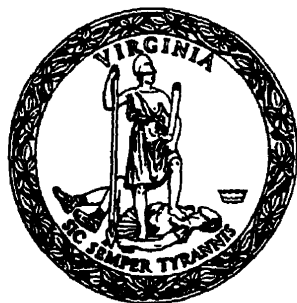


**REPORT OF THE
VIRGINIA DEPARTMENT OF HISTORIC RESOURCES ON**

The Financial Impact of Historic Designation

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 23

**COMMONWEALTH OF VIRGINIA
RICHMOND
1992**

THE FINANCIAL IMPACT OF HISTORIC DESIGNATION

A Study by the Virginia Department of Historic Resources
Pursuant to Senate Joint Resolution 162
December, 1991

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THE FINANCIAL IMPACT OF HISTORIC DESIGNATION

EXECUTIVE SUMMARY

Senate Joint Resolution 162 adopted by the 1991 General Assembly called on the Department of Historic Resources to study "compensation for property designated as a historic landmark." The Department was charged with the task of examining the financial impact on property owners as a result of "designation of land as a historic landmark," and determining "whether compensation for loss in value is advisable." The key question raised by the resolution was how to measure that "loss in value." The argument for compensation depended first upon a definition of loss that is related not to the existing use of property but to some anticipated greater use of the property in the future.

The fundamental issue of the study is whether any governmental action that may diminish a property owner's expectation for that property's future development should be considered an action for which the government should compensate that property owner. The specific governmental action in question here is the designation of property as a historic landmark.

The various state, federal, and local historic designations may in some instances be among the elements influencing a local speculative real estate market; in addition subsequent governmental decisions may call for some protection of historic resources as a part of future development projects, so that the intensity of that future development may be somewhat reduced. However, none of the designations deny the existing use of the property, nor do they regulate the buying and selling of those properties. Additional development of designated land can and does occur. It is also clear that, even taken cumulatively, the various federal, state, and local designations are far less severe in their regulatory effect than are numerous other noncompensatory governmental actions that properly limit the ability of property owners to do what they wish with their land.

Relevant case law is consistent and clear in finding that the test for compensatory takings pertains to denial of existing use of property or denial of a reasonable return from property, not to influence on speculative value of property based on some anticipated change in its use. In Virginia state level designation in particular has been found by the Virginia Supreme Court to have no regulatory effect and to raise no constitutional question of taking. Around the country the courts have regularly upheld local historic district zoning against challenges asserting a taking of property.

Information provided by local assessors from every region of Virginia showed no discernible pattern of any negative effect on value flowing from historic designation. While the Department agrees with some proponents of compensation that a property's assessed value at any given moment may not necessarily be a good predictor of what that property's

next sale will bring, the Department believes that assessment histories over a period of several years are in fact good indicators of how the local real estate market has treated historic properties in the past.

Members of the public who offered comments favoring compensation focused on historic designation's ability to influence local real estate speculation, local zoning decisions, and future development generally. They argued that such influence was sufficient to warrant compensation. Those opposed to compensation relied on the distinction between existing use and speculative value, on the recognized ability of government to affect property values in pursuit of a legitimate public purpose, and on the lack of significant regulatory effect of historic designation. They noted that the current recession accounts for much of the difficulty some property owners are facing in their attempts to sell their land at pre-recession prices.

Based on its examination the Department concludes that even the composite regulatory effect of all possible historic designations is well within guidelines set out by the courts for permissible government action; that compensable loss in value cannot properly be attributed to government action that may or may not influence subsequent decisions on land development that is as yet unspecified and unapproved by local zoning; and that compensation to the owners of designated historic landmarks is therefore not appropriate or advisable.

The identification and protection of historic resources is well established in law as being among the legitimate public purposes served by governmental efforts to promote the general welfare. Providing compensation for state historic designation cannot be sustained without also agreeing to similar demands for compensation for every other governmental effort to protect other resources. In addition, compensation inevitably would be due to property owners not just where a local government includes provisions in its zoning ordinance for the protection of any historic resources, but in virtually every effort to regulate land use in the public interest.

The Department also concludes that the suggested alternative of granting property owners an absolute veto over the state's ability to identify significant historic resources fundamentally and inappropriately compromises the state's interest in those resources based on their inherent significance.

SUMMARY OF FINDINGS IN SUPPORT OF CONCLUSIONS

The Effects of Designation

In coming to its conclusions the Department first examined the legal effect of the various kinds of historic designation: state, federal and local.

The Virginia Landmarks Register. Of the three, state designation is the most innocuous. It imposes absolutely no restrictions or affirmative obligations on landowners or on local governments. That the state's landmark recognition is hortatory and not regulatory has been affirmed by the Virginia Supreme Court in Virginia Historic Landmarks Commission v. Board of Supervisors of Louisa County (1976).

The National Register of Historic Places. The National Register's basic purpose is as an educational and planning tool. It imposes no restrictions or affirmative obligations on landowners or on state and local governments. However, federal agencies are legally obliged to consider the effects of their own actions on historic resources that are federally designated or are found to be eligible for such designation, whether or not historic resources have already been identified in the project area. As a result, in those cases where a private landowner or an agency of government seeks to use federal funds or needs some federal license to carry out a project that affects the environment, the project becomes a federal undertaking that is subject to the federal agency's obligation. Meeting federal historic preservation review obligations can take time and can cost money. Mitigating adverse effects on significant resources can require negotiation of some formal compromise, but in the end the projects do go forward.

Local Historic District Zoning. Local landmark designation in Virginia is generally a function of the locality's zoning ordinance. State law specifically recognizes protection of historic resources as a proper function of local zoning, and it sets out a model for how localities should go about administering historic district zoning. Such local ordinances do not prohibit change within designated areas, but call for design review by a local board. The underlying land use category of property is generally not affected by these "overlay" historic district zones. Adoption of historic district zoning is a local option that, so far, only a minority of Virginia's localities have implemented.

Comparison of Designation with Other Governmental Programs

Virginia's effort to identify and encourage the protection of its significant historic resources is only one of various similar efforts to identify and protect other resources for valid public purposes. Several other state and local government programs may affect property values in the name of resource protection and land use regulation, so that the preservation program should be seen within this broader context of public programs. The state preservation effort is generally far less demanding or restrictive than those other state level efforts, and not remotely comparable in effect to local land-use regulation. The question of compensation for the designation of historic resources cannot legitimately be examined in isolation from all other governmental efforts to carry out recognized public purposes.

Case Law: Is Historic Designation a Taking of Property?

Government has long been acknowledged as being properly able to affect private property values one way or another, without necessarily having such action judged as a taking of property for which compensation must be paid. The courts have generally found that a compensable taking of property occurs only when a property owner is denied the effective use of the property or is denied some reasonable economic return from the use of the property as it exists. Governmental action that alters a property owner's expectation of how the property will be developed in the future has not been deemed a compensatory taking of property, except in certain cases where investments have already been made in reliance on that expectation.

Not surprisingly, case law concerning historic preservation and the taking of property has focused on local zoning regulations, not on state and federal designations, because the local zoning regulations have a far greater and far more direct impact on property. Overwhelmingly, the courts have upheld local preservation zoning against the takings challenges that have been mounted. The relevant U. S. Supreme Court decision came in the case of Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), in which the court upheld that city's historic preservation ordinance against Penn Central's assertion that the ordinance took the company's property. As noted above, the Virginia Supreme Court has looked specifically at Virginia's state designation program and has found that it raises no constitutional questions regarding the taking of property.

The Effect of Designation on Assessed Values

Assessment histories of state and federally recognized landmarks shed some light on whether the historic designation has affected value. Because assessments generally follow rather than precede the local market, a property assessment today for land in an area of considerable real estate speculation may well not reflect what that property will bring at its

next sale. However, again because assessments do follow the market, looking at assessment histories over time can shed some light on whether the market has in the past treated designated historic properties differently from similar properties in the area. The virtually unanimous response from local Assessors and Commissioners of the Revenue has been that no loss of assessed value has occurred as a result of historic designation, and that values have risen in general accord with the values of surrounding properties over the years.

Public Comment on the Compensation Question

Pro-Compensation. Those favoring either compensation to owners or restrictions on the state's ability to recognize historic resources came for the most part from three places: Brandy Station in Culpeper County, Bristoe Station in Prince William County, and the Richmond Battlefield area in Henrico County. The Department has recently recognized Civil War battlefields at Brandy Station and Bristoe Station, an action that has led numerous property owners within the designated areas to be greatly concerned about their ability to sell their land for development. The existing Richmond Battlefield was designated in 1973.

The pro-compensation comments focused on the relationship of historic designation to more intense development of currently undeveloped land at some point in the future. Commenters spoke of the state and federal designations' ability to influence local land-use decisions on subsequent rezoning requests, and they spoke of the designations' ability to influence the local real estate market downward by causing some prospective buyers to walk away or make lower offers for the land. They spoke of the ability of local preservation advocates to use state and federal designation as an arguing point in the local debate over rezonings. Culpeper County, itself a landowner within the designated Brandy Station Battlefield, expressed great concern over the development of its airport and industrial park, because the developments will depend on federal funding and/or other sponsorship. In short, these comments focused on the land's potential as a developable commodity. They argued that such potential is in effect "property," and that such potential cannot be diminished by government without compensation. They argued that even the influence attached to state and federal designations can take this "property" by introducing uncertainty into a local market, by influencing a local rezoning decision, or by potentially increasing a developer's cost of compliance with federal law.

Anti-Compensation. Comments to the effect that compensation for historic designation is neither required nor appropriate were fewer in number, but they came from more places around the state. These comments cited a number of themes. They emphasized that real estate speculation inherently involves risk, and that there is a significant difference between government action that deprives a property owner of the existing use of land and government action that may influence the speculative value of that

same land for more intense future use. The former case may call for compensation, but the latter case does not. They argued that no property owner or buyer has an inherent right to a favorable rezoning by local government or to a grant or permit from the federal government. They noted that local regulations governing use are a far greater determinant of land's value than any historic designation. They pointed out that, if state designation is a compensable action on account of its ability to influence a subsequent local zoning decision, logically those local zoning decisions, themselves, must also be seen as compensable actions. Commenters who related specific case studies focused on buildings and neighborhoods; they pointed to numerous studies or personal experiences in which historic designation appeared to have some beneficial effect on property value. Finally, some commenters emphasized that any recent decline in the speculative value of land in places like Culpeper and Prince William is explained in greatest measure by the current major recession in the real estate industry.

Development and Destruction of Designated Historic Landmarks

Because some public comment referred to designation as a "setting aside" of the land in order to prevent development, the Department compiled a brief list of instances where open land within designated landmark boundaries has subsequently been developed. A second brief list demonstrates that designated historic structures have also been subsequently demolished.

Is Owner Veto Appropriate?

The fundamental purpose of the state's historic preservation program since its inception in 1966 has been to create a full inventory of Virginia's historic resources and to encourage but not require the protection of the most significant of those resources. If the state's ability to identify landmarks is dependent upon the current property owner's consent, the fundamental purpose of the program cannot be achieved. No intelligent judgments can be made about which resources are worthy of preservation if the resources cannot all be identified. Any resource inventory that is compromised by current owner consent ceases to reflect that resource accurately and so becomes of seriously diminished value as a planning tool. The state is left unable even to encourage resource protection, except in those cases where an owner is already disposed toward that course of action.

I. INTRODUCTION

Senate Joint Resolution 162 adopted by the 1991 General Assembly called upon the Department of Historic Resources to study the question of whether designation of property as historic has a financial impact on the owner of that property, and whether compensation to that owner for any loss in value is advisable. The resolution further called on the Department, in the event that compensation does appear advisable, to identify an appropriate mechanism for that compensation.

The impetus for this study request was an action by the Department in 1990/91 to identify the Civil War battlefield at Bristoe Station in Prince William County as a Virginia Landmark, despite the objections of a majority of the property owners of that battlefield. Those property owners argued that the state's designation, while nonregulatory in and of itself, introduced doubt into the local real estate market as to whether the county's Board of Supervisors would approve subsequent requests for rezoning to allow for development of the area. They argued that this uncertainty was causing potential developers to reconsider their previous interest in buying property within the identified area, and that the delay in or loss of such a sale represented a taking of the property by the state. As a result of those complaints, the General Assembly adopted SJR 162 calling for this study.

In carrying out this study the Department has first set out some explanation of the processes and effects of the various historic landmark designation programs. While SJR 162 refers generically to "property designated as a historic landmark," there are actually four kinds of designation: two bestowed by the federal government, one by state government, and one by local government. Each of these designations is explained in some detail.

To examine the relationship between historic landmark designation and property value, with special regard for whether such designation constitutes an action for which the property owner should be compensated by the government, the Department examined several kinds of information relevant to the questions raised by the study resolution. First, the Department study surveys existing case law on the question of what constitutes a compensable taking of property in the eyes of the court.

The study also examines several different indicators of specific experience in Virginia. Each of these indicators offers insight into the questions posed by SJR 162. One indicator consists of the information submitted by local Assessors and Commissioners of the Revenue in response to the Department's questionnaire on the history of assessed values for designated historic landmarks. Response to that survey was sufficiently widespread to allow for some reasonable general conclusions. Another indicator is the public comment, both oral and written, submitted to the Department as a part of this study. The Department held four public hearings across the state and solicited written comments. Last, because many

public comments calling for compensation referred to historic designation either as a "taking" or a "setting aside" of private property - an effect that would by definition remove the property from the control of its owner - the Department sought some specific examples of whether owners of designated land have remained able to develop it and whether owners of designated structures have remained able to demolish them.

Every indicator the Department examined led to the conclusion that the various historic designations may and should have some formal or informal effect on individual or community decisions with regard to historic resources, but that the effect was neither so direct nor so severe as to validate the claim that designation constitutes a compensable taking of property.

II. THE FOUR LANDMARK DESIGNATIONS

While Senate Joint Resolution 162 refers simply to landmark designation, there are actually four possible designations for Virginia properties. The designation most closely associated with the state program is the Virginia Landmarks Register, administered by the Virginia Board of Historic Resources. There are two designations at the federal level. The National Register of Historic Places is the broader of the two and is routinely dependent on nominations from the various states. The National Historic Landmark program deals only with nationally significant resources; while states from time to time may recommend properties for such recognition, the program is run by the National Park Service independent of state nominations, and the designations are made by the Secretary of the Interior. Finally, local governments in Virginia may also designate historic landmarks; typically, they do so by enacting historic district zoning and making specific properties subject to the restrictions of that zoning category.

Each of these four designations is explained in more detail below. Any discussion of whether property owners should be compensated as a result of any or all of these designations must begin with a thorough understanding of what these designations do and, just as importantly, what they do not do.

The Virginia Landmarks Register

Placing properties on the Virginia Landmarks Register is the official means by which the Board of Historic Resources carries out its legal mandate to "Designate historic landmarks, buildings, structures, districts, objects and sites which constitute the principal historical architectural and archaeological sites which are of local, statewide or national significance and withdraw the designation for failure to retain the characteristics which led to designation." (Sec. 10.1-2204, Code of Virginia). That mandate has remained essentially unchanged since first enacted by the General Assembly in 1966. By its original action in 1966 and in its more recent action of 1989 creating the current Department of Historic Resources, the General Assembly acknowledged the public benefit of identifying historic resources based simply on the significance of those resources; it created the landmarks designation program as the nonregulatory vehicle for pursuing that public benefit.

As of December, 1991 there are 1,553 entries in the Register: 1,372 individual landmarks and 181 multi-property historic districts. There is at least one Virginia Landmark in every city and county in the state. The designation process is at the heart of the Department's larger mandate "to encourage, stimulate and support the identification, evaluation, protection, preservation, and rehabilitation of the Commonwealth's significant historic, architectural, archaeological, and cultural resources;...to establish a permanent record of those resources;...and to foster a greater appreciation of these resources among the citizens of the Commonwealth." (Sec. 10.1-2202, Code of Virginia)

Placement of a property on the Virginia Landmarks Register imposes absolutely no restrictions on the owner of that property, unless that owner happens to be an agency of state government. The owner may continue to use the property to the fullest extent allowed by local land-use regulation. The owner may alter or even destroy a Virginia Landmark without seeking permission from the state or even notifying the state before or after the fact. The owner of a Virginia Landmark remains free to sell or otherwise transfer ownership of the property, again, without notice to or permission from the state. In short, the property owner is required neither to act nor to refrain from acting in any way. Similarly, local government is not required to take any cognizance of the state's designation. For its part, the Commonwealth has established internal review procedures that assess the impact on historic resources of projects carried out directly by agencies of state government, but there is no requirement for a similar review of private or local projects licensed or funded by the state.

The intent and extent of the Virginia Landmarks Register is and always has been to encourage, but not to require, the preservation of Virginia's significant historic resources by officially calling that historic significance to the attention of the owner and all those responsible for the land-use decisions that will determine the property's future. Entering a property onto the state register is the state's formal means of requesting that those responsible for the property include its historic significance among the various elements to be weighed in decisions about the property's care and use. However, the property owner and local land-use decision makers remain free to make their own decisions - ranging from total preservation through compromises involving partial preservation to total obliteration of the historic resource - in accordance with the needs of the community and the prerogatives of the owner.

In Virginia Historic Landmarks Commission v. Board of Supervisors of Louisa County (1976), the Virginia Supreme Court considered the Virginia Landmarks Register. The County of Louisa asked the Court to nullify the state's designation of the Green Springs Historic District on the grounds that the designation clouded the marketability of property and took property rights without compensation or due process. The Court denied the County's petition, and it came to the following conclusions:

The Commission's identification of an area of land...as an historical district was a hortatory act...[that] did not determine any property rights of the landowners in the district....All that has happened is that the Commission has recognized that a certain area has historical significance and has recognized it as such...There is no compulsion on the Board of Supervisors to enact any regulation respecting the identified...District. Neither is there any compulsion upon the Board to give the resolution any weight in its consideration of zoning, rezoning or other matters affecting land in the district.

See additional discussion of this case in the survey of relevant case law below. The Virginia Landmarks Register remains unchanged in power or intent since that ruling.

In short, the Virginia Landmarks Register does not and is not intended to regulate behavior. Instead, it is intended to educate, to influence, and to persuade those individuals with the right and/or authority to determine the future of Virginia's historic resources. Nevertheless, at the heart of some of the oral and written comments received by the Department in the conduct of this study is the belief that, because identifying a property's historic significance may indeed have some influence on local decision making (both public and private sector decisions), the state should not be permitted to identify a landmark, unless the individual property owner agrees to allow such identification or unless the state pays the property owner in some manner.

State law does not make the identification of landmarks dependent on consent of the current owner. Further, because designation itself places no burdens on the property owner, state law does not even require that individual property owners be notified of the state's pending consideration of a property for landmark status. In cases where a multi-property historic district is being considered, state law requires the Department to hold a public hearing, if the local government requests such a hearing.

In practice, because it recognizes the importance of an informed public, the Department currently does far more than state law requires in an effort to provide information to owners and to seek comment from them. In the case of individual properties under consideration for landmark designation, there is formal notification to the owner at the preliminary stage of considering the property's eligibility. If the property is deemed eligible for designation, and if a full nomination report is then prepared for board action, the owner is once again formally notified of the upcoming board review and subsequently of the board's action. Property owners and any other interested parties have a full opportunity to comment on proposed nominations both in writing and in person before the board. The appropriate local government is also notified at each of these two stages. In the case of multi-property historic districts, the Department's policy is that public hearings should be held in any event, not just when a local government requests the hearing. The hearings are held in the jurisdiction of the nominated property, and arrangements for the hearings are made through the local government. In all cases legal notices are published prior to the hearing. Those notices include time and place of the public hearing, the time and place of the subsequent board meeting, and boundaries of the proposed district. In addition, individual notices are sent to property owners in all cases where the proposed district includes 100 or fewer property owners.

The National Register of Historic Places

The National Register was established by the National Historic Preservation Act of 1966 to serve as a listing of properties of local, state, and national significance. The vast majority of properties on the National Register are there because they are significant in state or local history, rather than nationally.

Like the Virginia Landmarks Register, the National Register is a formal effort to encourage the preservation of significant resources by calling attention to that significance in the hope of persuading both landowners and public officials to meet their present needs in a manner that preserves or at least minimizes damage to those resources.

Also like the Virginia Register, the National Register does not place any limitation on the actions of the private property owner:

"Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property." (36 CFR 60.2)

Beyond the hoped-for persuasive power of National Register status, the Register is also the cornerstone of some specific federal efforts to encourage the preservation of historic resources. Owners of income-producing Register buildings may take a tax credit to offset 20% of the expenses incurred in an approved rehabilitation of those buildings. Subject to certain limitations, federal historic preservation funds may be used to assist property owners in restoring or rehabilitating a Register property. To encourage federal stewardship of historic properties, the law also calls upon federal agencies to take into account the impact of their undertakings on resources on or eligible for the Register. This "Section 106 Review Process," as it has come to be called, will be discussed in some detail below.

A property's National Register status is expected to be an element in any local discussion or debate on zoning, rezoning, or other land-use matter, but like the Virginia Register, the National Register does not require a property owner or local government to act or refrain from acting in any way. Contrary to the fears expressed by some, listing property on the National Register is in no way intended as a precursor to acquisition of that property by the federal government, just as listing on the Virginia Register is not a signal that the Commonwealth intends someday to turn the property into a museum or park.

The National Register is maintained by the National Park Service. In Virginia, nominations to the National Register are made by the Director of the Department of Historic Resources serving in his federal capacity as State Historic Preservation Officer (SHPO). As with the Virginia Register, the fundamental premise of the program is that resources should be identified on the basis of their significance and integrity and not on the basis of their current ownership or the political climate. Therefore, great care is taken to

ensure that properties placed on the National Register meet specific published criteria and that the nomination undergoes rigorous scrutiny. In order to submit nominations, the SHPO must have a professional staff whose training and experience in the appropriate disciplines is specifically approved by the Park Service. Nominations must be reviewed by a federally mandated State Review Board, a majority of whose members must be professionally trained in history, architecture, archaeology, or architectural history. However, to make sure that all potentially eligible properties are considered, federal law specifically requires that access to the process not be restricted. Anyone may request that a property be nominated to the National Register, whether they are an owner of that property or not; anyone may prepare and submit a nomination; and if the Department rejects or does not act on a nomination that has been submitted, anyone may go directly to the National Park Service and request that the nomination be considered.

Prior to considering and submitting a nomination to the National Register, the SHPO must provide notice to property owners. Federal regulation calls for individual written notice to property owners in the case of individual property nominations or in the case of multi-property historic districts with fewer than fifty property owners. For larger historic districts a published legal notice of the pending nomination is prescribed. There is no requirement for a public hearing prior to the State Review Board's public meeting.

As a matter of practice, Virginia considers properties for the Virginia Register and for the National Register at the same time. The Department combines the state's notification requirement for a public hearing with the federal requirement for written notice, and, as noted in the Virginia Register discussion above goes further to provide the opportunity for public comment than the two mandates require either separately or together.

Unlike the Virginia Register, the National Register program includes a method by which an owner may prevent the formal listing of his or her property, although the result of such objection is a formality which blocks access for the property owner to federal incentive programs. The objection does not prevent the federal government from evaluating and identifying the resource based solely on its significance and integrity. Where the owners object, the National Park Service will not add the property(ies) to the Register but will instead come to a formal finding of eligibility for the Register. The properties are still considered significant, and federal agencies must still take these "eligible" properties into account in determining the impact of their undertakings.

The National Register of Historic Places: the Section 106 Review Process

Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f) reads in toto:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

What do these two sentences mean?

The Section 106 process is triggered by the existence of the proposed federal undertaking, not by the known existence of a historic landmark. Every federal undertaking with the potential to affect the environment is reviewed to determine whether such effect exists and, if so, whether that effect is adverse. Where historic resources are concerned, undertakings are reviewed to determine their effect on any properties that are either already on or are determined eligible for the National Register. If there has been no previous determination of a property's eligibility for the Register, that judgment must be made at the time the federal undertaking is being reviewed.

The federal project sponsor must provide the SHPO enough information on the existence and significance of historic and archaeological resources in the project area to allow the SHPO to make a determination of the property's eligibility for the Register. Where resource information already on file with the SHPO is not adequate to make such determinations, it is the project sponsor's responsibility to conduct field survey work sufficient to provide the information. In those cases where the proposed undertaking is a federally funded or licensed project, the recipient of the funds or license generally becomes responsible for any necessary field survey work. While some complaints have arisen to the effect that recent recognition of two Civil War battlefields by the state and federal governments will subject them to a review process that would otherwise not apply, the fact is that the Section 106 process will occur whether or not the resource has already been recognized. Ironically in light of these complaints, the prior survey and recognition of the resource relieves the grant or license applicants of responsibility - including the financial responsibility - for field survey work at the time of their applications, and may shorten the time necessary for review of the proposed project.

In a review process that involves consultation among the project sponsor, the SHPO, and the federal Advisory Council on Historic Preservation, a determination is made as to whether the project as proposed has an effect on any resources on or eligible for the National Register. If there is a finding of effect, the next determination is whether or not that effect is adverse in its impact on the historic resource. In the very small percentage of cases that result in a finding of adverse effect - in 1991 only 55 of 1,245 cases, or 4.4%, resulted in such a finding - the project sponsor, the SHPO, and the Advisory Council seek to negotiate an agreement that sets forth how the project will go forward. The agreement typically will acknowledge the adverse effect and will include any alterations to the original proposal and/or any additional mitigative measures the project sponsor agrees to carry out to lessen or eliminate the identified adverse effects.

On rare occasions, the parties fail to agree. In such cases, it is important to note that the authority for deciding whether the project moves ahead rests with the federal project sponsor, not with the SHPO or the Advisory Council. Section 106 obligates the federal project sponsor to "take into account" the project's impact on historic resources and give the Advisory Council "a reasonable opportunity to comment," but the project sponsor never loses the ultimate authority for deciding whether and how the project will proceed. In short, the federal sponsor's obligation is to negotiate in good faith and to explore the prudent and feasible alternatives for meeting its needs while minimizing damage to historic resources: that negotiation and exploration can and does resolve initial conflicts to the mutual benefit of all interests represented by the consulting parties. The process also can and does result in findings that damage to or even loss of historic resources is unavoidable.

A recent statement by Thomas Hayden, Assistant Secretary of the Interior, emphasizes that the decision making authority in the 106 process remains with the federal project sponsor. Writing on December 5, 1991 concerning the Brandy Station Battlefield's eligibility for the National Register, Hayden said,

[S]ubstantial misunderstandings have arisen concerning the effect of this action. It has been represented, for example, that Federal Aviation Administration (FAA) officials have stated that because of Register eligibility airport fueling facilities cannot be upgraded and a fence cannot be constructed to prevent collisions between deer and aircraft...I am confident that FAA understands that National Register eligibility does not invoke such restrictions... Federal agencies are required to take into account the effects of their undertakings upon historic properties, but National Register eligibility does not change the fact that decisions are - and should be - based upon each agency's internal guidelines.

National Historic Landmarks

As noted above, the National Historic Landmark (NHL) program is intended to provide official federal recognition of properties that are nationally significant. Whereas 1,530 Virginia landmarks are on the National Register of Historic Places, only 101 Virginia landmarks have been designated as National Historic Landmarks by the Secretary of the Interior. While NHL nominations may be prepared and submitted to the National Park Service by state offices or by members of the public, most nominations are prepared by Park Service staff pursuant to specific theme studies.

Notification procedures, along with the owner objection feature, are the same for the NHL program as they are for the National Register program. However, the Park Service carries out these procedures directly for the NHL program, whereas the states carry out notification for their National Register nominations. National Landmark nominations are reviewed by the National Parks Advisory Board, a citizen board appointed by the Secretary of the Interior, and are acted on by the Secretary. A property not already on the National Register is automatically added to that Register if it is designated a National Historic Landmark.

National Historic Landmark designation has essentially the same effect as National Register listing. There is no regulation of nonfederal actions affecting National Landmarks. In setting out the planning and review process for federal undertakings that may affect a National Historic Landmark, Section 110 of the National Historic Preservation Act moves beyond the "take into account" standard of Section 106: "Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking." (16 U.S.C. 470h-2) Even with this additional encouragement toward preservation, however, the project sponsor retains decision making authority.

Locally Designated Landmarks

Local governments in Virginia can also designate historic landmarks. In general, this local action is taken through the zoning ordinance and, unlike the state and federal designations, is intended to regulate the property owner in a way that protects the designated landmark from unnecessary destruction or insensitive alteration to the exterior of the structure or structures.

Section 15.1-489 of the Code of Virginia lists protection against destruction of or encroachment upon historic areas as a proper function of local zoning ordinances. In addition, Section 15.1-503.2 sets out a model for such local efforts, that includes establishment of a local Architectural Review Board to hear and consider applications for demolitions of or alterations to structures within any areas to which the local governing body has applied its historic district zoning category. As a rule, historic district zones are considered "overlay" zones that regulate design but that do not change the underlying zoning category that governs the uses to which the property may be put. Imposition of such historic district zoning at the local level is carried out in a manner consistent with other zoning actions.

The decision to establish a local historic district zoning category rests entirely with the local governing body. The Code allows for but does not mandate such action. In addition, the Department of Historic Resources may encourage and assist a locality in establishing or administering a local ordinance (see Sec. 10.1-2202[8] of the Code), but it has no authority to require local zoning protection for historic resources. This lack of authority is evidenced by the fact that, while the state has recognized landmarks in every county and city of the Commonwealth, only about 55 jurisdictions - a clear minority - have so far chosen to enact a local ordinance affording protection to historic resources. Most of those jurisdictions are cities or towns; relatively few counties have taken such action.

In addition, where a locality has decided to establish a zoning category for historic resources, the decisions as to where that ordinance will apply rest entirely with the local government. No prior act of recognition by the state is necessary to enable local application of its historic zone. Likewise, recognition of a resource by the state imposes no obligation on the local government to protect that resource. Even where both the state and local governments act to designate a resource, there is no requirement that the boundaries chosen by the state and the locality coincide.

Examples throughout the state demonstrate the legal independence of local decision making in this area. In most cities that have local historic zoning ordinances, for example, the state has recognized more landmarks than the locality has. Various localities have in fact applied their historic district zoning to properties not yet recognized by the state. In some cases localities have afforded zoning protection to an area larger than that recognized by the state, and conversely some localities have designated only a portion of a resource recognized by the state.

While the legal independence of local decision making is clear, it has been argued that recognition of a resource by the state may influence that decision making toward resource protection at the expense of the most intense development. It is argued further that, while the decision making is local, local citizens interested in historic preservation can use state landmark recognition as an argument in the local debate over how a given property will be treated.

The Department of Historic Resources agrees fully with those statements. However, it disagrees with the suggestion that any persuasive power attached to state recognition is somehow improper, or with the assertion that local preservationists have no right to argue before a local governing body unless they happen to own the property proposed for rezoning, demolition, or whatever. The relationship between state recognition and local land-use decision making is embodied in the Department's mandate "to encourage..." and in the Virginia Supreme Court's description of state action as "a hortatory act...not couched in terms of command." The relationship is one that expects only that, where the state has recognized a property's historic significance, a local governing body will include that significance among the many elements it must weigh and balance in deciding upon the property's best use within the community. To argue that the power of state recognition to exhort and encourage certain behavior is properly exercised only when a governing body and/or landowner is already disposed to behave in the manner encouraged is to rob the state's program of its fundamental meaning.

Summary of Effects of Landmarks Designations

Of the four designations described above, the recognition provided for in state law carries with it the least effect. It imposes no regulatory burden on private property owners or on local governments. The Commonwealth does conduct an internal review of the impact of its own state agency projects on historic and archaeological resources, but that review is not required for private or local activity funded or licensed by the state. In short, state designation is, as the Virginia Supreme Court said in 1976, a "hortatory" act.

The National Register of Historic Places and the National Historic Landmarks program share the state register's basic intent. The federal designations do not regulate nonfederal action. However, because federal undertakings are defined - more broadly than state undertakings - to include nonfederal actions that are dependent on federal funding or licensing, the federal sponsors of those undertakings are obligated by federal law to take into account the impact of their actions on properties on or eligible for the federal designation. Unlike regulatory programs, however, federal project sponsors do not need a historic preservation "permit," nor do they surrender their own decision making authority.

Local designation of historic landmarks through imposition of historic district zoning directly affects private property, just as all other provisions of a local zoning ordinance regulate land use. In Virginia the historic district zone is typically an "overlay" design review zone that does not change the underlying use category, nor does it prevent the underlying use from being changed. A local historic district zone does not prohibit change within the area designated; instead it calls for design review by the local government of proposed changes, including proposed demolitions. Decisions on whether, where, and to what extent historic properties will be protected by local zoning remain the sole prerogative of the local governing body.

III. CONSTITUTIONAL REQUIREMENT FOR COMPENSATION: THE TAKING ISSUE

Under the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, ". . . private property [shall not] be taken for public use without just compensation."¹ The Virginia Constitution contains an analogous provision: "the General Assembly shall not pass . . . any law whereby private property shall be taken or damaged for public uses, without just compensation."² Interpretation of the Virginia provision has closely followed the United States Supreme Court's interpretation of the federal provision. Actions which violate these constitutional guarantees include not only the physical expropriation of property, but also governmental regulations which are found to be overly restrictive. Thus, although government has the authority to regulate the use of property for the public good, regulations that exceed the legitimate limits of the police power constitute takings under the United States and Virginia Constitutions. Many of the challenges to historic preservation regulations have been based on taking claims. A survey of case law on the taking clause, however, reveals that listing on the National and Virginia Registers does not amount to a compensable taking.

A. The Green Springs decision

In 1976, the Virginia Supreme Court ruled on that very question in Virginia Historic Landmarks Commission v. Bd. of Supervisors of Louisa County.³ The court held that listing on the Virginia Landmarks Register did not constitute a taking. In 1973, the Virginia Historic Landmarks Commission had identified 14,000 acres in Louisa County as the Green Springs Historic District. The district was placed on the Virginia Register, and subsequently, on the National Register. The Board of Supervisors of Louisa County and a number of property owners within the district filed a petition seeking judicial review of the designation, claiming that the action of the Commission placed a cloud against and jeopardized the free marketability of their property, and took property rights from them without compensation or due process. The Supreme Court of Virginia disagreed, holding that "[t]he Commission's identification of an area of land in Louisa County as a historical district was a hortatory act, and was not couched in terms of command. It did not determine any property rights of the landowners in the district." Furthermore, the Court held,

¹U.S. Const. amend. V.

²Va. Const. art. 1, §11.

³217 Va.468 (1976), 230 S.E.2d 449.

While the identification of a certain building, site or area as historical conceivably could have some incidental effect on the value of the property, the evidence in this case fails to show that the impact thereon would be so immediate, direct, or significant as to assume constitutional proportions and necessitate the requirement of public notice or public hearing. The action taken by the Commission was neither individual in impact nor condemnatory in purpose.⁴

The Court observed that the Commission's action did not have any binding effect upon the local government or upon the property owners. "[A]t most the resolution of the Commission does no more than encourage the county to adopt rules and regulations which the Commission might recommend."⁵ The county was, however, under no compulsion to enact regulations for the protection of the district or to give the district any weight in zoning matters.⁶

B. The Penn Central decision

The United States Supreme Court has never ruled directly on whether listing in the National Register constitutes a taking. However, in Penn Central Transportation Co. v. City of New York,⁷ the Court addressed the constitutionality of a local historic preservation ordinance which, unlike the National Register, imposed restrictions on the use of historic properties. The Court upheld the ordinance.

At issue was the question of whether New York City's Landmarks Preservation Law had effected a taking by designating Grand Central Terminal a historic landmark. The New York City law was typical of many urban preservation ordinances. It required the owner of a landmark to keep the exterior of the building in good repair and to seek prior approval for any alterations to the building. Other provisions of New York City's zoning law allowed the owner of a landmark building to "transfer" unused development rights from the landmark site to contiguous properties, thereby providing the owner with a certain economic advantage as a result of designation.

The Court identified several factors which it considered significant to the question of whether the regulation constituted a taking. "The economic effect of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct

⁴Id. at 474, 230 S.E.2d at 452.

⁵Id. at 474, 230 S.E.2d at 453.

⁶Id.

⁷438 U.S. 104 (1978).

investment-backed expectations are, of course, relevant considerations," the Court declared.⁸ "So too is the character of the governmental action."⁹ However, the Court added, a regulation is not invalid merely because it reduces the value of property.¹⁰ Having established the parameters of its takings analysis, the Court considered the property owners' claim as a two-part inquiry. The first step was to determine whether the Landmarks Law effected a taking by its very terms. The second step was to decide whether the law so interfered with the property rights of the owners of Grand Central Terminal as to constitute a taking under the circumstances.

The Court systematically and unambiguously disposed of each of the appellants' arguments that the New York City law was facially invalid. The Court noted that the appellants did not dispute the legitimacy of New York City's goals of preserving structures and areas of special historic, architectural, or cultural significance, or the appropriateness of the Landmarks Law's means of achieving that goal. Rather, as the appellants had been denied the right to build a 55-story office tower atop the Terminal building, their taking claim was based on their assertion that the law denied them the gainful use of the air rights over the building. Observing that other land-use decisions had upheld restrictions not only on air rights, but also on subjacent and lateral development of land, the Court held that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."¹¹ The Court also held that the property had not been "taken" merely because its value had been diminished, noting that prior land use decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'"¹² Finally, the Court rejected the appellants' claim that the owners of landmarks were unfairly burdened by the law, remarking that the law embodied a comprehensive plan for the preservation of all landmarks throughout the city, that the availability of judicial review prevented the possibility of arbitrary or discriminatory landmark designations, and that legislation designed to promote the general welfare often

⁸Id. at 124.

⁹Id.

¹⁰"[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." Id. at 125.

¹¹Id. at 130.

¹²Id. at 131.

burdens some more than others.¹³ "In any event," the Court concluded, "appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate . . . [u]nless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures."¹⁴

The Court next considered the question of whether the law interfered with the appellants' property rights to such an extent as to constitute a taking under the circumstances. The Court noted that the law did not interfere with the current use of the building, and further pointed out that the law permitted Penn Central not only to profit from the building, but also to obtain a "reasonable return" on its investment.¹⁵ Furthermore, the Court added, the appellants had exaggerated the effect of the law on their ability to make use of the air rights above the landmark building -- not only was it possible that an addition smaller than 55 stories might be approved, but to the extent that such approval was withheld, the appellants had the right to transfer the unused development rights to other parcels. "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on the appellants, and for that reason are to be taken into account in considering the impact of regulation."¹⁶

C. Analysis

The factors which the Court listed in Penn Central as relevant to a taking inquiry -- the character of the governmental action, the economic impact of the regulation, particularly the extent to which the regulation interferes with investment-backed expectations -- have become the standard focus of inquiry in taking cases. Under each of these factors, listing of property on the Virginia and National Registers clearly passes constitutional muster.

1. The nature of the governmental action

In focusing on the nature of the governmental action, courts generally undertake a threshold inquiry into the legitimacy of the public purpose to be accomplished by the regulation. In Euclid v. Ambler Realty Co.,¹⁷ the United States Supreme Court noted that all laws and regulations must find their justification in some aspect of the police power

¹³Id. at 131-134.

¹⁴Id. at 134.

¹⁵Id. at 136.

¹⁶Id. at 137.

¹⁷272 U.S. 365 (1926).

asserted for the public welfare, but that the line separating legitimate uses of this power from illegitimate "is not capable of precise delineation."¹⁸ Wide ranging public purposes have been held legitimate, including preservation of the character and desirable aesthetic features of a city,¹⁹ preservation of historic landmarks and areas,²⁰ and open-space and agricultural land protection.²¹ However, even where the public purpose to be served by the regulation is legitimate, the regulation may fail if it does not "substantially advance" that purpose. In Nollan v. California Coastal Commission,²² the appellants challenged a requirement that they dedicate an easement for public right-of-way across their beachfront property in exchange for approval of their proposal for new construction on the property. The Court was troubled by what it perceived as a "lack of nexus between the condition and the original purpose of the building restriction," and held that the restriction constituted a taking.²³

The legitimacy of historic preservation has been amply demonstrated in Virginia both constitutionally and legislatively. The Virginia Constitution specifically recognizes historic preservation: ". . . it shall be the policy of the Commonwealth to conserve, develop, and

¹⁸Id. at 387.

¹⁹See New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974); Berman v. Parker, 348 U.S. 26, 33 (1954).

²⁰Penn Central, 438 U.S. 104 (1978). See also City of New Orleans v. Dukes, 427 U.S. 297 (1976).

²¹Agins v. City of Tiburon, 447 U.S. 255 (1980).

²²483 U.S. 825 (1987).

²³The Nollan holding has been widely regarded as revolutionary in the field of land use law, because it purported to create a new and very strict requirement of rigid identity between the public purpose to be achieved and the means used to achieve it. See R. Roddewig, C. Duerksen, Responding to the Takings Challenge, American Planning Association and the National Trust for Historic Preservation (1989) at page 6; T. Boasberg, T. Coughlin, J. Miller, Historic Preservation Law and Taxation, (1986), § 8.04[2][a][ii][C]. It was, however, a five-four decision. Three of the four dissenting Justices wrote separate opinions. The most comprehensive, Justice Brennan's, states that the Court's requirement of an exact identity between the public purpose and the terms of the regulation "imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century." 483 U.S. at 842, Brennan, J., dissenting. Justices Marshall, Blackmun, and Stevens agreed with Justice Brennan's observation that planners must be able to fashion creative and flexible solutions to increasing land use pressures.

utilize its natural resources, its public lands, and its historical sites and buildings."²⁴ "In the furtherance of such policy, the General Assembly may undertake . . . the acquisition and protection of historical sites and buildings."²⁵ The Virginia General Assembly has demonstrated its support of historic preservation by passing a wealth of statutes to protect the historic resources of the Commonwealth,²⁶ and by making grants and other appropriations for historic purposes.²⁷ Local governments in Virginia are required to adopt comprehensive plans which may include designation of historical areas.²⁸ Zoning ordinances are required to give reasonable consideration to the protection of historic areas from destruction or encroachment,²⁹ and may include sections designating historic districts and establishing architectural restrictions for the protection of these districts.³⁰

Historic preservation has also been unequivocally sanctioned judicially, both in Virginia and nationally. In the Green Springs case, the Virginia Supreme Court specifically upheld the constitutionality of the listing of property on the Virginia Landmarks Register. In the Penn Central case, the United States Supreme Court definitively stated that historic preservation is a legitimate purpose of governmental regulation,³¹ and has subsequently affirmed this position.³² Except in a recent Pennsylvania decision,³³ every state court which has considered a taking challenge to a historic preservation regulation has found that

²⁴Va. Const. art. XI, §1.

²⁵Va. Const. art. XI, §2.

²⁶See, e.g. Va. Code Ann. §§ 10.1-2202 through 10.1-2216 (historic resources), 10.1-2300 through 10.1-2306 (Virginia Antiquities Act), 10.1-2400 through 2404 (Virginia Historic Preservation Foundation), 10.1-1700 through 1705 (allowing public bodies to accept easements for historic purposes), 10.1-1009 through 10.1-1016 (allowing private organizations to accept easements free of certain common-law impediments).

²⁷See, e.g., Va. Code Ann. §§ 10.1-2211, 10.1-2213 (1989 Repl. Vol.), 10.1-2212 (1991 Cum. Supp.). The General Assembly has also funded numerous individual grants to historic and cultural properties in past years through the Department of Historic Resources' Threatened Properties Grant Program.

²⁸Va. Code Ann. § 15.1-446.1(4) (1991 Cum. Supp.).

²⁹Va. Code Ann. § 15.1-489(5) (1991 Cum. Supp.).

³⁰Va. Code Ann. § 15.1-503.2 (1989 Repl. Vol.).

³¹Penn Central Transportation Co. v. New York City, 438 U.S. 104, 129 (1978).

³²See Nollan v. California Coastal Commission, 438 U.S. 825, 835 (1987)

³³See discussion of Boyd Theatre case infra.

historic preservation is related to the public welfare and is thus a permissible governmental purpose.³⁴

Listing of properties on the National and Virginia Registers also indisputably meets the Nollan-imposed requirement for a nexus between the regulation and the public purpose. By identifying existing resources, the historic registers allow society to decide which of these resources are most worthy of preservation. Without such an index, it would be impossible for federal, state, or local governments to take these resources into consideration in an informed way when planning for land use and development. By cataloguing those elements which make listed properties significant, the historic registers also facilitate the study and teaching of, and appreciation for, architectural and social history, cultural values, and historic patterns of land use.

In addition, the regulatory aspects of historic designation also meet this requirement of a nexus between the purpose of the regulation and its terms. The section 106 process is designed not to prevent governmental projects, but rather to provide federal agencies with a process by which to ensure that their activities do not unnecessarily compromise irreplaceable resources. Without such a process, these agencies would have no consistent, practicable way to take historic resources into consideration.

³⁴See Bohannon v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973); Figarsky v. Historic District Com'n of the City of Norwich, 171 Conn. 198, 368 A.2d 163 (1976); Glisson v. Alachua County, 558 So.2s 1020 (Fla. Dist. Ct. App. 1990); In re Kyo-ya Co., Ltd., S.P. No. 5104 (Haw. 1982); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969); Dept. of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989, cert. denied, 110 S.Ct. 1130 (1990)); Allen Realty Co., Inc. v. City of Lawrence, 14 Kan. App. 2d 361, 790 P.2d 948 (1990); Mayor and Alderman of City of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974); Opinion of the Justices (Nantucket), 333 Mass. 773, 128 N.E.2d 557 (1955); Opinion of the Justices (Beacon Hill), 333 Mass. 783, 128 N.E.2d 563 (1955); Sleeper v. Old King's Hwy. Regional Historic District Comm'n, 417 N.E.2d 987 (Mass. App. 1981); Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. Ct. App. 1990); Lafayette Park Baptist Church v. Bd. of Adjustment, 599 S.W.2d 61 (Mo. Ct. App. 1980); Dempsey v. Boys' Club of the City of St. Louis, 558 S.W.2d 262 (Mo. Ct. App. 1977); Shubert Organization, Inc. v. Landmarks Preservation Comm'n, 166 A.D.2d 115, 570 N.Y.S.2d 504, appeal denied, No. 1075-SSD-73 (Ct. App. Sept. 23, 1991); Lubelle v. Rochester Preservation Bd., 158 A.D.2d 975, 551 N.Y.S.2d 127, appeal denied, 75 N.Y.2d 710, 556 N.Y.S.2d 532, 555 N.E.2d 929 (1990); Society for Ethical Culture v. Spatt, 415 N.E.2d 922 (N.Y. Ct. App. 1980); Penn Central Trans. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271, Aff'd 438 U.S. 104 (1978); County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985); ; First Presbyterian Church of York v. City Council, 25 Pa. Commw. 154, 360 A.2d 257 (1976); Buttnick v. City of Seattle, 105 Wash.2d 857, 719 P.2d 93 (1986). See also 900 G Street Assoc. v. Dept. of Housing & Community Dev., 430 A.2d 1387 (D.C. 1981).

2. The economic impact of the regulation and investment-backed expectations

In a seminal 1926 opinion on the taking clause, Pennsylvania Coal Co. v. Mahon³⁵, the United States Supreme Court declared that one factor for consideration in assessing whether a regulation effects a taking is the extent of the diminution in the property's value caused by the regulation.³⁶ In Goldblatt v. Hempstead,³⁷ however, the Court described the limited nature of this consideration: "Although a comparison of values before and after is relevant, [citation omitted] it is by no means conclusive."³⁸ The Court cited Hadacheck v. Sebastian,³⁹ where a diminution in value from \$800,000 to \$60,000 was upheld. In Penn Central the Court considered at some length the economic impact of the New York City Landmarks Law on the appellants. The Court firmly established that mere reduction in property value did not constitute a taking, nor did the fact that the law imposed different restrictions on the Terminal building than on surrounding structures. "It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others."⁴⁰

The Court has also been quite clear in its assertions that a regulation does not effect a taking simply because it denies an owner the most beneficial use of his property. In Goldblatt v. Hempstead,⁴¹ the Court upheld a zoning ordinance which prohibited excavation below the water table and imposed an affirmative duty upon landowners to refill any existing excavation. The appellants, who had used their property for a sand and gravel mining operation, contended that the ordinance constituted a taking because it confiscated their property and their business. The Court conceded that the ordinance completely prohibited a beneficial use to which the property had previously been devoted. "However," the Court declared, "such a characterization does not tell us whether the ordinance is unconstitutional . . . If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it

³⁵260 U.S. 393 (1922)

³⁶Id. at 413.

³⁷369 U.S. 590 (1962).

³⁸Id. at 594.

³⁹239 U.S. 394 (1915).

⁴⁰Penn Central, 438 U.S. 104, 133 (1978).

⁴¹369 U.S. 590 (1962).

unconstitutional."⁴² In Agins v. Tiburon,⁴³ the Court held that an ordinance effects a taking if it "denies a property owner economically viable use of his land."⁴⁴

The lower courts have applied this standard in a number of situations, specifically including historic preservation. In Park Avenue Tower Associates v. City of New York,⁴⁵ the Court of Appeals for the Second Circuit held that compensation is not warranted merely because governmental action causes the loss of a reasonable return. The crucial inquiry, the court stated, is "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to 'sell the property to someone for that use.'"⁴⁶

Like the federal courts, the Virginia Supreme Court has held that the constitutional requirement of compensation does not necessitate payment in every case where financial loss might be shown as a result of a public undertaking.⁴⁷ Rather, "[a]ll citizens hold property subject to the proper exercise of the police power for the common good . . . Even where such an exercise results in substantial diminution of property values, an owner has no right to compensation therefor."⁴⁸ The mere fact that governmental action renders

⁴²Id. at 592. See also Penn Central, 438 U.S. 104, 125 (1978)(citing zoning ordinances as examples of permissible governmental actions even when prohibiting most beneficial use of property); Miller v. Schoene, 276 U.S. 272 (1928)(state law requiring destruction of diseased cedar trees without compensation for value of trees or decrease in value of property upheld); Walls v. Midland Carbon Co., 254 U.S. 300 (1920)(law prohibiting manufacture of carbon black upheld); Hadacheck v. Sebastian, 239 U.S. 394 (1915)(property owner prohibited from continuing otherwise lawful brickyard business on grounds that state legislature found use inconsistent with neighboring uses); Reinman v. Little Rock, 237 U.S. 171 (1915)(law prohibiting livery stable upheld); Mugler v. Kansas, 123 U.S. 623 (1887)(law prohibiting liquor business upheld).

⁴³447 U.S. 255 (1980).

⁴⁴Id. at 260. In Keystone Bituminous Coal v. DeBenedictus, 480 U.S. 255, 260 (1980), the Court characterized takings challenges under this standard as "an uphill battle."

⁴⁵746 F.2d 135 (2d Cir. 1984), cert. denied 105 S.Ct. 1854 (1985).

⁴⁶Id. at 139 (quoting Sadowsky v. New York, 732 F.2d 312 (2d Cir. 1984)). See also Pompa Constr. Corp. v. City of Sarasota Springs, 706 F.2d 418 (2d Cir. 1983).

⁴⁷Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971).

⁴⁸Commonwealth ex rel. State Water Control Board v. County Utilities Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982).

private property less desirable for some purposes, or even less salable, does not constitute damage within the meaning of the constitutional guarantee.⁴⁹

The Virginia court has also held that development potential or speculative future increases in value are not property for purposes of the taking clause. In State Highway and Transportation Comm'r. of Virginia v. Lanier Farm, Inc.,⁵⁰ a developer claimed that as a result of governmental action, his costs for a planned development would be increased, and that the value of the tract would be decreased. The court first noted that the developer's evidence regarding the increased costs was speculative and should not have been admitted. However, even if the developer's speculation was correct, the court held, the theory of damages he sought to prove was fallacious. The frustration of his plans for development or future use of the property was not compensable. "It is the present actual value of the land with all its adaptations to general and special uses, and not its prospective, or speculative, or possible value based upon future expenditures and improvements that is to be considered."⁵¹

As discussed above, listing of a property on the National and Virginia Registers does not have a demonstrable effect, in and of itself, on the property's value. Even where some reduction in a property's value or loss of development potential can be shown to have resulted from listing on the Virginia and National Registers, or from inclusion in a local historic district, cases in both federal and Virginia courts have demonstrated that such reduction seldom rises to the level of a compensable taking of property.

Related to the economic impact inquiry is the question of whether the regulation interferes with the property owner's "reasonable investment-backed expectations." In Kaiser Aetna v. United States,⁵² a developer dredged a channel from a private pond to the ocean to create a marina. The work was undertaken by permit from the Corps of Engineers. The government later attempted to impose a navigational servitude on the property, claiming that the dredging had converted the pond into navigable waters of the United States. The Court held that the developer had a reasonable investment-backed expectation that it would

⁴⁹Lambert v. City of Norfolk, 108 Va. 259, 61 S.E. 776 (1908).

⁵⁰233 Va. 506, 357 S.E.2d 531 (1987).

⁵¹Id. at 510, 357 S.E.2d at 533 (quoting Richmond & P.R. Co. v. Seaboard, &c., Co., 103 Va. 399, 407, 49 S.E. 512, 515 (1905)). See also City of Virginia Beach v. Virginia Land Investment Association No. 1, 239 Va. 412, 389 S.E.2d 312 (1990)(Downzoning which was later invalidated did not constitute temporary regulatory taking because property owner could show only that it was unable to develop property as anticipated during period when ordinance was in effect; owner had been able to lease property and thus was not deprived of all economically viable uses of its property).

⁵²444 U.S. 164 (1979).

be able to exclude the public from its private marina, and that this was an interest that was protected under the taking clause.⁵³

The concept of investment backed expectations was also applied prior to Penn Central, in the Pennsylvania Coal case,⁵⁴ although the phrase "investment-backed expectations" was not used. In that case, a coal company had sold property, but while conveying the surface rights, it had specifically reserved the right to remove the coal which constituted the "support estate." Finding that the law effectively destroyed the value of these reserved rights, the Court held that it constituted a taking.

The full scope and meaning of investment-backed expectations has not been fully developed by the courts.⁵⁵ It is clear, however, that implicit in taking cases is the idea of equity. The courts remind us that there is no "set formula" for determining when a regulation becomes a taking, but that "justice and fairness" dictate how particular circumstances are to be construed.⁵⁶ It is conceivable that isolated situations may arise

⁵³Id. Another case that deals with the concept of investment-backed expectations in a taking analysis is somewhat more esoteric. In Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), the Court found that trade secrets which a company submitted to the Environmental Protection Agency in an application for registration of pesticides constituted property which could be protected under the taking clause. The EPA's disclosure of the data, the Court found, in effect destroyed the company's right to exclude the public from the property, thereby destroying the value of the property to the company. No taking had occurred, however, because Congress had made it clear that only limited confidentiality would be given to data submitted for registration purposes. "If . . . Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission," 467 U.S. at 1006-1007.

⁵⁴Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

⁵⁵Some commentators have suggested that investment-backed expectations may be equated with vested rights. R. Roddewig, C. Duerksen, Responding to the Takings Challenge, American Planning Association and the National Trust for Historic Preservation (1989) at pages 18-19. Others have noted that in cases which have turned on the idea of investment-backed expectations, the Court has found that the expectation being thwarted is the expectation of being able to exclude the public from the property. T. Boasberg, T. Coughlin, J. Miller, Historic Preservation Law and Taxation (1986), § 8.04[2][c].

⁵⁶See, e.g., Penn Central, 438 U.S. at 124; Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). In Agins v. Tiburon, 447 U.S. 255, 260-61 (1979), the United States Supreme Court held, "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when

where listing of property on the National and Virginia Registers could in some way interfere with development plans on which the owner has, in good faith, spent significant sums of money. In those cases a court could find that a taking had occurred. In most instances, however, listing will not affect the owner's plans.

D. The Boyd Theatre decision

On July 10, 1991, the Pennsylvania Supreme Court ruled that the designation of private property for historic preservation purposes without owner consent is a taking under the Pennsylvania Constitution.⁵⁷ Although the case is limited to Pennsylvania law and is binding only on Pennsylvania courts, it has attracted widespread interest, because of its startling departure from well-settled precedent. In fact, as a result of that attention, the Court has subsequently heard reargument on its ruling and is expected to issue its new decision in the near future. In the meantime, its initial ruling is in abeyance.

In 1987, the Philadelphia Historical Commission designated both the interior and the exterior of the Boyd Theatre, a fully intact, Art Deco structure that the Commission described as having "one of the most important public interiors left in the city,"⁵⁸ a historic landmark under the "Historic Buildings, Structures, Sites, Objects and Districts" provision of the Philadelphia Code. The owner of the property objected to the designation, and sought a declaratory judgment that the Commission was without authority to make the designation. The trial court upheld the Commission's decision, and was in turn upheld on appeal by the Pennsylvania Commonwealth Court.⁵⁹ The Commonwealth Court relied on the following provision of the Pennsylvania Constitution:

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 benefits of all people.⁶⁰

property has been taken, . . . the question necessarily requires a weighing of private and public interests."

⁵⁷United Artists Theatre Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission (No. 48 E.D. Appeal Docket 1990).

⁵⁸Preservation News, September 1991, p. 2.

⁵⁹Sameric Corp. of Chestnut Street, Inc. v. Philadelphia Historical Comm'n., 125 Pa. Cmwlth 520 (1990).

⁶⁰Pennsylvania Const. art. 1, §27.

On appeal, the Supreme Court of Pennsylvania overturned the Commonwealth Court's decision.⁶¹ The court held that the entire historic preservation provision of the Philadelphia Code was "unfair, unjust, and amount[ed] to an unconstitutional taking without just compensation" under the Pennsylvania constitution.⁶²

The court based its holding on the ordinance's architectural restrictions and affirmative maintenance provisions. The ordinance, similarly to the New York ordinance which was upheld in Penn Central, requires that alterations to designated buildings be approved by the Historical Commission, and that the property owner keep the building in good repair. If the owner seeks permission to demolish the building, the Commission may request information on alternate uses consistent with preservation. The court described these restrictions as giving the Commission "almost absolute control over the property," and held that by assuming such control, the Commission was forcing the owner of the property to bear a public burden which, "in fairness and justice, should be borne by all." The court cited a 1982 case in which it had held that neither aesthetic reasons, nor the conservation of property values, nor the stabilization of economic values, were sufficient public purposes to support either a zoning ordinance or the exercise of eminent domain,⁶³ and added that these purposes would not support a historic preservation ordinance, either.

Before the Boyd Theatre decision, the Pennsylvania court had traditionally applied the federal standard to taking questions under the Pennsylvania Constitution.⁶⁴ Indeed,

⁶¹The trial court and the Commonwealth Court had both focused on the issue of whether the designation of the entire theatre building, as opposed to merely its exterior, was a permissible exercise of the police power. To the surprise of many, including the litigants themselves, the Pennsylvania Supreme Court's decision did not mention this issue. Instead, the court declared the entire ordinance unconstitutional.

⁶²Article I, § 10, of the Pennsylvania Constitution provides, in pertinent part, "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

⁶³ Redevelopment Authority of Oil City v. Woodring, 498 Pa. 180, 445 A.2d 724 (1982).

⁶⁴See, e.g., Hughes v. Commonwealth of Pennsylvania Department of Transportation, 514 Pa. 300, 306 A.2d 747, 750 (1987); Replogle v. Pennsylvania Liquor Control Board, 514 Pa. 209, 212, 523 A.2d 327, 329 (1987); Township of Chester v. Commonwealth of Pennsylvania Department of Transportation, 495 Pa. 369, 433 A.2d 1353, 1355-1356 & n.6 (1981); National Wood Preservers, Inc. v. Pennsylvania Department of Environmental Resources, 489 Pa. 221, 233-37, 414 A.2d 37, 45-46 (1980); Cleaver v. Board of Adjustment of Tredyffrin Township, 414 Pa. 367, 372-373, 200 A.2d 408, 412 (1964); Andress v. Zoning Board of Adjustment of the City of Philadelphia, 410 Pa. 77, 83, 188 A.2d 709, 712-715 (1963); Redevelopment Authority of the City of Philadelphia v. Lieberman, 461 Pa. 208, 211-212, 336 A.2d 249, 251 (1975).

in Commonwealth v. Gray,⁶⁵ the court stated that "[w]hile we can interpret our own constitution to afford . . . greater protection than the federal constitution does . . . there should be a compelling reason to do so."⁶⁶ Nevertheless, the court rejected the Supreme Court's Penn Central interpretation of the federal constitutional guarantee. The opinion gives no indication of the court's reasons for this departure. The authorities cited for the conclusion that historic preservation laws bite too deeply into individual private property rights are Justice Rehnquist's dissenting opinion in the Penn Central case, a dissenting opinion in a previous Pennsylvania Supreme Court case,⁶⁷ and a minority opinion in a lower Pennsylvania case.⁶⁸ The court also overlooked the overwhelming body of persuasive law from other states upholding historic preservation ordinances.⁶⁹

As noted above, the Pennsylvania Court has responded to numerous legal petitions that emphasized how widely at variance with well established precedents the court's decision was, and has taken the unusual step on October 27, 1991 of hearing a reargument of the portion of its decision that dealt with the taking issue. To date, no decision on the reargument has been handed down.

⁶⁵509 Pa. 476, 503 A.2d 921 (1985).

⁶⁶509 Pa. at ___, 503 A.2d at 926.

⁶⁷Cass Plumbing and Heating Co. v. PPG Industries, Inc., 488 Pa. 564, 412 A.2d 1376 (1980).

⁶⁸First Presbyterian Church of York v. City Council of the City of York, 25 Pa. Cmwlth 154, 360 A.2d 257 (1976)(the court characterized the quoted opinion as dissenting, but it was actually a concurring opinion).

⁶⁹See Bohannon v. City of San Diego, 30 Cal. App. 3d 416, 106 Ca. Rptr. 333 (1973); Figarsky v. Historic District Commission, 171 Conn. 198, 368 A.2d 163 (1976); Glisson v. Alachua County, 558 So.2d 1030 (Fla. Dist. Ct. App.), Review denied, 570 So.2d 1304 (1990); In re Kyo-ya Co., No. 8124 (Haw. Dec. 10, 1982); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969); Foster & Kleiser v. City of Chicago, 146 Ill. App. 3d 928, 497 N.E.2d 459 (1986); Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989), cert. denied, 110 S.Ct. 1130 (1990); Allen Realty, Inc. v. City of Lawrence, 14 Kan. App. 2d 361, 790 P.2d 948 (1990); Mayor and Aldermen of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974); Opinion of the Justices (Nantucket), 333 Mass. 773, 128 N.E.2d 557 (1955); Opinion of the Justices (Beacon Hill), 333 Mass. 738, 128 N.E.2d 563 (1955); Sleeper v. Old King's Highway Regional Historic District Commission, 11 Mass. App. 571, 417 N.E.2d 987 (1981); Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. Ct. App. 1990); Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61 (Mo. Ct. App. 1980); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977); Dempsey v. Boys' Club, 558 S.W.2d (Mo. Ct. App. 1977); Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), aff'd, 438 U.S. 104 (1978); Buttnick v. City of Seattle, 105 Wash. 2d 857, 719 P.2d 93 (1986).

IV. HISTORIC DESIGNATION AND ASSESSED VALUE

In an effort to examine the long-term effect of the state's historic landmark designation on the value of the designated properties, the Department surveyed the state's local Assessors and Commissioners of Revenue concerning the assessed value of landmark properties. The Department sent to each such local official a list of the landmarks recognized by the state in that official's jurisdiction; those lists also included the dates over the last twenty-five years on which the properties were added to the Virginia Landmarks Register and to the National Register of Historic Places.

The Department asked the following questions.

- 1. Has the assessed value of any of the properties on the list been lowered since its listing?**
- 2. If so, was the reduction caused by that listing or by some other event?**
- 3. Either in general or specific terms, have the assessed values of the listed properties risen or fallen since their listing?**
- 4. Is there any other information or comment you wish to give us?**

Such a survey has both strengths and weaknesses that must be acknowledged at the outset. Assessed value must be related to fair market value; it is important to understand that assessments generally follow the market rather than dictate to it. Consequently, an extended history of a property's assessed value should be a reliable indicator of how the local real estate market has regarded the property over the years. At a minimum, such a history should also show whether there has been any absolute decline in a property's value over the years. If the locality recognizes state designation as a clear and immediate restriction of a property's use that will affect fair market value, one should reasonably expect the reassessment immediately following designation to reflect some reduction commensurate with the restriction that locality perceives (compare, for example, the requirement of Sec. 10.1-2207 of the Code that local assessors take into account the effect of any permanent easement governing the use and development of a historic landmark). Finally, if the assessment histories of designated properties are compared to nearby or otherwise similar undesignated properties, one can come to some general conclusions, if not precise findings, as to whether designated properties are routinely treated in some different manner by the local real estate market.

On the other hand, examining assessed values cannot show some things that may represent a hardship to a property owner. There is no way that assessed values can demonstrate those situations in which for one reason or another, profit from a sale is less

or is slower in coming than expected. If an event such as historic designation or a set of circumstances such as a depressed real estate market causes a property to sit on the market longer than expected, assessment history will not reflect the impact of that delay on the owner. If a prospective buyer decides against a purchase because that buyer is uncertain of whether historic designation will somehow be a disadvantage, assessed values will not reflect that lost sale. If historic designation, or discovery of an endangered species, or a state decision to select a different route for a new superhighway hampers recruitment at an industrial park, assessed values are not likely to demonstrate the problem. Finally, if the seller of a recognized historic property expects a significant profit from the sale due to the land's development potential, but realizes only some lesser profit, ostensibly because the buyer places some negative value on the historic designation, assessed value will reflect only the amount of increase, rather than a loss in comparison to the seller's expectation. Especially in this latter case, some comparison of assessment histories for similar designated and undesignated properties may shed some light on the relationship of historic designation to market value.

The Consensus

Eighty-seven local Assessors and Commissioners of the Revenue responded to the Department's brief questionnaire. Responses ranged from handwritten notes on the questionnaire itself to full assessment histories for every designated landmark within the locality. Some local officials also offered some personal observations, while others did not. A full listing of the jurisdictions providing some response to the questionnaire appears as Appendix A.

Eighty-four of these local officials responded with either a general statement or a set of assessment histories to the effect that state and federal landmark recognition cause no lowering of a property's existing value. The general tenor of any additional remarks from these officials was that such recognition has no effect on value, that values of these properties have risen over the years in accord with the increase of property values generally in the jurisdiction, and that in some cases historic recognition probably adds value in certain markets. These local officials made no distinction between designated properties involving considerable amounts of open, developable land and designated properties involving a structure on a small lot.

Where a landmark property had shown some decrease in value, the loss was clearly attributed by these local officials to deterioration of structures, to the placement of some easement or other covenant limiting development on the property, to some local government zoning action, in one case to a general reassessment downward of downtown properties, or to the selling off of part of the land. In a clear example of the property owner's continuing ability to use or dispose of a registered landmark, the Arlington County Assessor explained the loss of land value at The Glebe as resulting from the selling off of a portion of that designated land for a townhouse development project.

The following selected comments of these various Assessors and Commissioners of the Revenue speak for themselves both as to the official assessed value of the landmark properties, and as to the way the local real estate market has reacted over the years to landmark properties in relation to unrecognized properties.

We assess these properties in accordance with other properties in the areas. Because listing on these registers imposes no restrictions on private property owners, the market value is not adversely affected.

John W. Bryant, Supervisor Appraiser
Henrico County Real Estate Assessment Division

Generally, the assessed values have risen at a rate similar to all other properties. As such, we have no evidence that the listing of a property on either the National Register of Historic Places or the Virginia Landmarks Register adversely influences the assessed value relative to surrounding and/or similar properties.

John Cunningham, Manager of Assessments
Prince William County

The market indicates that no reduction in value occurs when properties are listed on these registers.

William C. Gardner, Assessor
Loudoun County

[Values have] risen based on surrounding land values during general reassessments.

Michael A. Didawick, Director of Re-Assessments
Frederick County

The value of properties listed on historical lists is determined from sales of like or similar properties. Based on what we have seen in Albemarle, I am of the opinion that listing properties on historical registers would be an asset to the value of their property.

Bruce M. Woodzell, County Assessor
Albemarle County

[Values are] stable with comparable properties!

Gary N. Plauger, Commissioner of the Revenue
City of Manassas

In general...we have never been able to document market data which substantiates that a state or federal historical designation has any bearing on value. Properties with such designations tend to receive a higher degree of maintenance due to pride of ownership and thus maintain or increase in value better than those of comparable actual age without a designation of historical significance.

L. L. Barbour, Real Estate Assessor
City of Danville

There is no evidence at all that any values for the reviewed properties have been lowered. It appears that these values have followed the same trend as other neighboring properties not on the historical list.

Maynard H. Sayers, Commissioner of the Revenue
Pulaski County

We have heard comments that some people would be hesitant to buy property in these districts...but at this time the market has not indicated this.

Nadine C. Minnix, Acting Director
Office of Real Estate Valuation
City of Roanoke

I have researched the records concerning properties listed on the historic register, and find the listing seems to have no effect on property values here.

Audrey W. Cobb, Commissioner of the Revenue
Charlotte County

Assessed values changed upward at reassessment periods. The changes appear to be in line with other reassessments.

Irving J. Arnold, Commissioner of the Revenue
Nottoway County

The values have risen, in general, comparable to other non-listed properties in their respective areas.

R. A. Rush, Assessor
Prince George County

Therefore, it would seem reasonable that, at worst, the listing of property on either of the two registers, would have no effect on value, but most likely, at least in the City of Norfolk, such listings would enhance value.

Wayne N. Trout, Real Estate Assessor
City of Norfolk

I am puzzled that owners cite lack of interest by developers as a basis for compensation for listing.

Courtney P. Baker, Commissioner of the Revenue
Lexington

I am of the opinion that the problem being experienced is one of perception; not knowing the true facts concerning the Registers.

William A. Diggs, Director
Dept. of Real Estate Assessments
Chesterfield County

The Exceptions

While no one responding to the Department's survey indicated that the state and federal registers systematically depressed property values, the Department did receive two reports on individual cases where some reduction was attributed to the state's historic designation. Two other responses included some qualifying remarks. Each of those reports is summarized below.

Harrisonburg Deputy Real Estate Assessor June W. Hosaflook reported on the four recognized landmarks in that city. For three of the buildings no relationship between state recognition and assessed value was cited. For the fourth, the Anthony Hockman House, the following was offered:

The assessed value of the improvements decreased in 1983. There appears to have been consideration of the historic nature of the building by the appraiser as evidenced by a note of 'Landmark' on the assessment card. Since then, no such remarks have been made and the value has increased.

In response to a follow-up inquiry Ms. Hosaflook confirmed that the 1983 per square foot value of the building was a bit lower than that of surrounding properties, that there was no explanation beyond the appraiser's "Landmark" note, and that such a distinction is not reflected in subsequent assessments.

Stafford County Director of Assessments James H. Guy generally supported the notion that landmark designation does not affect market value, but he offered some qualifying remarks. He noted that the locally imposed zoning restrictions, along with location of most of the properties in the flood plain, caused some decrease in the value of properties in the Falmouth Historic District. He also stated,

I feel that most of the properties listed on the Virginia Landmarks Register may require a longer period of time on the real estate market...but the fair market value will not be decreased. The assessed values of most listed properties have risen or fallen as the economy dictates.

Charlottesville Deputy Assessor Roosevelt W. Barbour, Jr. indicated that assessed values were not affected by state or federal recognition. In reference to locally imposed historic zoning designation he said,

We have noticed instances in which potential owners have encountered difficulties when planning developments. The landmarks must be protected and the development has to be worked within some forms of limitations. Thus the marketability might be affected.

Finally, Culpeper County Commissioner of Revenue James F. Shive offered some general comments and some comments specific to the Brandy Station Battlefield designation:

A cursory examination of the properties listed would tend to indicate that the assessed values have not been impacted by their listings. Their values tend to rise with other similar properties that are not listed.

However, there is one situation that seems to indicate a very negative impact on value....[T]he representatives of Lee C. Sammis...feel that the designations have prohibited the property from achieving its highest and best use. They also feel that their agricultural property, which has certain residential possibilities, has also been negatively impacted due to the federal definition of "undertakings." I have not thoroughly investigated the validity of their position, but I tend to feel that the value of their property has been negatively impacted.

Conclusions from Assessment Survey

What caveats must be attached to the results of the survey? As noted above, assessments follow the market rather than precede it. Consequently, assessment histories are good reporters of how the market has behaved in the past without necessarily being accurate predictors of how the market - especially in a developing area - will behave in the future. Thus, the speculative value of a piece of property today based on future development potential will not be fully reflected in an assessment until some subsequent sale or development of that property confirms or alters the speculation.

Nevertheless, several conclusions can be drawn from the information provided by local Assessors and Commissioners of the Revenue. First, state and federal designations clearly take no existing value from designated properties. Second, local real estate markets show no discernible trend toward singling out designated landmarks as less desirable than similar undesignated properties: numerous responses said routinely that assessment histories and/or market values for similar designated and undesignated properties are comparable. Third, there is no pattern of distinction among the responses based on geography. Local officials from suburban counties, from urban cores, and from rural areas all provided remarkably similar reports and observations. Fourth, local officials made no distinction between designated open land and designated structures. Fifth, while landmark designation may or may not influence some local markets, there is no indication that the designation dictates to any markets.

V. PUBLIC COMMENT

As a part of its study, the Department sought public comment on the questions raised by SJR 162. In particular, the Department sought information on any specific cases in which designation of a property as a landmark had led to some measurable loss of the property's value. The Department advertised and held four public hearings, one each in Richmond, Prince William, Norfolk, and Roanoke. The Department also used its own newsletter, "Footnotes," to solicit written comments. That newsletter is sent to a mailing list that includes, among others, members of the General Assembly, representatives of all Virginia counties and cities, planning district commissions, and over 800 individuals identified as owners of property on the Virginia Landmarks Register.

The Public Hearings:

The substance of both oral and written comments is discussed in greater length below. Prior to that discussion is a brief profile of the public hearings themselves. The first hearing, in Richmond, drew an audience of 55, of whom 18 offered comments. A majority of those commenting said that, while designation of buildings may well have a positive effect on the value of the buildings, designation of open land could have a negative effect on that property's value. Of the 14 people offering such a comment, three were from eastern Henrico County near the National Park Service's Richmond Battlefield Park, while six were representing interests in the area of the Brandy Station Battlefield in Culpeper County. Five other individuals stated their belief that there is some negative effect of designation on developable land. Three individuals from Richmond and one from Charles City County offered comments to the effect that formal recognition as landmarks has enhanced the value of historic properties with which they were familiar.

The second hearing, in Prince William, was attended by 60 people, 27 of whom offered comments. With the exception of one individual who said that designation did not affect property value, all other comments were to the effect that historic designation of undeveloped land has a negative effect on the value of that land. Eleven of those individuals were from the area of the Bristoe Station Battlefield, while seven were from Brandy Station. Three were from Madison County.

The Norfolk hearing attracted six people, including two from eastern Henrico who had also attended the first two hearings. Two residents of the Ghent Historic District in Norfolk spoke both of the positive value designation has had on their neighborhood and of their interest in seeing their historic district boundaries expanded. One resident of Portsmouth said that if the government takes property it must pay for what it takes.

In Roanoke 20 people came to the hearing, and 11 offered comments. Eight of those commenting indicated that landmark recognition has proved beneficial to property value in the cases with which they are familiar. All of the individuals speaking to the positive effect of recognition were from Roanoke and several surrounding counties. A representative of the Virginia Farm Bureau from Richmond offered the contrary view that designation could hamper a farmer's ability to sell his or her land. In addition, two individuals from eastern Henrico spoke of the need to allow property owners to veto any proposed historic designation by the state.

The Comments:

All together the Department received oral or written comments from 110 individuals and organizations. Of this total, 74 offered the belief that historic designation can have a negative effect on the value and/or marketability of property to the extent that property owners should be compensated for such effect or they should be allowed to veto any proposal for identifying their property as a landmark. Thirty-six comments presented the opposite view that historic designation represents no taking of property, that compensation is therefore not appropriate, and that in their experience historic designation has improved property values. The comments representing these opposing points of view are discussed below.

Comments in Support of Compensation

Of the 74 comments supporting this point of view, 58 came from one of three places associated with the Civil War: 11 came from Bristoe Station in Prince William County, 15 came from Brandy Station in Culpeper County, and 32, representing 19 households, came from an area near the Richmond National Battlefield in Henrico County. An important theme of many of these comments was that the impact of historic designation (virtually no one acknowledged any distinction in effect among the various kinds of designation discussed above) on undeveloped land is very different from its impact on structures. These commenters acknowledged that identification as a landmark could well enhance the value of a structure by encouraging its rehabilitation in various ways, but they argued strongly that the very same designation must be recognized as having a negative effect on the value and marketability of undeveloped land, because the designation has the effect of discouraging any development on that land.

This discouragement, it is argued, takes several forms. First, the designation can simply introduce doubt into a local real estate market, especially in areas of recognized development potential. It is argued that the interest of potential buyers can be chilled because they believe the designation will in some way hamper them or will some day lead to additional restrictions not now in effect, or will some day lead to seizure of the land by some level of government.

Second, but related to the first, is the argument that recognition of a landmark by the state or federal government may influence a local governing body's subsequent decisions on rezonings necessary to allow for full development of the land. The commenters argue that by making a statement that might make the local governing body less sympathetic to such rezoning petitions the state may dampen the interest of potential buyers when that interest is dependent upon obtaining a higher zoning category.

Third, some commenters take note of the additional requirements imposed by Section 106 of the National Historic Preservation Act on private or public developers whose projects are dependent on some federal funding, permit, or other approval. Because gaining federal approval for their project may take additional time and/or cost additional money, the commenters argue that the land on which the federally sponsored project is proposed has been devalued. Similarly, some argue that public agencies will be hindered in carrying out public improvements necessary to support private development.

Boiled down to its essence, the argument for compensation is not that the land has been taken by the government, or that use of the land has been prohibited, and not that sale of the land has been blocked. Instead, the argument is that the state and federal designations' "influence" and "uncertainty" are such that in some cases a willing seller may experience more difficulty or require more time or be unsuccessful in finding a buyer willing to pay the asking price, that in some cases a local governing body may be influenced by the designation in its rezoning decisions, and that in some other cases a developer or an agency of government may spend additional time and money meeting federal requirements. Those seeking compensation argue that the ability of state and federal designation to influence the local market for developable land, as well as to influence future development of that land, must be regarded as a compensable taking. Their sense of compensable loss is geared not to existing use of the land but to its development potential: any action that may slow, mitigate, or increase the cost of development is regarded as a financial impact for which the government must pay. As some of the comment below indicates, some proponents of compensation see an adverse local rezoning decision as a taking of property.

Typical of the comments that sounded one or more of these themes are the following.

It is apparent...that even the threat of a label on a property affects the value of such property.

Albert and Claire Rollins
Bristow

Our [Prince William County] Comprehensive Plan...states "The Designated Cultural Resources (DCR) classification, as reflected by the Long Range Future Land Use Plan Map, is not designed to prevent development but, rather, to identify sites of important cultural, and/or historical importance. Development that would affect these sites should occur in accordance with the provisions set forth in the Cultural and Historical Resources Plan Chapter of the Comprehensive Plan. Primary uses within the DCR designation are those reflected by the underlying land use classification. When more than one such classification exists, the one allowing for the lowest degree of development intensity should prevail." This clearly states a lower degree of development should prevail, thereby reducing the value of the property...If property values are decreased as a result of historic designation, then logically the owner must be compensated, unless he/she choose not to be.

Patricia A. Bradburn, Catharpin
Citizens Forum for Truth & Progress

Section 106 requires that every federal agency take into account how each of its undertakings could affect historic properties. The applicability of 106 Review is extremely far reaching...The resulting limitations preclude the property from developing at its highest and best use. This uncertainty results in a conservative and artificially low valuation of a property.

Michael H. Armm, Culpeper
Development Director, Elkwood Downs

The limitations and uncertainty introduced to the development process as a result of a property's designation as an historic landmark may result in a diminution of value. At the very least, the additional limitations and uncertainty associated with a property that has an historic designation is likely to result in a smaller pool of potential purchasers/developers.

Myra C. McCain, Alexandria
Appraiser, Delta Associates

It is my feeling that historic designation unsolicited and opposed by the landowner has the same economic effect as condemnation and just compensation is due.

Lyle H. Thompson, Culpeper
Broker

Any weakness in an economic development portfolio will significantly impair the ability to market the site...The most basic component of an industrial site marketing portfolio is the site itself...It must contain nothing that would impede its legally zoned uses, or create questions as to that use...Historic designation raises that type of question. In the most elementary terms, it is a buyer's market. If there is a question mark regarding a site, there are too many without them that are available.

James C. Witherspoon, Director
Culpeper Co. Chamber of Commerce

The following sets of quotations reflect the four basic points that were made in a similar fashion in virtually all of the comments submitted by residents of eastern Henrico County:

It is clear that the "tax assessed value" is unrelated to the actual "market value" of real property which has been "designated historic"! [Robert W. Burnham]...Local real estate tax assessments do not take into account the market forces which drive the prices of property down. [Mrs. C. G. Welch]

You must distinguish raw land devaluations (without historic structures) from any investigation into improved properties with historic structures on them. [John L. Yahley]...Clearly, property without standing historic structures will be

more greatly reduced by the designation than will a parcel which may be able to qualify for tax incentives and/or funds for making improvements... [Mrs. Karla B. Fridley]

There is no comparison between property that is designated at the request of or with the agreement of the property owner, and private property which is designated historic over the objection of the property owner. [Thomas R. Moore]...I think it is clear that if the property owner does not want the designation, then it is because it is a financial burden to him. [David E. Fridley]

When the property has been devalued, and was designated over the objection of the property owner, then morally, if not legally, the property owner should be compensated. [Fred Hedgecoth]...If you "designate" you must compensate! [Reginald H. Nelson, IV].

While these difficulties do not appear to meet the current judicial test of a compensable taking, those who argue for compensation believe that the concept of compensable taking needs to be broadened to account for experiences like those set out below.

Mr. Frank Winslow of Bristow commented at the Prince William public hearing that he had previously sold his land, but that in 1991 he has had to forgive the annual payment from the buyer. Mr. Winslow indicated that the historic designation necessitated this action, but he offered no further explanation.

Culpeper County Planning Director John C. Egertson reported on the cancelled sale of an 813 acre tract at Brandy Station. The contract documents cancelling the sale cite "the adverse real estate market, war conditions, and general bad economic conditions" for the cancellation. A subsequent letter from William L. Bryant to Mr. Egertson explained his decision to cancel his purchase:

[T]he clock kept ticking unmercifully; time was killing us, and as the expenses of carrying this 813 acre [parcel] became unbearable in light of the risks to the investment, which were analyzed; we felt that we would not be able to overcome, in a reasonable period of time, those obstacles placed before us by the the Civil War Historical advocates and that we could not use the property in a sound economical beneficial sense. All of this had caused our hopes to fade.

Ms. Barbara P. Aylor of Culpeper reported that her family had received in 1988 an offer of \$15,000 per acre for their land, but that in 1989 immediately after state recognition of the battlefield the family received an offer of \$2,000 per acre.

Culpeper realtor Lyle H. Thompson reported

During the past few months we have had several specific incidents of customers refusing to consider the purchase of historically designated properties as well as many more general statements from customers concerning the negative aspects of this designation.

Mr. and Mrs. Albert Rollins of Bristow reported on the loss of the sale of their land. The letter cancelling the contract reads in part,

After much consideration, Land Management Groupe, Inc. has decided not to proceed beyond the feasibility study phase of the contract....We are sorry that we were not able to pursue the purchase of your tract at this time. We simply felt that the historical significance of the site would place the additional...deposit at extreme risk. If you feel there might be some benefit in discussing the possibility of Land Management Groupe pursuing the rezoning without money at risk, we would be more than willing to talk to you."

This letter is dated January, 1989, two years before the state finally took action to approve the Bristoe Station Battlefield nomination; however, the Rollinses offered this cancellation as proof that "even the threat" of historic designation can cause compensable harm. The Rollinses report that no developers are currently interested in their land.

Comments Opposed to Compensation

The 36 comments in opposition to compensation for the owners of property designated as historic came from a combination of individuals, nonprofit organizations that promote historic preservation, and government agencies. The comments came from the various regions of Virginia; there was no discernible concentration of comments from any one area or set of areas. Three comments came from property owners within the designated Brandy Station Battlefield; no comments came from within the designated Bristoe Station Battlefield, though three comments came from people who had been proponents of its designation.

An important theme among these comments was the distinction between existing use of property and an anticipated change in the use of that property. Commenters agreed that, if historic designation had the effect of denying a property owner the ability to continue the existing use of the property, a compensable taking may have occurred; however, these commenters noted, action that affects or influences how a property will be developed for more intense use cannot be considered a taking of existing property. Other commenters made reference to case law generally or to specific cases to emphasize that ordinances that regulate property for purposes of historic preservation have regularly been held by the courts not to be a taking of property.

Some comments noted the nonregulatory nature of the Virginia Landmarks Register. Others emphasized that the federal Section 106 review process tied to listing in or eligibility for the National Register of Historic Places 1) applies only to projects dependent on federal funding or license, and 2) does not mandate preservation but instead calls on federal agencies to take preservation values into account in their decision making. One commenter noted further that unfettered access to federal funding and permits cannot be considered to be among the rights of property ownership.

While those seeking compensation pointed to examples of historic designation's negative effect on developable land, opponents of compensation cited various examples of neighborhoods and commercial areas in Virginia and nationwide that had benefitted financially in the wake of designation. These comments, which were a combination of personal experiences and analytical studies, noted that the market for such properties places some premium on historic value, so that state and national recognition along with local protective zoning are seen by prospective buyers as positive elements.

Finally, some comment emphasized - both generally and with specific reference to Bristoe Station and Brandy Station - that the current major recession and other market factors have far more to do with any loss of speculative value in land than historic designation does. These comments also pointed out that local zoning and the basic principles of supply and demand are the significant determinants of a property's value in the real estate market.

A sampling of the comments to the effect that compensation for historic designation is not appropriate is set out below.

[The Virginia Association of Counties] would not be in favor of any legislation which would say that designation of a place as a historic landmark constitutes a constitutional taking of property. If this were to be done the next step would be to say that a denial of a rezoning would be a constitutional taking of property for which local government should compensate the owner.

C. Flippo Hicks, Staff Counsel
Virginia Association of Counties

The purchase of land is considered an investment and therefore has a risk factor. What the future holds for land values or the stockmarket is anyone's guess....Since several factors comprise the value of property, to single out historical designation alone as having future negative financial impact is erroneous....It seems to me in these uncertain times, that landowners are reaching for straws to determine exactly what has possibly lowered (if, in fact, the value is lower) their property values. The landowners are trying to point a finger at one specific

reason when many may exist. To enact legislation for compensation for any single issue would set a serious precedent for compensation for other singular issues.

Karen Berkness, Director, Historic Properties,
Farms, and Estates
Virginia Properties, Richmond

If a man buys a piece of land and hopes to change its use, he has no right to expect any guarantee of success. He has chosen to take a risk, his project may be inadvisable for a number of reasons...Briefly, if historic designation prevents the continuation of an established use, there is a possibility that compensation may be in order. If historic designation is perceived as preventing a potential land use, no compensation is called for. I doubt anyone could reliably determine the "potential value" of a piece of land, or define what use a piece of land could eventually be suited for. I do not believe we want to hold any entity responsible for every real or perceived change in the possible future of a piece of land....No compensation is due to a landowner who cannot obtain government funding unless he is treated differently from all other applicants or unless the government itself has made commitments to the landowner which affected his decisions regarding his property...No landowner has a right to expect or receive such money.

Christina M. Stockton
Rixeyville

The much-maligned Section 106 Review process does not govern private undertakings (i.e. those free from Federal funding, licenses, and permits), and for Federal undertakings it merely asks Federal agencies to consider the effects of their actions on significant historic resources. While historic designation can conceivably have some positive or negative effects on land values, the notion that such hortatory acts regularly diminish land values is patently absurd.

B. B. Mitchell, III, President
Brandy Station Foundation

I have been associated with Jack Samuels Realty as a real estate salesperson for the past 15 years and have found that placing land in Historic District [status] does not devalue the property.

Dana Faulconer
Orange

These findings indicate that properties within Fredericksburg's historic district gained appreciably more in value over the last twenty years than properties located elsewhere in the City. While we cannot attribute the higher rates of increase solely to historic district designation, as it is only one of several measures taken by the City to encourage community preservation in this area, it appears likely that the historic district designation has helped, not hurt, property values within the district.

Government Finance Research Center
Washington, D.C., 1991

There is no legal requirement for compensation of owners of historic designated properties. The U. S. Supreme Court has specifically upheld New York City's landmarks preservation ordinance against the type of constitutional challenge which would require such compensation, in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). It would be inappropriate on policy grounds to single out historic preservation regulation for compensation, when the vitality of any community's existence is based on a variety of governmental actions that affect private property interests to one extent or another (including, for example, building codes, zoning laws and subdivision laws, sign control ordinances, pollution controls). In a recent decision, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S.470, 491 (1987), the Supreme Court observed: "Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."

As Justice Holmes wrote in 1922, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393,413 (1922). In Virginia, if owners of designated historic properties are provided compensation, property owners will be encouraged to seek compensation for all types of land use restrictions, placing local jurisdictions in the position of choosing between providing compensation or permitting uncontrolled development.

David A. Doheny, Vice President for Law and
Public Policy
National Trust for Historic Preservation

To allow the speculation of the 80's to dictate the policy of the future is unrealistic.

Betty H. Rankin, Catharpin
Save the Battlefield Coalition

I would first like to observe that the timing of this study couldn't be worse - coming in the midst of the State's most severe real estate recession in more than 15 years. It concerns me that property owners in recently designated historic districts such as Brandy Station might attribute any decline in value to historic designation rather than market forces. To give you an example of the magnitude of the market decline (and previous inflated values) I will cite one land sale in Culpeper County reported in the Culpeper paper on October 3, 1991. A 95 acre parcel which had been intended as part of a proposed "multi-use development" sold in September for \$191,000. It had previously been sold in December 1987 for \$810,000. Thus there has been a 76% decline in "value" in less than four years.

[I]n an inflationary real estate market, people's perceptions about the value of their property are distorted. Like any commodity, property price is inversely related to availability. Thus, while a few properties offered for sale may command high prices, if everyone put his land on the market at the same time, there would be a rapid deflation (as we are now experiencing).

Robert T. Dennis, President
Piedmont Environmental Council

As owners of land which is included within the boundaries of the Brandy Station Battlefield Virginia Historic Landmark, we would like to go on record as supporting the Virginia Historic Landmarks program as it currently operates. We believe that the identification and recognition of the Commonwealth's bountiful historic resources is of great importance to all Virginians.... Furthermore, we believe that neither the value of our land nor our right to develop it has been diminished in any way by its inclusion in the Brandy Station Landmark historic district. It is clear to us that designation as a Virginia Historic Landmark does not infringe upon private property rights in any manner.

Gordon Grayson
Upperville

My sister and I own land within the Brandy Station historic district...We do not feel that the value of our land nor our right to develop it has in any way been diminished by its historic designation.

Audrey C. Austin
Brandy Station

In early 1987 when the County proposed to place a landfill on a portion of Bristoe Station Battlefield, the estimated buying price per acre in the Bristoe area was \$10,000 an acre. I obtained this figure from the County's Public Works Department. I assume it was an average of agricultural and industrial zoned property in the area.

Note: The County identified a portion of Bristoe Station Battlefield as a potential landfill site on January 12, 1988. On February 2, 1988 the Board of County Supervisors (BOCS) resolved, in response to the outraged property owners of Bristow - who could not understand how the County could propose a landfill on such an historically significant site - that because the location had "been determined to be of historical significance to Prince William County" and the BOCS did "encourage the preservation of the area" the Bristow site should be dropped from consideration as a landfill site. The same property owners vehemently objected to listing Bristoe Station Battlefield in the National Register nine months later.

In the last half of 1989 when the Comprehensive Plan update was underway, the estimated price was \$40,000 per acre. If you take this at face value, property value in the Bristow area quadrupled within a two year period and after the County identified it as being historically significant.

I have no idea what the current property values are; I imagine they have gone down as they have all over Northern Virginia and especially in Prince William County where land speculation was particularly pervasive. My point is that there are many factors that influence property value and many of those factors have changed in the Bristoe area over the last few years.

Jan Townsend
Alexandria

VI. CONCLUSIONS

Senate Joint Resolution 162 called for an examination of "compensation for property designated as a historic landmark. The Department shall consider the financial impact that designation of land as a historic landmark has on its owner; whether compensation for loss in value is advisable."

In the broad sweep of its language, however, the resolution makes no distinctions among the historic landmark "designations" made by the federal government, the state government, or the local government, nor does the resolution indicate that each of those designations can have a different impact on the property designated. In its treatment of "financial impact," the resolution's preamble appears to focus ultimately on local government actions, but it contemplates the possibility of a broader range of compensable actions than has been accepted heretofore: "comprehensive land use planning and zoning may place restrictions on the development of property and change the value of the parcel of land." The resolution takes note of the incumbent U. S. Secretary of the Interior's efforts to encourage local planning and zoning decisions that will offer some protection to significant battlefields. Concern over the impact of state and federal designations on local land use decisions was made plain in subsequent public comment: preservation advocates may cite these designations in local land use debates, and local governing bodies may be influenced by these designations in their consideration of requests for upward rezoning of land.

In carrying out this study the Department of Historic Resources has attempted to examine the broad range of questions raised by the resolution, in order to determine whether any of the various historic landmark designations affects designated property in such a way that the owner of the designated property should be compensated in return for that designation.

FIRST, WHAT IS THE PRECISE LEGAL EFFECT ON PROPERTY WHEN IT IS ADDED TO THE VIRGINIA LANDMARKS REGISTER OR THE NATIONAL REGISTER OF HISTORIC PLACES? WHAT IS THE PRECISE LEGAL EFFECT OF LOCAL HISTORIC DISTRICT ZONING? DO THESE LEGAL EFFECTS IN AND OF THEMSELVES CONSTITUTE COMPENSABLE ACTIONS?

It is clear that the Virginia Landmarks Register has absolutely no regulatory effect on private property. It is equally clear that the state register does not have the effect of "setting aside" designated land or prohibiting development of that land in accordance with local land use decisions. The state register does not prevent the destruction of designated structures. State designation may or may not prove to be a persuasive advocacy device in any given situation, but the ultimate decision-making authority of the property owner and the local government is in no way altered by state designation.

In light of the total absence of any regulatory restrictions, there is no basis for concluding that the legal effect of the Virginia Landmarks Register is such that a property owner should be compensated in return for the designation, whether the property owner objects to the designation or not.

Likewise, the National Register of Historic Places does not regulate the private property owner. The National Register prohibits no action by a property owner or by a local government. However, the National Register does have a significant effect on federal undertakings, including undertakings funded or licensed by the federal government but carried out by nonfederal agencies and individuals. The nature of that effect on federal undertakings is important to this discussion: regardless of whether historic resources have already been identified in the project area, the federal agency considering a project or considering a grant or license must take into account the project's impact on historic resources. The federal project sponsor does not surrender its authority to determine whether and how the project will go forward, but the consultation process, itself, can cause increased costs measured in time and money; in addition, designing or redesigning the project so as to minimize or avoid damage to historic resources can increase the cost of the project. In short, doing business is not prohibited, but the cost of doing business can be increased. Similarly, federal project costs are often increased by the legal imperative to meet a whole host of public concerns. The increased costs associated with meeting these other far more stringent governmental standards are not costs the government reimburses to a private licensee, nor are such costs the responsibility of the agency that promulgated the protection standard.

Judged against the range of other federal resource protection requirements or against the full range of local land-use regulations, the federal historic preservation standards are mild - especially so because project sponsors retain the authority to decide whether and how their projects

will go forward. It is equally important to emphasize that the federal review process for historic preservation does not apply of its own accord to nonfederal projects. The review process applies to nonfederal actions only if those actions are dependent upon some other federal grant or license. The vast majority of private development projects - even those including privately built streets that are subsequently taken into the state's secondary road system - are never reviewed at the state or federal level for their impact on historic resources.

If those project costs associated with going through the Section 106 review process or with minimizing or avoiding damage to historic resources are to be considered reimbursable to the project sponsor by the State Historic Preservation Officer or by the federal Advisory Council on Historic Preservation, or by the National Park Service, then all costs for protection of other resources must similarly be deemed to be the responsibility of the resource protection agencies, rather than of the agency or organization or individual who proposes to affect those resources. Such a system of compensation is at odds with overwhelming legal precedent and would represent a profound change in the ability of government as representative of the public to operate in pursuit of the public's interest.

In contrast to state and federal designations, local historic district designation has a direct effect on every property designated. The local designation is a function of the local zoning ordinance. As the summary of case law shows, virtually all of the legal challenges to historic preservation regulations have come as a result of the imposition of local protective measures.

As that summary also clearly shows, the courts have consistently upheld the local historic district zoning efforts as a reasonable exercise of local police power; the courts have rejected the claim that such regulations constitute a taking of property for which compensation is due. Compensation in return for local historic designation would be inconsistent with the directly pertinent case law, and it would fly in the face of the more general principles underlying a local government's ability to govern. As the Virginia Association of Counties pointed out in the comments it submitted for this study, a finding that historic designation is a compensable action leads very quickly to a finding that any local zoning decision that provides for less development than the property owner wishes is also a compensable action.

SECOND, IF THE EVIDENCE INDICATES THAT LOCAL, STATE, AND FEDERAL HISTORIC DESIGNATIONS ARE NOT TAKINGS OF PROPERTY THAT CROSS THE CONSTITUTIONAL THRESHOLD REQUIRING COMPENSATION, IS THERE OTHER EVIDENCE TO SUGGEST THAT STATE AND FEDERAL HISTORIC LANDMARK DESIGNATIONS SYSTEMATICALLY DEPRESS THE RECOGNIZED VALUE OF THE DESIGNATED PROPERTIES OR OF A SPECIFIC CLASS OF DESIGNATED PROPERTIES?

This study drew the intense interest of property owners in or near three recognized Civil War battlefields in Prince William, Culpeper, and Henrico Counties. The fundamental argument of these property owners is that designation has a negative effect on a specific kind of property: open land. While some of the more extreme comments incorrectly suggested that designation sets the land aside and prohibits development, and while others argued simply that if their land is recognized over their objection they should be paid, the heart of the argument is that state and federal historic designation of undeveloped land raises doubts about how much development the locality will ultimately approve. This element of doubt, it is argued, lowers the price developers are willing to pay for the land and reduces the number of potential buyers for the land.

A handful of examples of cancelled contracts, lesser offers, and one forgiven installment payment in Prince William and Culpeper were offered as evidence of the harmful effect. One of the contract cancellations, which occurred two years before the state or federal government approved the historic designation, was offered as proof that even the possibility of historic designation was enough to affect the local market in a way that merits compensation. On the other hand, a few property owners within the designated battlefield in Culpeper commented that they felt the value of their land had in no way been diminished by the designation. Still others commented that open land in Prince William and Culpeper had been the object of intense speculation and dramatically rising prices in the late 1980's (despite, one commenter said, Prince William County's previous acknowledgement of Bristoe Station's historic significance), and that the current, ongoing recession in the real estate market is the overriding reason for any decline in the speculative value of undeveloped land.

Leaving aside the broader question of whether, in any event, government action that may influence the speculative real estate market is a compensable action, the Department sought first to find out from reliable data whether designated historic properties in Virginia have shown over time any pattern of reduced value compared to neighboring or similar properties in their communities. In relying on data on the history of assessed values for designated landmarks the Department acknowledges that the assessment of a given property - particularly an undeveloped or sparsely developed property - at a given moment may well not reflect or predict what the next buyer of that property will be willing to pay, especially if the property is in an area of increasing development. However, the Department does believe that, because assessments do follow the local market, an examination of assessments

over a period of years can show whether the local market has regarded designated historic properties in any manner different from similar undesignated properties.

The clear and overwhelming message from the assessment data submitted to the Department and from the personal observations of local assessment officials is that state and federal designations have not affected local real estate values in any significant way. Values for designated properties have increased all over the state in a manner that is consistent with the values of neighboring properties. While the advocates of compensation asserted a clear difference in impact on undeveloped land as opposed to structures, assessment data shows no such pattern over the twenty-five year history of the state and federal landmarks program. While the advocates of compensation argued that assessment figures are unrelated to the actual real estate market, various local assessors were very clear in saying that "the market" indicated no loss in value as a result of designation.

Because the advocates of compensation argued that designation has the effect of limiting or prohibiting development of "raw" land the Department sought examples of land within designated landmark boundaries that has subsequently been developed. Because those advocates referred to designation as a taking or setting aside of property, the Department also sought examples of designated structures that have subsequently been demolished. Either case reasonably demonstrates that an owner's ability to alter or destroy a designated landmark has not been taken away by that designation. The short lists offered in Appendix B are not intended to be exhaustive, but merely illustrative of the fact that development of land and demolition of structures can and do occur within the boundaries of designated landmarks.

THIRD, IF THERE IS NO CONSTITUTIONAL TAKING, AND IF THERE IS NO EVIDENCE TO SUBSTANTIATE THE CLAIM THAT PROPERTY VALUES ARE SYSTEMATICALLY DEPRESSED BY HISTORIC DESIGNATION, IS THERE SOME OTHER WAY IN WHICH A PROPERTY OWNER MIGHT SUFFER A LOSS AS A RESULT OF HISTORIC DESIGNATION FOR WHICH THE GOVERNMENT SHOULD CONSIDER COMPENSATION?

If the question of compensation is examined solely from the viewpoint of a seller of a landmark designated by the state and federal governments, and if that specific seller can demonstrate that a potential buyer either refused to buy or made some measurably reduced offer on account of "uncertainty" about the effects of these designations on a desired rezoning, is the seller due some compensation from the state and federal governments? If that same buyer makes some measurably reduced offer and cites anticipated costs of complying with Section 106 as the reason for the reduction, is the seller due compensation from the state and federal governments? In any case where the sale and/or development of the designated land is contingent on an upward rezoning of the land, is the owner due compensation from the state and federal governments in the event that the local governing body fails to grant the full rezoning request and cites protection of the historic resource as the reason for its action?

Affirmative answers to each of these questions form the basis for the pro-compensation arguments put forward during the course of this study. Most of the owners of designated land who commented in favor of compensation for designation were not concerned with how they would cope with the legal effects of designation. Instead, they were owners expecting to sell their land, and so were expressing concern for the designation's possible influence on the return they would realize from that sale. For these owners the precise legal effects of the various designations is the lesser concern. For these owners the primary consideration is whether the speculative real estate market responds positively or negatively at any given moment to what any governmental agency may say about the historic significance of the commodity they have for sale.

Given the nature of this concern, the question to be answered by the state is whether the "hortatory" effect of state and federal designation calls for compensation to a property owner who indicates that some subsequent public or private decision deprived him of a part of his anticipated return in the name of protecting the historic resource.

The Department believes that the Virginia Supreme Court's 1976 Green Springs decision remains the valid answer to this question. Property rights are not determined by the state's action; neither is the local government required to take any action pursuant to the state's recognition. Furthermore, the United States Supreme Court clearly affirmed in Penn Central that local government action to regulate significant historic resources in the public interest is not, itself, a compensable action. If the effect of state or federal

action is simply to encourage a noncompensable regulation by local government, no logic can sustain the idea that the encouragement, itself, is compensable. Compensation from the state cannot be the answer for a property owner dissatisfied by his return in the speculative real estate market; neither can compensation from the state be the answer for a property owner dissatisfied by a zoning decision from the local governing body.

If the state must pay compensation in those cases where its action is "not couched in terms of command," what becomes of the remaining state and local actions that do in fact mandate a certain behavior at some private cost?

FINALLY, SHOULD THE STATE AVOID THE POSSIBILITY OF CONTROVERSY SUCH AS HAS ARISEN AT BRISTOE STATION AND BRANDY STATION BY RESTRICTING ITS HISTORIC RESOURCE IDENTIFICATION PROGRAM TO ONE THAT ALLOWS THE STATE TO IDENTIFY ONLY THOSE HISTORIC RESOURCES WHOSE CURRENT OWNERS WISH TO HAVE THEM IDENTIFIED?

During the course of this study a number of compensation advocates argued that an alternative to providing compensation was to provide property owners with a veto over the state's ability to identify a landmark. They argued that no compensation was necessary whenever a property owner approved the designation, but that objecting owners should be given either veto power or money. One commenter noted that compensation is not a practical solution to the "problem," so that owner veto is the only realistic way to avoid any harm from historic designation.

The Department can certainly agree that limiting the state's actions to those that have full support from property owners will cut down on the kinds of disagreements that have arisen in Prince William and Culpeper. However, the Department does not believe that avoidance of disagreement is the fundamental purpose of state government in general or of its historic preservation program in particular.

The fundamental purpose of the state's historic preservation program since its inception in 1966 has been to create a full inventory of Virginia's historic resources and to encourage but not require the protection of the most significant of those resources. If the state's ability to identify those significant resources is dependent upon the current owner's consent, the fundamental purpose of the program cannot be achieved. No intelligent judgments can be made about which resources are worthy of preservation if the resources cannot all be identified. A resource inventory that is compromised by current owner veto ceases to reflect the resource accurately, and so becomes of seriously diminished value as a planning tool.

Much of the state's historic preservation program is dependent upon and aimed at a supportive constituency that sees preservation not only as an important tool for keeping the significant tangible reminders of our past, but also as a successful device for addressing many of today's needs, such as downtown revitalization and affordable housing. For that constituency the Department's ability to "encourage" preservation takes the form of welcome support. Just as important in encouraging preservation, however, is the state's ability to operate in less friendly arenas at least to the extent of saying that a significant historic resource is a significant historic resource. Further, the state has a logical and necessary role in following up on such an identification by advocating sensitive treatment of designated resources to the degree possible in meeting the needs of today's society.

A significant part of the state's program is currently aimed at working for acceptable compromises in those cases where preservation is only one of several competing values that must be accommodated in the public interest. As noted earlier in this report,

to argue that the power of the state to exhort and encourage certain behavior is properly exercised only when a governing body and/or a landowner is already disposed to behave in the manner encouraged is to rob the state's historic preservation program of its fundamental meaning. Establishing such a premise for one program also clearly sets the stage for putting other similar programs on the same footing.

The Commonwealth's efforts to identify and encourage the protection of significant historic and archaeological resources carry out an important public purpose established by the General Assembly and validated by the courts. Similarly, the state's efforts to identify and protect other resources, along with local governments' efforts to regulate land use, serve important public purposes.

To argue that these valid public purposes cannot be served without the individual permission of each affected property owner is to invalidate the public purposes. The Department of Historic Resources recommends against any change that establishes a property owner veto over the state's ability to identify the historic resources of the Commonwealth.

* * * * *

In conclusion, the Department finds no basis for providing compensation to owners of designated landmarks generally or to any specific subset of owners, such as those whose landmarks include open land or those who object to having their property identified as a landmark. Neither can the Department find a basis for making the identification of resources with community value contingent upon individual owner assent to that identification. While the idea of historic significance may have contributed to some of the difficulties expressed by some property owners in Culpeper and Prince William, identical difficulties have been fully considered in the courts and have been found not to be compensable takings of property. The Department regrets the unusual level of anger, frustration, and fear that has arisen among those property owners over the recent designations of the battlefields at Bristoe Station and Brandy Station. However, the requested relief - i.e., money or veto power - is inappropriate in light of the relative mildness of historic designation's effect and is completely contrary to currently accepted principles of government's ability to pursue valid public purposes.

APPENDIX A

JURISDICTIONS RESPONDING TO ASSESSED VALUE SURVEY

Albemarle County	Henrico County	Shenandoah County
Arlington County	Henry County	Smyth County
Augusta County	Highland County	South Boston
Bath County	Hopewell	Southampton County
Bedford County	Isle of Wight County	Spotsylvania County
Bland County	Lancaster County	Stafford County
Bristol	Lexington	Staunton
Brunswick County	Loudoun County	Suffolk
Buena Vista	Lynchburg	Sussex County
Caroline County	Madison County	Virginia Beach
Charlotte County	Manassas	Warren County
Charlottesville	Martinsville	Waynesboro
Chesapeake	Mecklenburg County	Westmoreland County
Chesterfield County	Middlesex County	Williamsburg
Clifton Forge	Montgomery County	Wythe County
Colonial Heights	Nelson County	
Covington	New Kent County	
Culpeper County	Newport News	
Cumberland County	Norfolk	
Danville	Northampton County	
Dickenson County	Northumberland County	
Emporia	Nottoway County	
Fauquier County	Page County	
Floyd County	Petersburg	
Fluvanna County	Pittsylvania County	
Franklin City	Portsmouth	
Frederick County	Powhatan County	
Fredericksburg	Prince George County	
Giles County	Prince William County	
Gloucester County	Pulaski County	
Goochland County	Radford	
Grayson County	Rappahannock County	
Greene County	Richmond County	
Halifax County	Roanoke City	
Hanover County	Russell County	
Harrisonburg	Salem	

APPENDIX B

DEVELOPMENT AND DESTRUCTION WITHIN DESIGNATED LANDMARKS

Part 1. of the following list includes some examples of Virginia landmarks where substantial development has taken place within the landmark boundaries subsequent to designation. Part 2 provides some examples of individually recognized landmarks that were subsequently demolished. The list is merely illustrative and is not intended as a full catalog. For example, if this list were to focus as well on activities within designated multi-property historic districts such as Old Town Alexandria, Shockoe Slip in Richmond, or other urban areas, the list would include numerous demolitions of structures as well as many examples of new construction from all over the state.

Part 1. Development of Land Within Designated Landmark Boundaries

Poplar Forest, Bedford County
Magnolia Grange, Chesterfield County
Ellerslie, Colonial Heights
Mansfield, Dinwiddie County
Bel Air, Prince William County
Weblin House, Virginia Beach
Governor's Land Archaeological District, James City County
Roaring Springs, Gloucester County
Kingsmill Plantation, James City County
Waverly, Loudoun County
Powhatan Plantation, James City County
North Fork Valley Rural District, Montgomery County
Rippon Lodge, Prince William County
Waterford Historic District, Loudoun County

Part 2. Demolitions of Designated Structures

Christ Church, Norfolk
Crawford House Hotel, Portsmouth
James River and Kanawha Canal District, Richmond
Hayes Hall, Lynchburg
William H. Bowers House, Petersburg
Morrison House, Harrisonburg
Moss Tobacco Factory, Mecklenburg
Preston House, Smyth County