of what constitutes economic hardship. For example, when should economic hardship claims be considered and upon which party should the burden of proof lie? Set forth below is a brief overview of some of the concerns raised in addressing these issues. Further discussion will follow under Part 3 of this article, to be published in 1997.

While property owners often raise economic issues at the time of designation, communities should resist the temptation to consider economic hardship at that time.

Timing. Economic hardship claims may arise at any time, but when should they be considered? While property owners often raise economic issues at the time of designation, communities should resist the temptation to consider economic hardship at that time. The reasons for this are readily apparent. The economic impact of the regulation is purely speculative at this point. Economic hardship must be established by "dollar and cents" proof,[34] in the

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owner of all reasonable beneficial use or return. 24 Ill. Rev. Stat. § 11-48.2-5.

[32]The D.C. Court of Appeals reiterated the high burden of proof placed on property owners to establish economic hardship in *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)[14 PLR 1197]. Quoting from *900 G Street Assocs. v. Department of Housing & Community Dev.*, 430 A.2d 344 (D.C. 1982)[1 PLR 3001], the court explained economic hardship as follows:

> [I]f there is a *reasonable* alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if "higher" or "more beneficial" uses of the property have been proscribed.

[33]In the District of Columbia, economic hardship is considered only in the context of applications for demolition. Section 5-1005(f) of the District of Columbia's historic preservation law provides: "No permit [to demolish a historic landmark] shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner."

[34]In consideration of a takings claim, the New York Court of Appeals stated in *De St.*

context of a specific proposal for alterations or demolition. Although it is occasionally argued that designation alone gives rise to immediate and real impacts, those impacts generally do not rise to the level of economic hardship under the applicable legal standards.[35]

Consideration of economic claims at the designation stage also tends to cloud the issue at hand: whether the property meets the criteria for designation. Preservation commissions or other review boards must be careful to base their decisions on actual criteria in the ordinance. Moreover, it would be a waste of administrative resources to consider economic hardship claims at each stage of the administrative review process. As will be discussed in further detail under Parts 2 and 3 of this article, economic hardship review generally requires full consideration of the economic viability of the property in its present condition, along with various alternative proposals.

The burden of establishing economic hardship generally rests on the property owner.

Many experts advise that the economic hardship issue should be addressed in a separate proceeding after a permit application has been denied on the merits. Where there is no clear differentiation of the two issues (appropriateness versus economic hardship), economic impacts that would not otherwise meet the criteria for "hardship" may improperly affect the outcome of the permit application.

Burden of Proof. The burden of establishing economic hardship generally rests on the property owner.[36] The owner must be able to

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Aubin v. Flacke, 68 N.Y.2d 66, 76-77, 496 N.E.2d 879, 885, 505 N.Y.S.2d 859, 865 (1986), "the property owner must show by '*dollar and cents*' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue."

[35]A number of courts have ruled that historic designation does not result in an unconstitutional taking. *See, e.g., Estate of Tippett v. City of Miami*, 645 So.2d 533 (Fla. App. 1994)[takings claim at designation stage is premature][13 PLR 1179]; *Canisius College v. City of Buffalo*, 629 N.Y.S.2d 886 (App. Div. 1995)["failed to present evidence that the designation physically or financially prevents or seriously interferes with the carrying out of its charitable purpose"]; *Shubert Organization, Inc. v. Landmarks Preservation Commission*, 570 N.Y.S.2d 504 (App. Div. 1991), *appeal dismissed*, 78 N.Y.2d 1006 (1991), *cert. denied*, 112 S.Ct. 2289 (1992)[11 PLR 1071]. (Broadway theater owners failed to carry burden of proof that landmark designation denied them "essential use of their property"]; *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, *cert. denied*, 107 S.Ct. 574 (1986)[5 PLR 3017](claim that historic designation effects unlawful taking not ripe for review]; *United Artists Theater Circuit, Inc. v. City of* Philadelphia, 635 A.2d 612 (Pa. 1993)[12 PLR 1165](historic designation is not a taking requiring compensation).

[36]*See, e.g.* West Palm Beach, Fla. Ordinance No. 2815-95 § 15(b). ("The applicant has the burden of proving by competent, substantial evidence, that the denial of a permit has

demonstrate that denial of the requested action will result in "economic hardship" as defined under the prevailing statute. The evidence that must be provided in consideration of an economic hardship claim will vary from jurisdiction to jurisdiction. For example, a number of communities, such as Pittsburgh and Chicago, require a property owner to establish, among other things, that the property cannot be sold.[37] The general rule of thumb, however, is to require the submission of evidence sufficient for the reviewing body to analyze a hardship claim.[38]

Note that, while the burden of proof rests on the applicant, a reviewing court will often look at the "record as a whole" to determine if substantial evidence supports the commission's determination, or whether the commission's decision was "arbitrary or capricious." Thus, it is important to ensure that a complete record is developed.[39] Economic hardship procedures should generally provide commissions with the opportunity to develop the record by hiring its own experts[40] and hearing evidence presented by both the property owner as well as interested organizations.

Providing Relief. As previously noted above, economic hardship provisions typically offer communities a second chance to save a building by allowing the local government to develop a relief package once hardship has been established. The process and form of relief available to property owners upon demonstration of economic hardship will necessarily vary from property to property and from jurisdiction to jurisdiction.[41] Examples

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caused or will cause an Unreasonable Economic Hardship to the owner of the property."]

[37]Note that some courts have ruled that a property owner must demonstrate that the property could not be sold to establish a regulatory taking. *See e.g. Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) and *City of Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086].

[38]This may require the submission of detailed information such as the price paid for the property, the value of the property before and after the proposed action, the amount of debt service/equity in the property; historical levels of income and expenses, the ownership structure and income tax position, the condition of the property and feasibility for renovation, and so forth. *See, generally*, Richard J. Roddewig, "Preparing a Historic Preservation Ordinance", *PAS Report No. 374* (American Planning Ass'n 1983), pp. 25-28.

[39]In *Indianapolis Historic Partners v. Indianapolis Historic Preservation Commission*, No. 49D01-9107-CCP-0813 (Ind. Sup. Ct. Sept. 15, 1992)[11 PLR 1139], for example, the court ruled that the owner had established by "clear and convincing" evidence that an office building could not "be put to any reasonable economically beneficial use for which it is, or may be reasonably adapted without approval of demolition" where the evidence in the record almost entirely reflected the owner's position. In ruling against the commission in this case, the court found the owner's experts to be especially convincing where the commission had made no attempt to refute the evidence or offer any support for its position that alternative uses may be feasible.

[40]*See, e.g.* section 15(a) of the West Palm Beach Ordinance authorizing its historic preservation board to solicit expert testimony or require that the applicant submit specific information.

[41]New York City, for example, requires the formulation of a plan for relief upon a "preliminary" finding of hardship, while Chicago provides for the development of a plan after an actual finding of hardship has been made. Some experts suggest that the New York ap-

range from substantial modification of a current proposal to property tax abatement to direct financial support through a combination of grant money and favorable loans so as to make renovation an economically viable option.

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proach places a community in a stronger bargaining position and allows more time for development of an acceptable proposal for relief. An actual finding of hardship is made only upon a determination that adequate relief is not available. Both the New York and Chicago approach will be discussed in greater detail in Part 3 of this article.