SPECIAL ANALYSIS

Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?

Many jurisdictions around the country have faced or are facing the issue of whether to include owner consent provisions in local historic preservation laws. Increasingly, such provisions are being slipped into historic preservation ordinances at the last minute as a point of compromise. For example, in San Antonio, the night before the scheduled adoption of a new, comprehensive preservation ordinance, the city agreed to a provision which requires that anyone initiating a request for landmark or historic district designation, other than the city, must first obtain the concurrence of the property owner(s). In Chicago, the city council included a provision requiring owner consent to designate religious properties into its preservation ordinance at the last minute, without a hearing or referral to the City Council Committee on Cultural Development and Landmark Preservation.

Efforts are underway to insert owner consent provisions into existing historic preservation legislation. Both Oregon and Florida are currently responding to intense lobbying efforts to incorporate owner consent requirements into their respective state planning laws. The District of Columbia is considering a proposal to amend its existing historic preservation law to require owner consent as a precondition to designation. In Vienna, Virginia, the Town Council recently approved a measure that would allow individual owners to opt out of an existing historic district.

The U.S. Supreme Court's decision in Penn Central Transportation Co. v. City of New York establishes that historic preservation ordinances without owner consent provisions are constitutionally valid. But is the reverse true? Are historic preservation ordinances with owner consent provisions legal? The article below, "Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?," raises some of the issues that state and local jurisdictions should consider before incorporating owner consent provisions into their own historic preservation legislation. This article suggests that there are some serious questions regarding the legality of such provisions, especially when final decision making authority is conferred to individual property owners.

Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?

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The role of property owners in the designation of landmarks or historic districts is an issue of increasing importance. Concerned with the impact of historic preservation laws on individual property owners, a number of local governments require owner consent as a precondition to regulation. In such cases, property owners are allowed to "opt out" of historic preservation laws without regard for the social and economic benefits of preserving historic resources. The end result is that fewer historic properties are protected.

Despite the proliferation of so-called "owner consent provisions," little thought has been given to their validity. Legislators include owner consent requirements in historic preservation ordinances as a means to placate wary property owners. Preservationists go along for fear that otherwise no historic preservation ordinance will be passed.

But are they legal? Owner consent provisions raise several serious questions. Do they, in fact, violate the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution as an unlawful delegation of authority to private individuals? Do they undermine the police power objective of preserving historic property for the general welfare? Are they consistent with state enabling authority?

By way of background, owner consent provisions in historic preservation ordinances appear in a variety of forms. One version allows property owners to "veto" historic designations through the filing of a formal letter of objection.[1] Another type precludes designation of property under a historic preservation ordinance, absent the express consent of the property

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[1]In Sarasota, Florida, for example, the Historic Preservation Board "may take no action on a proposed designation of an individual property if a statement of objection has been returned by the property owner."

owner.[2] Some ordinances allow property owners to formally protest a designation, thus triggering a super majority vote by the governmental body responsible for the designation.[3] In the case of historic districts, property owners may either affirmatively approve or veto historic designations by a majority vote. In Chicago, only religious property owners have veto authority. Under its ordinance, historic religious property may not be designated without the express consent of the property owner.[4] These provisions, in whatever form, seriously limit the ability of local governments to fulfill the mandate to protect historic property and the heritage of their citizenry.

I. Owner Objection and the National Register of Historic Places

The recent proliferation of owner consent provisions in historic preservation ordinances may be attributable, in part, to the inclusion of an "owner objection" provision in the 1980 Amendments to the National Historic Preservation Act (NHPA). Under this provision, private property may not be listed in the National Register of Historic Places if an owner formerly objects to the listing of his or her property by way of a notarized statement. In the case of historic districts, a majority of property owners must object to the listing.[5]

Following the lead of the National Historic Preservation Act, local

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[2]Section .053 of the Galesburg, Illinois ordinance provides that "any person, group of persons or association may request the designation of an historic preservation district by submitting to the secretary of the commission a petition for designation. This petition must include . . . (a) [t]he signatures of the owners of not less than 66 2/3 percent of all tracts located within the boundaries of the proposed district in favor of designation."

[3]Jersey City's ordinance provides: "As per N.J.S.A. §40: 55D-63, a protest against any proposed designation of a landmark or historic district may be filed with the city clerk, signed by the owners of 20% or more of the proposed landmark or 20% or more of the owners of property within the proposed historic district, or of the lots or lands extending 200 feet in all directions therefrom inclusive of street space, whether within or without the municipality. Such designation shall not become effective following the filing of such protest except by the favorable vote of two-thirds of all members of the city council." (Jersey City's ordinance also exempts property owned by nonprofit or tax-exempt organizations from the ordinance's requirements.)

[4]Preservationists challenged the constitutionality of this provision under the First and Fourteenth Amendments to the United States and Illinois Constitutions in *Alger v. City of Chicago*, 90 C. 2778 (N.D. Ill. Sept. 19, 1990). However, the merits of the case were never discussed because the lawsuit was dismissed for lack of standing. *See* 9 PLR 1121 (Oct. 1990). In addition to the due process concerns discussed in this article, owner consent provisions as applied to religious property owners raise both establishment and equal protection questions.

[5]16 U.S.C. § 470a(a)(6).

jurisdictions have included owner consent provisions in historic preservation ordinances to placate property owners. Little consideration, however, has been given to the substantive differences between the NHPA and state and local preservation laws.

The owner objection provision was incorporated into the 1980 Amendments to the NHPA in response to specific concerns regarding a tax disincentive that denied accelerated depreciation for buildings constructed on the site of property listed in the National Register of Historic Places. Individual property owners, represented by then-Representative Richard Cheney, had sought to include an owner consent requirement in the proposed amendments as a way of working around this disincentive.

Congress ultimately voted to add an "owner objection" provision (as opposed to an "owner consent" provision) to the proposed amendments. Preservation organizations and individuals from around the country had objected to the inclusion of any form of owner consent on the basis that the interjection of the subjective views of the property owner would compromise the professional integrity of the National Register of Historic Places. To insure that other important measures would be included in the Amendments, however, preservationists ultimately acceded to the incorporation of an "owner objection" provision under the belief that property owners would be less likely to file an objection than withhold their consent.

Unlike owner consent provisions in local preservation ordinances, the owner objection rule does not affect the regulation of historic property as mandated under § 106 of the NHPA, 16 U.S.C. § 470f. Section 106 confers jurisdiction on the Advisory Council on Historic Preservation to review and comment on proposed federal agency undertakings affecting National Register eligible property. The NHPA provides that upon the filing of an objection, the Secretary of the Interior must make an independent determination of eligibility and advise the Advisory Council, the appropriate State Historic Preservation Officer and chief elected official, as the individual owner(s). Thus, the *eligibility* of a property for listing in the National Register, rather than the listing itself, triggers the application of the Section 106 Review Process.

There is no evidence that Congress, in enacting the owner objection provision, intended that owner consent or owner objection provisions be included in state and local historic preservation laws.[6] On the contrary, Congress recognized that there are critical distinctions between the functions of the National Register of Historic Places and local preservation laws.[7]

Listing in the National Register of Historic Places is primarily

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[6]The National Register of Historic Places serves as a guide for local jurisdictions in deciding what properties merit protection. 36 C.F.R. § 60.2.

[7]H.R. Rep. No. 96-1457, 96th Cong., 2d Sess. 26-28, *reprinted* in 1980 U.S. Code Cong. & Admin. News 6378, 6389-91.

honorific. The National Register is intended for use as a planning tool[8] and may allow property owners to obtain favorable tax incentives, such as a 20 percent income tax credit for the rehabilitation of historic property.[9] While National Register listing may invoke the procedural safeguards of the Section 106 process for federally-funded or federally-approved projects, such a listing does not impose substantive restraints on how a private property owner may use his or her property.

In comparison, designation of property as historic under state and local ordinances triggers the application of significant controls on private property owners. Once property is designated as a historic landmark or included in a historic district, the owner generally must obtain permission before altering or demolishing his or her property.

Generally speaking, owner consent (or owner objection) provisions are inconsistent with the philosophical basis of both the NHPA and state and local preservation laws (and indeed, the reason for including the owner objection provision in the 1980 amendments to the NHPA no longer exists: the disincentive discussed above was later repealed by the Economic Tax Recovery Act of 1981). Decisions to include property on a local, state, or national register should be made exclusively by objective, professional determinations of historic or architectural significance. It is through this process that a fair and comprehensive list of properties is identified for protection.[10] The listing of historic resources provides an invaluable planning tool and helps to ensure that significant resources are identified, researched, and recorded.

The impact of historic designations on private property owners is more appropriately dealt with through the process of reviewing requests to alter listed property (applications for a certificate of appropriateness) and upon application for a variance (certificate of economic hardship). Once a property owner has made a formal request to alter his or her property, a jurisdiction can then evaluate the request in light of the owner's particular hardship. In some cases, a jurisdiction may be able to alleviate hardships through incentive programs or, in extreme cases, the relaxation of preservation controls.

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[8] 36 C.F.R. § 60.2.

[9] *See* 16 U.S.C. § 470f, I.R.C. § 48(g).

[10] Indeed, the U.S. Supreme Court in upholding New York City's landmark preservation law, attached significance to the fact that the law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city." *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978).

II. Constitutional Validity of Owner Consent Provision

Guidance on the issue of the legality of owner consent provisions in historic preservation ordinances is limited. With the exception of *Department of Land Conservation and Development v. Yamhill*, discussed later on in this article, there are no cases addressing the validity of owner consent provisions in an historic preservation ordinance. It is clear under the Supreme Court's ruling in *Penn Central Transportation Co. v. City of New York*, that historic preservation ordinances *without* an owner consent provision are legal.[11] But no court has ever addressed the issue of whether the reverse is true.

Owner consent provisions in historic preservation ordinances bring to mind several serious constitutional questions. Do they constitute an unlawful delegation of legislative authority? Do they undermine the police power objective of promoting the general welfare and raise equal protection concerns? Are they consistent with state enabling authority? Each of these issues is discussed below.

A. Delegation of Police Power Authority

A number of courts, including the U.S. Supreme Court, have addressed the issue of whether owner consent provisions constitute unlawful delegations of police power authority in the context of other kinds of land use regulation. The majority of these cases, decided in the 1920s and 1930s, have involved attempts to provide neighboring property owners in residential areas with the ability to object to the construction of buildings that are commonly viewed as nuisances such as a gasoline station or public garage. These cases generally have addressed situations whereby property owners have been provided the opportunity to determine how someone else's land may be used.

The use of owner consent provisions in historic preservation ordinances appears, at first glance, to be entirely different. Property owners are given the authority to decide whether such laws will attach to their own property or future property owners (assuming that such property will eventually be sold), either in the context of the designation of an individual property as a historic landmark or a group of properties as an historic district. Property owners in these circumstances are not deciding whether to allow a potentially obnoxious use but whether their own property should be protected for the benefit of the general public.

Nonetheless, many of the concerns identified by the courts in these cases are applicable to historic preservation ordinances, regardless of the fact that owners are deciding whether such laws apply to their own property, as opposed to neighboring property. As with consent provisions in other types of land use ordinances, these provisions "undermine" the

[11] 438 U.S. 104 (1978).

public purpose of preserving historic structures by allowing individual property owners to decide what shall be protected based on subjective rather than objective factors. They also appear to be "standardless delegations of legislative authority" to individual property owners and "usurp legislative authority" to the extent that such decisions cannot be overruled.

1. The Supreme Court's Trilogy of Owner Consent Decisions

The paucity of recent cases on the issue of the constitutional validity of consent provisions has been attributed to the fact that zoning is now viewed as an acceptable, if not necessary, form of regulation and thus the perceived need to include consent provisions in zoning laws is no longer present. Professor Norman Williams, Jr. explained the decline of the use of consent provisions in zoning laws as follows:

> In the early days of experimenting with techniques of land use control, and apparently particularly in Illinois, a common device was to provide that a given zoning regulation would be modified, if a stated percentage of the nearby property owners approved in writing. Two early Supreme Court opinions, disapproving such arrangements, discouraged but did not eliminate the practice. However, over the years the use of such a device has declined in importance, for obvious reasons—judicial hostility, the likelihood of provoking neighborhood squabbles, and general distrust of the principle. The exclusionary implications of such arrangements are obvious, and the question is no longer of prime importance.[12]

The two Supreme Court cases referred to by Professor Williams are *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). *Eubank* involved an ordinance provision that established building lines upon the consent of two-thirds of the property owners on a given street. The Supreme Court struck down this provision as unconstitutional under the due process clause because there were *no standards* to guide the property owners in establishing building lines, and thus the Court determined that the consent requirement constituted an unreasonable exercise of police power. The Supreme Court stated:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely

[12] N. Williams, 1 *American Land Planning Law*, § 16.20 (1988).

for their own interest, or even capriciously.[13]

In *Seattle Title Trust*, the Supreme Court struck down a provision requiring the written consent of two-thirds of the owners of property located within 400 feet of proposed philanthropic homes for the aged in a residential area. The Court ruled that the ordinance violated the due process clause as an unwarranted delegation of power to other property owners. It explained that the consent requirement arbitrarily prevented the use of land for homes for the aged, without any standard or rule prescribed by legislative action. The Supreme Court explained:

> The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment.[14]

In a third Supreme Court decision, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), however, a provision authorizing the waiver of an absolute prohibition on the construction of billboards upon the express consent of affected property owners was upheld. The Court determined that there was no delegation of legislative power since the property owners were waiving an otherwise applicable legislative limitation. It distinguished the Supreme Court's decision in *Eubank v. City of Richmond* on the basis that the provision struck down in *Eubank* had left the establishment of a building line untouched until the owners acted and gave to it the effect of the law.

Constitutional scholars have explained the Supreme Court's seemingly disparate treatment of owner consent provisions in these decisions as an attempt to distinguish between ordinances that would otherwise allow a potential nuisance rather than promote the general welfare. The construction of billboards is perceived as a nuisance while the construction of elderly houses directly benefits the public.[15] Similarly, a provision

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[13]226 U.S. at 143-44.

[14]278 U.S. at 121-22 (citations omitted).

[15]In *State of Washington ex rel. Seattle Title Trust Co.*, the Supreme Court observed that "[it had] not [been] suggested that the proposed new home for aged poor would be a nuisance." 278 U.S. at 122. Unlike in *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917), the Court stated "[t]he facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive."

requiring owner consent as a condition to approving adult movie theatres or bookstores is more likely to be upheld than one relating to university buildings.[16]

An additional distinction is that in *Cusack*, the plaintiff was the beneficiary of the owner consent provision and thus his objections to the provision fell on unsympathetic ears. Perhaps if the validity of the provision had been challenged by a property owner who had withheld his or her consent, the result would have been different.

2. State Court Decisions on Owner Consent

A number of state court decisions were handed down both concurrently and after the Supreme Court's trilogy of decisions in *Eubank*, *Seattle Title Trust*, and *Cusack*. Many of these cases involved ordinances providing owner consent authority to neighboring property owners, either in the context of a rezoning or subdivision request, or an application for a use variance.

Several important principles can be extracted from these decisions. Owner consent provisions are more likely to be struck down when they delegate authority to individual property owners to decide how the general welfare shall be served. Courts appear to be most concerned by owner consent provisions that allow property owners to usurp the legislative function, where the final decision rests with the property owner, and which allow subjective, arbitrary decision making.

In comparison, owner consent provisions that provide neighboring property owners with the opportunity to relax existing laws have been viewed more favorably. Courts have accepted these provisions under the rationale that the police power has not been undermined since such provisions allow owners to ease or waive restrictions that had been enacted to protect those who are consenting to the waiver. The same holds true for consent provisions that merely seek the advice of property owners on a particular law. Because final decision making authority rests with the legislature, the due process concerns expressed above are less apparent.

Application of these principles to owner consent provisions in historic preservation ordinances suggest that many courts would find such provisions unlawful if challenged in court. Because property is not subject to regulatory controls under historic preservation ordinances unless

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[16]Indeed, the majority of owner consent cases have involved disputes over consent provisions as applied to specific uses such as the construction of gasoline stations in residential areas. *See e.g.*, *People ex rel. Busching v. Ericcson*, 263 Ill. 368, 105 N.E. 315 (1914) (public garage); *Epstein v. Weisser*, 278 App. Div. 668, 102 N.Y.S.2d 678 (Ct. App. 1951), *aff'd*, 302 N.Y. 916, 100 N.E.2d 186 (1951) (gas station); *Centro Building Corp. v. Board of Zoning Appeals*, 21 Misc. 2d 964, 197 N.Y.S.2d 869 (Sup. Ct. 1960); and *Appeal of Perrin*, 305 Pa. 42, 156 A. 305 (1931) (gas station).

formally designated as historic, owner consent provisions serve to undermine the police power objective of preserving historic resources. Moreover, such decisions are made by purely subjective motives, rather than on the basis of subjective criteria either in the context of individual landmark designations or historic district designations. The ability of a few individuals to decide the applicability of an ordinance enacted to protect the public welfare runs afoul of the due process clause of the U.S. Constitution.

Discussed below are a number of decisions that address the principles set forth above, including the delegation of legislative authority, waivers of existing prohibitions, and final decision making authority.

a. Delegation of Legislative Authority

Owner consent provisions have most commonly been invalidated as unconstitutional under the delegation-of-power doctrine.[17] This doctrine states that legislatures may not delegate power to *make* (as opposed to *administer*) laws. Moreover, any administrative decision making authority must be limited by standards or guidelines. Administrative authority may be delegated to officers and agencies (non-elected officials), provided that there are adequate procedural safeguards, including the adoption of meaningful standards, to control the discretion of the decision makers so as to prevent arbitrary and capricious decision making. The failure to include appropriate standards is viewed as an unreasonable exercise of the police power.[18]

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[17] *See*, *e.g. Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Coon v. Board of Public Works*, 7 Cal. App. 760, 95 P. 913 (1908); *Dupont v. Liquor Control Commission*, 136 Conn. 286, 71 A.2d 84 (1949); *Marta v. Sullivan*, 248 A.2d 608 (Del. 1968); *Downey v. Sioux City*, 208 Iowa 127, 227 N.W. 125 (1929); *People ex rel. Chicago Dryer Corp. v. City of Chicago*, 413 Ill. 315, 109 N.E. 2d 201 (1952); *Drovers Trust & Savings Bank v. City of Chicago*, 18 Ill. 2d 476, 165 N.E.2d 314 (1960); *Clark Oil & Refining Corp. v. Tinley Park*, 110 Ill. 2d 61, 249 N.E.2d 140 (1969); *Wolle v. City of Sioux City*, 229 N.W. 214 (Iowa 1930); *State ex. rel. Daniels v. Kasten*, 382 S.W.2d 714 (Mo. App. 1964); *State v. Withnell*, 78 Neb. 33, 110 N.W. 680 (1907); *Foster v. Minneapolis*, 255 Minn. 249, 97 N.W.2d 273 (1959); *Yanow v. Seven Oaks Park*, 18 N.J. Super. 411, 87 A.2d 454 (1952), *modified on other grounds*, 11 N.J. 341, 94 A.2d 482 (1953); *Starin v. Village Board of Zoning Appeals*, 198 Misc. 785, 101 N.Y.S.2d 80 (1950); *New York, N.H. & H.R. Co. v. Sulla*, 198 N.Y.S.2d 353 (Sup. Ct. 1960); *Koch v. Zoning Board of Appeals of the Town of Lewisboro*, 54 Misc. 2d 1090, 284 N.Y.S.2d 177 (1967); *People v. Deeks*, 61 Misc. 2d 1019, 307 N.Y.S.2d 914 (1969); *Janas v. Town Board of Appeals*, 382 N.Y.S.2d 394 (App. Div. 1976); *Appeal of Perrin*, 305 Pa. 42, 156 A. 305 (1931); *Willis v. Town of Woodruff*, 200 S.C. 266, 20 S.E.2d 699 (1942); *Spann v. City of Dallas*, 111 Tex, 350, 235 S.W. 513 (1921); *Williams v. Whitten*, 451 S.W.2d 535 (Tex. Civ. App. 1970); *Wasilewski v. Biedrzcki*, 180 Wis. 633, 192 N.W. 989 (1923).

[18] *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

Legislative Authority. Owner consent provisions that confer legislative authority on property owners have been consistently struck down by reviewing courts as unconstitutional. Two decisions are particularly instructive in that they involve situations (analogous to consent provisions in historic preservation ordinances) in which authority has been delegated to individual property owners to determine whether a given law will apply to themselves. In *Brodner v. City of Elgin*, 96 Ill. App. 3d 224, 420 N.E.2d 1176 (1981), an Illinois court struck down an owner consent requirement in the context of an application to amend a zoning ordinance as an unlawful delegation of rezoning power. The court stated that "the adoption of a rezoning ordinance is a legislative act which constitutes the exercise of the police power" and that "[l]egislative authority may not be delegated to private individuals."[19] The court reasoned that the effect of the provision was to confer upon the owner of property "the absolute discretion to decide that no rezoning shall ever occur" and that an owner could arbitrarily frustrate the City's efforts to adopt a comprehensive zoning plan in pursuit of the common good.[20]

The Illinois Supreme Court also addressed the issue in another case involving a challenge to an ordinance that had required the consent of sixty percent of the property owners to change the name of a street. In ruling that the consent provision was unconstitutional, the court in *People ex rel. Chicago Dryer Corp. v. City of Chicago*, 413 Ill. 315, 109 N.E.2d 201 (1952), reiterated that the legislature must decide what the law shall be. The court explained that an act which vests any person or authority with arbitrary discretion to determine what the law shall be in particular situation is invalid. The supreme court stated:

> This is not even a delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be, and often are, adverse to the interests of others similarly situated or directly affected by the exercise of the power delegated. . . . The will of this group is thrust upon the minority of the abutting owners and the city at large without regard for the necessity, beneficence or reasonableness of their action. This is legislative delegation in its most obnoxious form.[21]

In a recent Texas decision, *Minton v. City of Fort Worth Planning Commission*, 786 S.W.2d 563 (Tex. App. 1990), a Texas appellate court ruled that a consent provision included in a state law governing the

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Courts have long stressed the importance of restricting an administrative body's discretion through the adoption of adequate standards in preservation cases. *See*, *e.g.* *Maher v. City of New Orleans*, 516 F.2d 1051 (1975); *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 44 (1979).

[19] 420 N.E.2d at 1178.

[20] *Id.*

[21] 109 N.E.2d at 205-06.

subdivision of land was unconstitutional. The statute provided that if 20 percent of nearby landowners objected to a property owner's proposed replatting of his land, the property owner must obtain written approval of two-thirds of nearby owners to replat. Although this case involved a provision that required the consent of neighboring property owners, the court touched on the same concerns expressed above by the Illinois courts in *Brodner* and *Chicago Dryer*. The Texas court ruled that the statute "delegates the legislative power given by the people to the legislative body, to a narrow segment of the community" and that such "delegation of authority is contrary to the constitution." In reaching its decision, the court observed that "[c]onsent statutes have uniformly been held unconstitutional when they lack sufficient standards concerning how to exercise the delegated power."[22]

Administrative Standards. Ordinances that confer authority on property owners to veto applications to construct particular types of buildings such as gas stations, apartment buildings, or mobile homes, have been struck down as "standardless" delegations of police power authority. Relying principally on the U.S. Supreme Court decisions in *Eubank* and *Seattle Title Trust*, discussed above, courts have invalidated owner consent provisions because they delegate decision making authority to individual property owners without any standards. Ordinances subject to this type of challenge include owner consent provisions that allow neighboring property owners to rule on a proposed use or request for a variance. They generally authorize a small group of property owners to veto the construction of a particular building type, such as a gas station, without the benefit of legislative standards.[23]

As with the other owner consent cases discussed above, these cases are relevant to the extent that the same concerns raised by the court are applicable to owner consent provisions in the context of historic preservation ordinances. Such provisions enable individual property owners to decide whether historic property should be protected, based on personal whim rather than objective standards.

In *Marta v. Sullivan*, 248 A.2d 608 (Del. 1968), for example, a Delaware court addressed a consent provision requiring that 75 percent of residents living within one-eighth of a mile of the land in question consent before an apartment building could be constructed. The court ruled that the consent provision was void as a deprivation of due process and an improper delegation of legislative power.[24] In striking down the owner consent provision, the court made the following observation:

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[22]786 S.W.2d at 565.

[23]*See*, *e.g. Concordia Collegiate Institute v. Miller*, 301 N.Y. 189, 93 N.E.2d 632 (1950). The court, in that case, struck down a provision that allowed property owners to veto the proposed construction of university buildings.

[24]248 A.2d at 612.

> A legislative body may establish basic policy and vest in others the power to administer the declared legislative policy. But to avoid an unlawful delegation of legislative power, a statute must establish adequate standards and guidelines for the administration of the declared legislative policy and for the guidance and limitation of those in whom discretion has been vested; thus to the end that there may be safeguards against arbitrary and capricious action, and to assure reasonable uniformity in the operation of the law.[25]

Similarly, in *Dupont v. Liquor Control Commission*, 136 Conn. 286, 71 A.2d 84 (1984), a Connecticut court struck down a provision that required the consent of 50 percent of the property owners within a certain area as a condition precedent to obtaining a permit to operate a package or liquor store. The court stated:

> Whatever term may be applied to designate the power of consent so accorded, it cannot be questioned that if such an unrestricted discretion was conferred upon a duly constituted administrative board it would be unconstitutional for lack of adequate standards. A fortiori, the same holds true of the grant to these property owners of a discretion to prevent the use of the plaintiffs' premises for a package store.[26]

b. Waiver of a Prohibition

Some courts have upheld consent provisions that are akin to "waivers" of absolute prohibitions or "relaxations" of existing laws under the authority of the Supreme Court's decision in *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917).[27] The rule on this issue has been expressed in these words:

> If the existence of the law depends upon the vote or act of the people, it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself, the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power. . . .[28]

For example, in a recent Michigan decision, *Howard Township Board*

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[25] *Id*. at 609.

[26] 71 A.2d at 85 (citations omitted.)

[27] In this decision, the Supreme Court upheld a provision that allowed property owners to consent to the construction of billboards on the basis that such consent amounted to a waiver of an absolute prohibition. The Court reasoned that the property owner could not be heard to complain that he has been prejudiced when a relaxation of a prohibition depends upon a neighbor's consent.

[28] *Dupont v. Liquor Control Commission*, 136 Conn. 286, 71 A.2d 84, 86 (1984).

of Trustees v. Waldo, 425 N.W.2d 180 (Mich. 1988), the Michigan Court of Appeals ruled that a zoning ordinance with a consent provision did *not* constitute an unlawful delegation of legislative power to a narrow segment of the community. The ordinance under review required the consent of 100 percent of the property owners situated within 500 feet of property before the zoning board could consider a variance application. The court reasoned that the consent provision merely required a "waiver as the first step in an administrative procedure authorized by the zoning ordinance."[29]

The Michigan court acknowledged that "[z]oning ordinances have been invalidated when a consent provision, in effect, delegates the legislative power, originally given by the people to a legislative body, to a narrow segment of the community."[30] However, the court recognized that a distinction exists between "ordinances or regulations which leave the enactment of the law to individuals and ordinances or regulations prohibitory in character but which permit the prohibition to be modified with the consent of the persons who are to be most affected by such modification."[31]

The Texas decision discussed above, *Minton v. City of Fort Worth Planning Commission*, 786 S.W.2d 563 (Tx. App. 1990), however, exemplifies the limitations of this "exception." In that decision, the court rejected the position asserted by the Fort Worth Planning Commission that the statute was constitutional because it did not impose a requirement on the property owner, but rather "relaxed" an otherwise valid law that affected only a limited number of people. Although the court recognized that consent laws may be valid under some circumstances, it ruled that the Commission's position in this case was unfounded because it was premised on the erroneous presumption that all replatting could be prohibited. The court explained that an outright prohibition on replatting is not possible because it would be unconstitutional.[32]

Unlike the delegation of authority cases discussed above, these cases are distinguishable from the typical owner consent provision included in historic preservation ordinances. Owner consent provisions in historic preservation ordinances, particularly with respect to the designation of properties, operate as a determination whether property restrictions will be applied in the first place, rather than whether to relax existing laws.

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[29]The court nonetheless determined that the law was unconstitutional because it was not "reasonable on its face." It stated that the 100 percent requirement "is too stringent, particularly when testimony indicates, as in this case, that not all property owners were available," and that "requiring all property owners within 500 feet of the property unreasonably subjects the applicant to the very real possibility of being unable to reach all property owners, as well as the possibility of a single property owner whimsically deciding to refuse consent." 425 N.W.2d at 184.

[30]*Id.* (citations omitted).

[31]*Id.* (citations omitted).

[32]786 S.W.2d at 565.

c. Final Decision Making Authority

Courts have been more willing to uphold provisions in which the final decision is made by a governmental rather than private entity. In other words, owner consent provisions that are merely advisory to a governmental agency are more likely to be upheld.[33] For example, in *Seattle Title Trust*, discussed above, the Supreme Court appeared to be most concerned by the fact that the City of Seattle was "bound by the decision or inaction" of the owners and that there was "no provision for review under the ordinance." The owners' failure to give consent was final.[34]

A federal district court recognized this distinction in *Leighton v. City of Minneapolis*, 16 F. Supp. 101 (D. Minn. 1936). In that decision the court explained that where "the law is not complete in itself and is not effective until property owners act, and imposes restrictions that [have] the force and effect of law, the zoning law is invalid as an unauthorized delegation of legislative power."[35] However, if the law is complete and its operation does not depend on the act of property owners, then a consent provision is valid. Owner consent serves as a "mere jurisdictional pre-requisite" to a zoning change and is not binding on the legislature.[36]

Probably the most common form of advisory consent provision is the "protest clause." This type of clause generally requires a legislature to approve a proposed zoning change by a "super-majority" in cases in which a formal protest has been signed by at least 20 percent of affected property owners. These types of provisions are more likely to be upheld because final decision making authority remains with the legislature.[37]

One can infer from these decisions that owner consent provisions that are merely advisory to a legislative or administrative decision making body are constitutionally valid. Protest clauses such as that included in Jersey City's preservation ordinance, discussed in the beginning of this article, do not reach the same level of concern as other types of owner consent provisions because final decision making authority rests with a governmental body that is accountable to the general public and required to act in

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[33]*See, e.g., City of Stockton v. Frisbie & Latta*, 93 Cal. App. 277, 270 P. 270 (1928); *Clark Oil & Refining Corp. v. Village of Tinley Park*, 110 Ill. App. 2d 61, 249 N.E.2d 140 (1969) (invalid where not advisory); *Building Inspector of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262 (1924); *Leighton v. City of Minneapolis*, 16 F. Supp. 101 (D. Minn. 1936) (invalid where not advisory); *Robwood Advertising Associates, Inc. v. City of Nashua*, 102 N.H. 215, 153 A.2d 787 (1959).

[34]278 U.S. at 122.

[35]16 F. Supp. at 106.

[36]*Id.*

[37]*See Hattiesburg v. Mercer*, 115 So.2d 165 (Miss. 1965); *Hoelzer v. Incorporated Village of New Hyde Park*, 150 N.Y.S.2d 765 (1956).

the interest of furthering the public welfare.

3. Delegation of Police Power Authority in Historic Preservation Ordinances

Many of the concerns identified by the Supreme Court in its trilogy of owner consent cases,[38] and a number of state courts, as well, are present in historic preservation ordinances with owner consent provisions. As in the consent provision struck down in *Eubank v. City of Richmond*, owner consent provisions in historic preservation ordinances may be characterized as standardless delegations of decision making authority. Such provisions allow a single property owner (in individual landmark designations) or even several property owners (in historic district designations) to decide whether historical or architecturally significant property will be protected, without the benefit of any standards to guide that decision. As in *Eubank*, property owners may withhold their consent "solely for their own interest, or even capriciously."[39]

Additional concerns are also present. Once a property owner decides to withhold his or her consent, historic property cannot be regulated. As with the ordinance struck down by the Supreme Court in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, local governments are bound by the decision of owners who may decide for any reason not to consent to the designation of their property as historic landmarks or for inclusion in a historic district. There "is no provision for review under the ordinance," and "their failure to give consent is final." Property owners "are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [city or town] to their will or caprice."[40]

Owner consent provisions in historic preservation ordinances also do not fall within the various exceptions carved out by the courts over the years. Property owners are not consenting to waive or relax an outright prohibition, as in *Thomas Cusack Co. v. City of Chicago*, but rather are consenting to the regulation of their own property. Moreover, historic preservation ordinances are considered public benefit statutes as opposed to nuisance statutes.[41] The only type of consent provision that may be lawful under the delegation doctrine is the so-called "protest clause" that requires a super majority vote to designate historic property upon the filing of a formal protest by affected property owners. However, this type of provision

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[38]*Eubank v. City of Richmond*, 226 U.S. 137 (1912), *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917).

[39]226 U.S. at 144.

[40]278 U.S. at 121-22.

[41]The preservation of historic resources has long been recognized as serving the public welfare. *See*, *e.g. Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

has its own limitations due to the inherent difficulties in achieving a high level of consensus.

B. Other Due Process and Equal Protection Concerns

Under the Due Process Clause to the U.S. Constitution, land use laws must be derived from the "police power." The police power is the inherent authority in each state to regulate, protect, or promote the public health, safety, morals, or the general welfare. A regulation must bear a rational relation to the achievement of a legitimate governmental purpose, and the means selected to carry it out must be reasonable and of general application.[42] The Fourteenth Amendment to the U.S. Constitution also guarantees equal protection under the law.[43]

Courts have consistently recognized historic preservation as a valid exercise of the police power. In *Penn Central Transportation Co. v. City of New York*, the U.S. Supreme Court upheld the application of New York City's historic preservation laws to the Grand Central Terminal, a designated landmark. The Court stated that the city's "objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." It declared that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the city.[44]

A compelling argument can be made that the police power objective upheld in *Penn Central* is seriously compromised by owner consent provisions because the primary objective of preserving historic properties is secondary to the individual concerns of the private property owner. Historic property is regulated when consonant with personal interests rather then purely objective factors.

Indeed, under the Supreme Court's ruling in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, one could argue that historic preservation ordinances with owner consent provisions should be invalidated under the Fifth and Fourteenth Amendments to the U.S. Constitution as a "private benefit" as opposed to a "public purpose" statute.[45] The private benefits that flow from historic preservation regulation are no longer "coincidental" to the greater police power objective of preserving historic resources. Rather, since owner consent is required to trigger regulatory action, the public benefit that flows from preserving historic resources is only "coincidental" to private concerns. In other words, historic property is only protected

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[42] *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974); *Maher v. City of New Orleans*, 516 F.2d 1051, 1061 (5th Cir. 1975).

[43] *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974).

[44] 438 U.S. 104 (1978).

[45] 480 U.S. 470, 488-89 (1987).

when it is advantageous to the individual property owner.

Moreover, owner consent provisions undermine the general principle that regulation should be rationally and uniformly applied. As the U.S. Supreme Court recognized in *Penn Central*, historic preservation ordinances are enacted to protect the interests of the community as a whole, not just those of a few individuals.[46] If private individuals were permitted to veto zoning or other forms of land use law, the ability of local governments to protect the character of their communities would be fatally compromised.

Owner consent provisions also threaten the comprehensive character of preservation ordinances because they preclude the development of a fair and objective inventory of historic property.[47] Historic designations are not made in accordance with the general regulatory scheme of a given community as embodied in a comprehensive preservation plan but rather on the basis of individual concerns.

In evaluating equal protection concerns, courts are more likely to uphold laws that have been enacted in accordance with comprehensive plans evidencing general policies and principles. In the *Penn Central* decision discussed above, the Supreme Court upheld New York City's historic preservation law, despite charges that it unconstitutionally burdened some landowners more than others, because individual buildings had been designated in accordance with a comprehensive scheme for protecting historic resources. The court stated:

> In contrast to discriminatory zoning, which is the antithesis of land use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they may be found in the city.[48]

Owner consent provisions in historic district ordinances jeopardize the validity of historic preservation ordinances to the extent that they undermine a jurisdiction's comprehensive preservation scheme. By allowing property owners to withhold their consent or "opt out" of historic preservation controls, property is no longer being protected to advance the general objective of preserving historic buildings for the benefit of the community at large. Owner consent, in effect, is tantamount to "reverse spot zoning" because it operates as an exemption from regulation for purely private reasons.

Lastly, owner consent provisions make little sense. Some historic

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[46] 438 U.S. 104, 109.

[47] The U.S. Supreme Court's decision in *Penn Central* suggests that historic preservation ordinances should be comprehensive in character to avoid charges of spot zoning and constitute a valid police power regulation. *See Penn Central Transport. Co. v. City of New York*, 438 U.S. 104, 132 (1978).

[48] 438 U.S. 104, 132.

property may be preserved while other historic property is destroyed or altered on the basis of an individual property owner's viewpoint, rather than the welfare of the community at large.[49] As the Supreme Court recognized over 100 years ago in *Mugler v. Kansas*, 123 U.S. 623 (1887), the power to regulate land

> must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

C. Authority to Enact Owner Consent Provisions under State Law

Absent a general grant of power (referred to as home rule authority), local jurisdictions have only that authority which has been explicitly delegated to it by the state. Many historic preservation ordinances are enacted pursuant to state enabling legislation that authorizes local jurisdictions to adopt ordinances to regulate historic property. In other cases, local preservation controls may be enacted pursuant to authority included in comprehensive state planning laws. In either case, local controls must be consistent with the overriding state law.

Owner consent provisions consequently may be struck down if adopted without the requisite enabling authority. In the only case directly focusing on the issue of the legality of an owner consent provision in an historic preservation ordinance, *Department of Land Conservation and Development v. Yamhill County*, 99 Or. App. 441, 783 P.2d 16 (1989)[9 PLR 1001 (1990)], an Oregon court determined that the use of an owner consent provision as a precondition to landmark designation violated the state's planning law. The court reasoned that a county cannot categorically subordinate the protection of historic resources to an owner's preference for non-regulation.[50]

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[49]This concern was raised by the Supreme Court in *Eubank* because of the potential for the uneven establishment of building lines. The court stated, "it is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which can be so variously disposed." 226 U.S. at 144.

[50]One could also argue that owner consent provisions are contrary to state constitutions that recognize historic preservation as a state-wide objective. In *Vieux Carre Property Owners and Assocs. v. City of New Orleans*, 246 La. 788, 167 So.2d 367 (1964), the Louisiana Supreme Court struck down an amendment to a city ordinance that exempted areas on the periphery of Vieux Carre historic district from regulation because it violated

Under Oregon's planning law, a county must inventory resource sites, identify uses for those sites, and then develop a plan that addresses how those sites will be used. Pursuant to Goal 5 of this law, the plan may either: (1) protect the site fully by prohibiting conflicting uses; (2) permit all conflicting uses; or (3) permit limited conflicting uses so as to preserve the resource partially. Upon reviewing these requirements, the court in *Yamhill* concluded that the owner consent provision in the Yamhill County ordinance did not provide for "site-specific" conflict resolution as mandated by Goal 5, but rather amounted to a "categorical subordination" of all historic resources.

Consequently, owner consent provisions may be struck down simply because they have been included in historic preservation ordinances without the requisite state enabling authority. Apart from the constitutional concerns addressed above, owner consent provisions may be deemed invalid simply because they are unauthorized.

III. Conclusion

Preservation laws, as with other forms of land use law, are enacted to promote the public welfare. As with zoning regulations, these laws are intended to direct the manner and extent to which privately-owned property may be used or modified for the benefit of the public-at-large. Decisions regarding whether and how property should be protected should be made by impartial decision making bodies. Such entities should evaluate the individual significance of historic property based solely on objective criteria. The impact of historic designations on individual property owners are more appropriately dealt with in the context of an actual proposal to alter or demolish a designated resource.

Owner consent provision in historic preservation ordinances raise serious due process and equal protection concerns. Such provisions undermine the police power objective of preserving historic property for the benefit of present and future generations. They also prevent the fair and uniform application of preservation laws by extending protection only to those properties whose owners have conferred their consent.

Moreover, owner consent provisions appear to constitute an unlawful and standardless delegation of decision making authority. Such provisions, in effect, unlawfully delegate authority to individual property owners to decide whether or not a preservation law will apply. This authority should be reserved by the legislative body or delegated to an administrative body whose discretion is limited through the application of objective criteria.

Lastly, some provisions may be invalid simply because they are inconsistent with the requisite enabling authority, as found by the Oregon Court of Appeals decision in *Department of Land Conservation and Development v. Yamhill County*, 99 Or. App. 441, 783 P.2d 16 (1989)[9 PLR

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the state's constitution. The court concluded that the state constitution required that the entire district be preserved for the benefit of the citizenry of the state at large.

1001 (1990)]. Absent home rule authority, local jurisdictions only have that power which has been delegated to them by the state.

As with zoning laws, perhaps the perceived need to include owner consent provisions in historic preservation ordinances will wane. As individual property owners become more accustomed to the concept of preserving historic property, legislators will feel less compelled to include such provisions as a compromise position.[51] Moreover, as the constitutionality of these provisions are tested in court, one by one, we may find that owner consent clauses in state and local preservation laws are no longer a valid option.

[51]The economic impacts of historic regulations are more appropriately dealt with under "economic hardship" proceedings. These proceedings allow for a variance in the application of a provision in an historic preservation ordinance upon a showing of particular hardship to the property owner (such as the inability to earn a reasonable return on one's property).