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## Virginia's Historic District Enabling Legislation: Preservation at the Local Level

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## VIRGINIA'S HISTORIC DISTRICT ENABLING LEGISLATION: PRESERVATION AT THE LOCAL LEVEL

### I. INTRODUCTION

On April 10, 1987, Governor Gerald L. Baliles established the Governor's Commission to Study Historic Preservation (the Commission). The Governor created the Commission in order to ensure that "Virginia is back in the forefront of our nation's historic preservation efforts," and charged the Commission to examine preservation issues in Virginia and to make recommendations for improving the Commonwealth's preservation program.<sup>1</sup> Governor Baliles addressed the Commission in July of 1987, emphasizing that preservation is not mere reverence for the past.<sup>2</sup> Preservation is, rather, a tool to manage change, to enliven our future, and is "necessary if we are to hand over to our descendants a sense of who they are."<sup>3</sup>

During the next several months, the Commission held public hearings around the Commonwealth.<sup>4</sup> Those testifying at these hearings overwhelmingly agreed that Virginia needs to make a greater commitment to the preservation of its irreplaceable historic, architectural, and cultural treasures.<sup>5</sup> In its final report to the Governor, the Commission identified four categories of preservation concerns and made specific recommendations for strengthening Virginia's efforts in each of these categories.<sup>6</sup> The first category of concern which the Commission identified is Virginia's own preservation program at the state government level. The Commission's recommendations included reorganization and expansion of the administrative structure of the state preservation agency, the establishment of regional preservation offices, and additional resources for the state's salvage and underwater archaeological programs.<sup>7</sup> The second category is the impact of state actions on historic properties. The recommendations included revisions in the state environmental review process and the es-

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1. Va. Exec. Order No. 39 (Apr. 10, 1987).

2. Address by Governor Gerald L. Baliles, Governor's Commission to Study Historic Preservation (July 21, 1987) (reported in Mitchell, *Governor's Preservation Study Commission*, 31 Notes in Virginia 3, 3 (FALL 1987)).

3. *Id.*

4. GOVERNOR'S COMMISSION TO STUDY HISTORIC PRESERVATION, SUMMARY REPORT ON PUBLIC HEARINGS ON HISTORIC PRESERVATION IN VIRGINIA (1987) (hearings were held in Roanoke, Richmond, Charlottesville, Winchester, Alexandria, and Norfolk).

5. Mitchell, *supra* note 2, at 4.

6. GOVERNOR'S COMMISSION TO STUDY HISTORIC PRESERVATION, A FUTURE FOR VIRGINIA'S PAST, THE FINAL REPORT OF THE GOVERNOR'S COMMISSION TO STUDY HISTORIC PRESERVATION (Nov. 1988).

7. *Id.* at v-vi.

establishment of a special maintenance program for state-owned historic landmarks.<sup>8</sup> The third category is local government preservation programs. The Commission recommended that the General Assembly clarify and strengthen the general zoning and historic preservation enabling legislation and pass new legislation increasing the Commonwealth's role in land use decisions affecting interjurisdictional historic resources.<sup>9</sup> The fourth category which the Commission identified is the need for financial support and incentives for preservation. The Commission's recommendations included increased funding for the basic state preservation program, expansion of the existing state grant program, and establishment of a statewide revolving fund to protect endangered properties.<sup>10</sup>

This Note explores the Commission's third category of concern: the Commonwealth's zoning and historic district enabling legislation, and the problems Virginia localities have experienced in its implementation. Amendments which will strengthen and clarify the legislation, as well as increase its breadth, will be recommended.

## II. THE ENABLING LEGISLATION

The Virginia enabling statute for preservation of historical sites and areas by counties and municipalities is section 15.1-503.2 of the Code of Virginia.<sup>11</sup> Under this section, a locality may adopt an ordinance protecting local historic resources and may provide for an architectural review board (ARB) to administer the ordinance.<sup>12</sup> The ARB determines the propriety of designs for new construction within the district and decides whether existing buildings or structures may be altered or demolished. These decisions may be appealed first to the governing body and then to the local circuit court.<sup>13</sup> The statute specifies the procedure for such appeal.<sup>14</sup> The statute also grants the local government the authority to exercise eminent domain to acquire historic landmarks or areas.<sup>15</sup>

### A. *Designation of Historic Districts*

The locality designates historic resources to be protected, then accomplishes that protection by delineating districts encompassing the re-

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8. *Id.* at v.

9. *Id.*

10. *Id.*

11. VA. CODE ANN. § 15.1-503.2 (Cum. Supp. 1988).

12. *Id.* § 15.1-503.2(A)(1).

13. *Id.* § 15.1-503.2(A)(3).

14. *Id.*

15. *Id.* § 15.1-503.2(A)(4) (Additional authority to preserve, maintain and manage); see *infra* note 39 and accompanying text.

sources.<sup>16</sup> The resources may be individual historic landmarks or broader "historic areas."<sup>17</sup> Individual landmarks may be those established by the Virginia Historic Landmarks Board<sup>18</sup> or "any other buildings or structures within the county or municipality having an important historic, architectural or cultural interest."<sup>19</sup> "Historic areas" include buildings or places "having special public value because of notable architectural or other features relating to the cultural or artistic heritage of the community."<sup>20</sup> These areas need not contain individually significant buildings or structures as long as the area, taken as a whole, is architecturally or culturally significant to the locality.<sup>21</sup>

Under the statute, the locality may designate buildings, structures, or areas of purely local interest, as well as those of state or national significance. After the locality designates the resource to be protected, protection is accomplished by establishing a district adjacent to or encompassing the resource. The district is established by amending the zoning ordinance in accordance with the general zoning laws.<sup>22</sup>

#### B. *Control Within Historic Districts*

The preservation statute is part of the general zoning statutes of Virginia, and therefore, it is subject to general principles of zoning law. Zoning is a legislative power vested in the Commonwealth and delegable to localities.<sup>23</sup> The principle commonly known as Dillon's Rule constrains local governments in their exercise of any delegated legislative power. Dillon's Rule states that:

[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.<sup>24</sup>

Localities, then, are extremely hesitant to interpret the zoning statutes broadly.

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16. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988).

17. *Id.*

18. The Virginia Historic Landmarks Commission is now known as the Virginia Historic Landmarks Board. VA. CODE ANN. § 10.1-802 (Cum. Supp. 1988).

19. VA. CODE ANN. § 15.1-503.2(A)(1).

20. *Id.* § 15.1-430(b).

21. *Id.*

22. *Id.* § 15.1-503.2(A)(1); see *id.* §§ 15.1-486 to -498 (Repl. Vol. 1981 & Cum. Supp. 1988) (provisions for amending the local zoning ordinance).

23. *Hurt v. Caldwell*, 222 Va. 91, 96, 279 S.E.2d 138, 141 (1981).

24. *City of Richmond v. Board of Supervisors*, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958) (quoting DILLON ON MUNICIPAL CORPORATIONS § 89 (1872)).

The zoning statutes expressly empower a county or municipality to classify all the territory under its jurisdiction into districts.<sup>25</sup> Within each district, the locality may adopt zoning ordinances to regulate such factors as the use, dimension, mass, erection, demolition and physical treatment of buildings and structures.<sup>26</sup> In adopting and administering such zoning ordinances, however, the locality may not properly consider the architectural or aesthetic elements of the buildings and structures.<sup>27</sup>

The preservation statute enlarges the regulatory powers conferred by the general zoning statutes in only one significant way. The locality may condition approval of any erection, reconstruction, alteration, or restoration of any building or structure, including signs, within the historic district on the requirement that the proposed changes will be "architecturally compatible with the historic landmarks, buildings, or structures [in the historic district]."<sup>28</sup>

The statute also allows the local government to regulate the destruction of buildings within the district. The demolition, razing, or moving of historic landmarks, buildings, or structures within the historic district may be made subject to the approval of the ARB.<sup>29</sup> This apparently broad grant of power for the protection of historic buildings is rather strictly limited, however. The landowner has an absolute right to raze or demolish the historic landmark provided that he has 1) applied to the local government for such right, and 2) made a bona fide offer to sell the property in accordance with the terms of the statute.<sup>30</sup> The statute imposes no requirement that the ARB actually approve the demolition. When the landowner has applied for the right to demolish and has complied with

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25. VA. CODE ANN. §§ 15.1-486 to -498 (Repl. Vol. 1981 & Cum. Supp. 1988).

26. *Id.* § 15.1-486. The local government is authorized to regulate:

(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used.

*Id.*

27. *Planning Commission v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971) (disapproval of site plan improper where based on desire to forestall proliferation of free-standing franchise restaurants); see *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) (regulation on the basis of architectural compatibility was improper where statutory requirements for establishment of historic district were not met).

28. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988).

29. *Id.* § 15.1-503.2(A)(2).

30. *Id.* § 15.1-503.2(A)(3).

the offer-to-sell provision, the ARB has no power to prevent the demolition.<sup>31</sup>

### C. Appeals

Where the landowner is dissatisfied with the decision of the ARB, he may appeal to the governing body.<sup>32</sup> If the governing body upholds the ARB, the landowner may appeal to the local circuit court within thirty days.<sup>33</sup> The court will reverse or modify the governing body's decision if the decision was contrary to law or arbitrary. The filing of the petition stays the decision of the governing body.<sup>34</sup>

In some ways, the statute's appeal provisions appear to strengthen the locality's power to prevent demolition of historic structures. For example, in deciding an appeal from the ARB's denial of demolition approval, the governing body must consult with the ARB.<sup>35</sup> This requirement appears to advance historic preservation by ensuring that the appellate decision will not be based solely on the landowner's concerns. Additionally, the automatic stay imposed on the governing body's decision when the appeal is filed in the circuit court does not apply where the governing body's decision was to uphold the ARB's denial of demolition approval.<sup>36</sup> This provision prevents the landowner from filing a frivolous appeal to trigger the stay, and then demolishing the landmark during the pendency of the appeal. However, in light of the landowner's absolute right to demolish the landmark,<sup>37</sup> these provisions are not as strong as they appear. The landowner must comply with the statute's offer-to-sell requirement. If a buyer is found during the statutory period, then the property will be preserved. If, however, the statutory period lapses during the pendency of an appeal, it would appear that the landowner could demolish the landmark regardless of the governing body's decision.

### D. Other Actions Authorized by the Statute

The statute authorizes local governments to acquire estates and interests in historic properties "which, in the opinion of the governing body should be acquired, preserved and maintained for the use, observation, education, pleasure and welfare of the people."<sup>38</sup> This broad grant of power includes the authority to exercise eminent domain for the purpose of historic preservation. However, the locality is not permitted to use the

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31. *Id.*

32. VA. CODE ANN. § 15.1-503.2(A)(3) (Cum. Supp. 1988).

33. *Id.*

34. *Id.* (unless the decision denies the right to raze or demolish).

35. *Id.* § 15.1-503.2(A)(2).

36. *Id.* § 503.2(A)(3).

37. *Id.*; see *supra* text accompanying notes 30-31.

38. VA. CODE ANN. § 15.1-503.2(A)(4) (Cum. Supp. 1988).

right of condemnation "unless the historic value of such areas, landmark, building, structure, land pertaining thereto, or estate or interest therein is about to be destroyed."<sup>39</sup>

### III. PROBLEMS IN THE STATUTE AND PROPOSED SOLUTIONS

Virginia's historic district enabling legislation is extremely broad. It may be construed to grant localities tremendous freedom to legislate for the preservation of historic and other resources. It is also extremely vague. City attorneys and others "whose job it is to be careful"<sup>40</sup> may narrowly construe the statute as insufficient authority for the use of many preservation tools.<sup>41</sup>

Virginia's officials have expressed frustration and a reluctance to be creative in their efforts to enact local legislation under the preservation statute.<sup>42</sup> They have voiced confusion over specific issues such as what resources are eligible for protection under the statute; the role and function of ARB's; and the extent of local regulatory powers under the statute.<sup>43</sup>

The lack of clarity in the statutory language causes most of the localities' concerns. The local legislators do not know what the General Assembly intended the statute to do. Since Virginia courts follow Dillon's Rule,<sup>44</sup> the localities hesitate to interpret the statute too generously. The following discussion will focus on the specific concerns voiced by local governments and concerned individuals. Statutory reforms to clarify provisions of the preservation statute are recommended.

#### A. *Statement of Legislative Purpose*

Many statutes include a statement of legislative purpose.<sup>45</sup> These state-

39. *Id.* Other powers granted to the locality include the authority to establish a board, commission, or agency to provide for the renovation and management of historic property acquired by eminent domain; to provide for the charging of compensation for the use of or admission to such property; to lease the property subject to the restriction that the historic character or value of the property be maintained; and to enter into contracts for the preservation and maintenance of the property. *Id.*

40. Address by H. Bryan Mitchell, Director, Virginia Department of Conservation and Historic Resources, Division of Historic Landmarks, Governor's Commission to Study Historic Preservation (Mar. 2, 1988).

41. *Id.*

42. Survey by the Author of local planning officials, state officials with the Division of Historic Landmarks, members of the Governor's Commission to Study Historic Preservation, and other individuals concerned with preservation in the Commonwealth (Mar. 1988) [hereinafter Survey].

43. *Id.*

44. See *supra* notes 23-24 and accompanying text.

45. See VA. CODE ANN. § 15.1-427 (Repl. Vol. 1981) (Statement of legislative purpose for

ments provide insight as to legislative policies and objectives and are extremely useful in defending attacks on the validity of the legislation.<sup>46</sup> A statement of legislative purpose in an enabling statute also assists localities in interpreting the breadth of the statute's grant of power. In the historic district enabling statutes of many states, the statement of legislative purpose refers to the general health, welfare, safety, or culture of the public.<sup>47</sup> The statute may also address other, more specific, objectives.<sup>48</sup>

The value of a statement of legislative intent was demonstrated in twin challenges to an historic district designation encompassing Abraham Lincoln's home in Springfield, Illinois.<sup>49</sup> The cases, filed concurrently, charged that the restrictions placed on the property included in the historic district were confiscatory. The Illinois court referred to the declaration of policy contained in the Illinois Code. This policy stated that social changes threaten "areas, places, buildings, structures, works of art and other objects having special historical, community, or aesthetic interest or value,"<sup>50</sup> and that the preservation and continued utilization of these re-

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planning, subdivision of land, and zoning); *see also* GA. CODE ANN. § 44-10-21 (1982); ILL. ANN. STAT. ch. 24, para. 11-48.2-1 (Smith-Hurd Supp. 1988); PA. STAT. ANN. tit. 53, § 8002 (Purdon 1972 & Supp. 1988) (examples of statements of legislative intent with regard to historic district zoning in other states).

46. In *Board of Supervisors v. State Milk Commission*, 191 Va. 1, 60 S.E.2d 35, *appeal dismissed*, 340 U.S. 881 (1950), the Supreme Court of Virginia construed the statement of legislative purpose in the act which created the State Milk Commission. The plaintiffs were attacking the validity of the act. The court noted that the statement of legislative intent declared that the production and sale of milk and cream in Virginia "is a business affecting the public peace, health, and welfare." *Id.* at 10, 60 S.E.2d at 40. Therefore, the court declared that "[i]n the absence of evidence to the contrary, this Court will take the statements of the preamble to be true, and will not substitute its judgment for that of the legislature." *Id.* Similarly, in *Temple v. City of Petersburg*, 182 Va. 418, 29 S.E.2d 357 (1944), the court stated that, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy." *Id.* at 423, 29 S.E.2d at 358.

47. *See, e.g.*, ALASKA STAT. § 41.35.010 (1988); MD. ANN. CODE art. 66B, § 8.01(b) (Repl. Vol. 1988); MASS. ANN. LAWS ch. 40C, § 2 (Law. Co-op. 1983).

48. The Pennsylvania Historic District Enabling Act authorizes localities to create historic districts for the lofty purpose of "protecting those historical areas within our great Commonwealth, which have a distinctive character recalling the rich architectural and historical heritage of Pennsylvania, and of making them a source of inspiration to our people by awakening interest in our historic past." PA. STAT. ANN. tit. 53, § 8002 (Purdon Supp. 1988). The Georgia enabling legislation states economic purposes of stimulating revitalization of central business districts and enhancing the state's tourist appeal, as well as encouraging the state's citizens to take advantage of federal tax incentives for preservation. GA. CODE ANN. § 44-10-21 (1982). The West Virginia enabling legislation has recently been amended to change the language from a mere reference to the general welfare to a description of the specific advantages of historic preservation, including economic stimulation, tourism and education. W. VA. CODE § 8-26A-1 (Cum. Supp. 1988).

49. *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969); *M & N Enters., Inc. v. City of Springfield*, 111 Ill. App. 2d 444, 250 N.E.2d 289 (1969).

50. ILL. ANN. STAT. ch. 24, para. 11-48.2-1 (Smith-Hurd Supp. 1988).



sources are "necessary to sound community planning for such municipalities and to the welfare of the residents thereof."<sup>51</sup> The court noted that the statement of legislative intent "essentially created a new concept of public welfare and is a specific declaration by the Legislature that preservation and enhancement of historical areas is within the concept of the exercise of police powers for the public welfare."<sup>52</sup> In both cases the court held that the historic district designation was valid because its purposes were authorized by the statement of legislative intent.<sup>53</sup>

Virginia's statute contains no similar statement of policy. The general zoning statutes,<sup>54</sup> which encompass the preservation statute, are controlled by a broad declaration of legislative intent.<sup>55</sup> This declaration makes no reference to preservation of historic resources.<sup>56</sup> The Supreme Court of Virginia has held that an ordinance, in order to be valid, must comply with the enabling legislation by promoting the goals expressed therein.<sup>57</sup> The historical, architectural and cultural resources of the Commonwealth are not addressed in the zoning statutes. Therefore, these resources may be overlooked, or even deliberately ignored, by a local government attempting to balance competing interests in enacting local ordinances.

The General Assembly must address this deficiency. First, the broad statement of legislative intent which controls the general zoning statutes<sup>58</sup> should be amended to reflect legislative approval of the goals of historic preservation. Such an amendment would allow these goals to be balanced against other interests as localities attempt to conform to the requirements of the statute.

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51. *Id.*

52. *M & N Enters.*, 111 Ill. App. 2d at 450, 250 N.E.2d at 293.

53. *Rebman*, 111 Ill. App. 2d at 439-40, 250 N.E.2d at 288; *M & N Enters.*, 111 Ill. App. 2d at 450-51, 250 N.E.2d at 293.

54. VA. CODE ANN. §§ 15.1-427 to -503.2 (Repl. Vol. 1981 & Cum. Supp 1987).

55. *Id.* § 15.1-427.

This chapter is intended to encourage local governments to improve public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surrounding for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds.

*Id.*

56. Indeed, the language of the declaration of legislative intent may undermine the goals of historic preservation. Future development and new community centers are encouraged, and highway, utility, health, educational, and recreational facilities are contemplated. The needs of agriculture, industry and business are recognized. Historic preservation is conspicuous by its absence.

57. *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958).

58. VA. CODE ANN. § 15.1-427.

Second, a new section should be added to the preservation statute describing the legislative purposes which prompted its passage. This will ensure that historic preservation will be recognized by the courts as a valid goal of the legislature. The legislative purpose should include economic advantages such as revitalization of business districts, attraction of tourism and new industries, and stabilization of property values. Also, it should include educational and cultural advantages. Examples are an understanding of the history of the Commonwealth and its localities, and assurance that its cultural and historical heritage will be imparted to present and future generations. Other advantages which it should include may be social, such as neighborhood conservation and preservation of the character, social fabric, and "quality of life" of communities.<sup>59</sup>

### B. *Clarification of the Statute's Provisions*

Virginia localities have identified a number of situations where they have found the statute ambiguous or insufficient to accomplish their preservation objectives. In many of these situations, however, the statute could have been construed broadly enough to allow the locality to proceed with the regulation in question.<sup>60</sup> Again, localities cite Dillon's Rule<sup>61</sup> as the justification for their hesitancy. To alleviate this timidity, the General Assembly must assist localities in implementing the provisions of the statute by interpreting its language for them.

#### 1. Definition of Terms

Many of the statute's terms are not defined anywhere in the Code and the localities define them extremely narrowly. Consequently, a new definitional section must be added to the statute, defining terms broadly enough to cover virtually every preservation objective. When a particular local government wishes to restrict the scope of its regulation, it can do so through specific limiting provisions in its local ordinance. The following terms and definitions will add clarity to the statute.

##### a. Important Historical, Architectural, or Cultural Interest

The statute allows localities to protect buildings or structures having an "important historic, architectural or cultural interest."<sup>62</sup> The definition of this phrase is particularly important because it controls what resources are eligible to trigger historic district designation. Virginia locali-

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59. See A HANDBOOK ON HISTORIC PRESERVATION LAW 63-64 (C. Duerkson ed. 1983).

60. Survey, *supra* note 42.

61. See *supra* note 24 and accompanying text.

62. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988).

ties have demonstrated some confusion as to what these resources may include.

For example, representatives from the Roanoke Planning Office have noted increasing concern with the preservation of older residential neighborhoods.<sup>63</sup> Pursuant to a city development plan adopted in 1964, many of the traditional residential sections of the city were rezoned to allow commercial and industrial uses. Residents moved out of these areas, but in many cases, businesses did not move in to replace them. The result was "many vacant units, substandard conditions, housing demolitions and general disinvestment in older neighborhoods."<sup>64</sup> Since 1964, however, the city has come to recognize the cultural and social value of its diversity of neighborhoods, as well as the need to maintain its existing housing stock.<sup>65</sup> In 1985, Roanoke adopted a new comprehensive development plan which specifically addresses the need to preserve the city's residential neighborhood fabric.<sup>66</sup> The plan recommends that "neighborhood conservation zones" be established to achieve this goal.<sup>67</sup> The city planners envision these zones as relaxed versions of historic districts. Regulations in a neighborhood conservation district would be geared toward preserving the ambiance and visual character of the neighborhood, but would not be as strict as the historic district regulations.<sup>68</sup>

The Roanoke city planners noted, however, that they believe they are unable to establish these neighborhood conservation districts under the present enabling legislation.<sup>69</sup> The planners stated that the legislation imposes strict constraints on what resources may be protected. Only those resources which are considered "historic" according to established criteria will trigger historic district designation.<sup>70</sup> The planners indicated that these "established criteria" are the strict standards which control the Virginia Historical Landmark Board's nomination of historic sites to the Virginia Historic Landmarks Register.<sup>71</sup> Thus, the city planners believe that older neighborhoods without specific landmarks or remarkable architectural integrity are ineligible for protection under the statute.<sup>72</sup>

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63. Address by Earl B. Reynolds, Jr. and Evelyn S. Gunter, Governor's Commission to Study Historic Preservation (Mar. 2, 1988) [hereinafter Reynolds and Gunter].

64. *Id.*

65. ROANOKE CITY PLANNING COMMISSION & ROANOKE OFFICE OF COMMUNITY PLANNING, COMPREHENSIVE DEVELOPMENT PLAN FOR ROANOKE, VIRGINIA 1985-2005, ROANOKE VISION 34-35 (1986) (prepared by Buckhurst, Fish, Hutton, Katz in association with Thomas & Means Associates and Margaret Grieve).

66. *Id.* at 7.

67. *Id.*

68. Reynolds and Gunter, *supra* note 63.

69. *Id.*

70. *Id.*

71. See VA. CODE ANN. § 10.1-802 (Cum. Supp. 1988).

72. Reynolds and Gunter, *supra* note 63.

In fact, the statute does not require that such strict criteria be employed. The statute allows for the designation of "any . . . buildings or structures . . . having an important historic, architectural or cultural interest."<sup>73</sup> The statute does not refer to the standards which govern the Virginia Landmarks Board. Ostensibly, if the Roanoke City Council determines that older residential neighborhoods have an important cultural interest, the neighborhoods may be protected under an historic district ordinance. Nevertheless, the city planners remain hesitant to protect these neighborhoods because "important historic, architectural or cultural interest" has not been defined in the Code.

The Loudoun County Historic District Review Committee (HDRC) has also struggled with the definition of "important historic, architectural or cultural interest." Prior to 1977, the statute provided that the local governing body could designate *individual* landmarks, buildings, or structures, and delineate one or more historic districts adjacent thereto.<sup>74</sup> The statute also stated that "[n]o such historic district shall extend further than one-quarter mile from the property line of the land pertaining to any such historic landmark, building or structure."<sup>75</sup> This allowed the locality to establish an historic district, or buffer zone, which protected the setting of the landmark. In Loudoun County, this protection was particularly important for the National Landmark Village of Waterford.<sup>76</sup> The HDRC was able to establish an undeveloped, pastoral quarter-mile border around the village. This border preserved the historic rural landscape and the rural atmosphere of the village.<sup>77</sup>

In 1977, however, the quoted language was deleted from the statute, and language was added enabling the locality to designate "historic areas" in addition to individual landmarks.<sup>78</sup> Ostensibly, the amendment increased the locality's protective powers since an "historic area" may encompass considerably more than the quarter-mile radius to which historic districts had been limited. The Loudoun County HDRC, however, believes that the amendment removed its power to protect the setting of the landmark by eliminating control over the buffer zone.<sup>79</sup>

Loudoun County, like Roanoke, is taking an unnecessarily restrictive view of the statute. If the locality considers the buffer zone area historically or culturally important, then that area should be protected by an historic district ordinance. Again, however, afraid of running afoul of Dil-

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73. VA. CODE ANN. § 15.1-503.2(A)(1) (emphasis added).

74. VA. CODE ANN. § 15.1-503.2(1)(a) (1973), amended by 1977 Va. Acts 472.

75. *Id.*

76. The Village of Waterford is listed on the National Register of Historic Places.

77. Letter from Mrs. Teckla H. Cox, Loudoun County Planner, to the Author (Feb. 19, 1988) (discussing Village of Waterford).

78. VA. CODE ANN. § 15.1-503.2 (Cum. Supp. 1977).

79. See *supra* note 77.

lon's Rule,<sup>80</sup> the locality has chosen to interpret the statute extremely narrowly.

"Important historic, architectural or cultural interest" should be defined as broadly as possible so as to provide for maximum flexibility. Local governments wishing to restrict the scope of resources eligible for designation under the local ordinance may do so with specific limiting provisions. The following proposed definition incorporates the standards for designation that the Virginia Historic Landmarks Board must follow.<sup>81</sup> The definition also expands these standards so that the locality may designate resources of purely local interest including neighborhoods and other sources of unique social and visual character to the locality:

*Important historical, architectural or cultural interest* refers to those resources which are eligible for landmark designation under section 10.1-802; those buildings, structures, sites, areas or districts which have contributed to, or are identified with, or are representative of the historical, architectural, cultural, social, archaeological or visual character of the locality; and any other historical, architectural, cultural, archaeological or visual resources which, in the opinion of the governing body are significant to the locality, Commonwealth, or nation.

#### b. Structures

"Structures" is another undefined term used in the statute. The definition of this term is important for two reasons. First, the statute allows the ordinance to provide that "no building or structure" shall be constructed or altered without the local government's approval.<sup>82</sup> Therefore, the definition of structure will determine the extent of the locality's regulatory control within an established district. Second, the statute allows localities to protect "buildings or structures . . . having an important historic, architectural or cultural interest."<sup>83</sup> Therefore, the definition of "structure," like "important historic, architectural or cultural interest," will control what resources trigger historic district designation.

Whether fences were included in the definition of "structure" was the subject of a dispute involving the Village of Waterford.<sup>84</sup> In 1984, the local Historic District Review Committee refused to issue a permit for the erection of a chain link fence within the historic district. The property owners seeking the permit filed suit in the Loudoun County circuit court, challenging the county's authority to regulate fences. During the pen-

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80. See *supra* note 24 and accompanying text.

81. VA. CODE ANN. § 10.1-802 (Cum. Supp. 1988).

82. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988).

83. *Id.*

84. *Robitson v. Board of Supervisors*, No. 7796 (Loudoun County Cir. filed Aug. 3, 1984), noted in 4 PRESERVATION L. REP. 1033 (1985).

dency of the suit the owners erected the chain link fence despite the denial of the permit. The National Trust for Historic Preservation, the Conservation Foundation, and the Preservation Alliance of Virginia filed an amicus curiae brief arguing that fences are included within the definition of "structure" which ARB's are authorized to regulate under the statute. Before the case could be decided, however, the parties agreed to allow the property owner to maintain the chain link fence across less visible portions of the property.<sup>85</sup> Because the case was settled no definition of "structure" emerged from the dispute.

The Danville Planning Office has also questioned the definition of "structure." That office would like to exert some control over trees and landscaping within historic districts.<sup>86</sup> Where mature trees shade the street and contribute significantly to the character of the historic district, a developer or property owner should not be able to destroy those trees without some sort of regulatory control.<sup>87</sup> Similarly, where the landscaping of the district contributes significantly to its character, a lack of regulatory control over that landscaping can frustrate the locality's attempts to maintain the district's character.<sup>88</sup> The Danville Planning Office believes that the statute allows regulatory control only over "buildings and structures." Therefore, the local government cannot regulate natural phenomena such as vegetation and land formations unless such phenomena are considered "structures." Danville has not enacted any regulations which would protect such features.

The Danville Planning Office has even hesitated to regulate non-historic buildings within historic districts.<sup>89</sup> The statute allows ordinances to "include a provision that *no* building or structure, including signs, shall be erected, reconstructed, altered or restored within any such historic district unless the same is approved by the architectural review board . . . as being architecturally compatible with the historic landmarks, buildings or structures therein."<sup>90</sup> Yet the Danville planners, ever mindful of Dillon's Rule,<sup>91</sup> err on the side of conservatism because they believe that the statute was enacted for the preservation of historic buildings. Consequently,

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85. The property owners agreed to erect a picket fence across the front of the property and two-thirds of the side yard line. The chain link fence was allowed to remain on the remainder of the property but had to be screened with vegetation. Part of the cost of removing the chain link fence and erecting the picket fence was borne by a Waterford preservation organization. *Id.*

86. Interview with Danville County Planning Officer (Mar. 9, 1988).

87. *Id.*

88. *Id.*

89. *Id.*

90. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988) (emphasis added).

91. See *supra* note 24 and accompanying text.

without an express grant of power, the Planning Office hesitates to regulate non-historic buildings.<sup>92</sup>

Alexandria has also confronted the need for a definition of structure as used in the statute. The Alexandria ARB wanted to amend the city ordinance to protect archaeological resources under historic district regulation.<sup>93</sup> The Alexandria city government has suggested that archaeological resources are not contemplated by the statute's grant of regulatory power over historic landmarks or other buildings or structures. Therefore, the amendment was not possible.<sup>94</sup>

The Virginia State Division of Historic Landmarks requested the Attorney General's office to issue an informal opinion. That opinion ignored the word structure, concentrating instead on important historic, architectural or cultural interests.<sup>95</sup> The opinion concluded that if the local government determined that archaeological resources had an important cultural interest, such resources could be regulated. In addition, the statute grants localities the power to regulate historic landmarks "as established by the [Virginia Landmarks Commission]."<sup>96</sup> Because the Commission was currently designating archaeological sites as historic landmarks, the opinion concluded that the locality could do likewise.<sup>97</sup>

Although Alexandria accepted the opinion's conclusions and enacted an ordinance which protects local archaeological resources,<sup>98</sup> the controversy over the word "structure" remains unresolved. The opinion failed to address the fact that archaeological resources, located under the surface of the earth and usually comprising numerous isolated artifacts, seldom take a form which is recognizable as a "structure" under most accepted constructions of that term. A definition of "structure" which attempts to force archaeological resources into its confines would most likely be confusing to localities and courts. Consequently, archaeological resources should be excluded from the definition of "structure." Rather, archaeological resources should be included as a separate category meriting protection under the historic district enabling legislation.

The following proposed definition is taken verbatim from the Maryland Code.<sup>99</sup> It has the merit of encompassing virtually every aspect of the vis-

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92. See *supra* note 86.

93. Memorandum from Roger L. Chaffe, Assistant Attorney General to H. Bryan Mitchell, Director, Virginia Department of Conservation and Historic Resources, Division of Historic Landmarks (June 3, 1985) (discussing local historic zoning).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Interview with H. Bryan Mitchell, Director, Virginia Department of Conservation and Historic Resources, Division of Historic Landmarks, Richmond, Virginia (Mar. 10, 1988).

99. MD. ANN. CODE art. 66B, § 8.01(a)(3) (Repl. Vol. 1988).

ual features of the district. This definition would resolve the problems faced by Waterford and Danville, as well as provide guidance for other localities:

“[S]tructure” means a combination of material to form a construction that is stable; including among other things, buildings, stadiums, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks and towers, trestles, piers, paving bulkheads, wharves, sheds, coal bins, shelters, fences and display signs. The term also includes natural land formations and appurtenances and environmental settings. The term shall be construed as if followed by the words “or part thereof.” “Appurtenances” and “environmental settings” include walkways and driveways (whether paved or not), trees, landscaping, and rocks.<sup>100</sup>

### c. Demolition

The statute allows a locality to enact an ordinance providing that “no historic landmark, building or structure within any such historic district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the architectural review board.”<sup>101</sup> The Code does not define any of the terms used in this provision.

The need for a definition of “demolish” was emphatically demonstrated in Winchester when the local ARB was requested to permit the demolition of a porch on a nineteenth-century home located in a historic district. The porch, which wrapped around two sides of the house, was clearly the most architecturally important feature of the building.<sup>102</sup> The owner wished to replace it with a small Greek Revival portico. The ARB refused to grant a demolition certificate, and as a result, the property owner refused to make necessary repairs or to continue minimal maintenance on the porch. Eventually, the porch became a safety hazard and had to be removed under the provisions of the building code. In effect, the porch was “demolished by neglect,”<sup>103</sup> and the ARB believed it was powerless to prevent it.<sup>104</sup>

The Winchester porch could have been saved if Winchester’s ordinance had been similar to Smithfield’s ordinance which requires structural maintenance and preservation against decay and deterioration.<sup>105</sup> In 1983,

100. *Id.* (emphasis added).

101. VA. CODE ANN. § 15.1-503.2(A)(2) (Cum. Supp. 1988).

102. Address by H. Bryan Mitchell, Director, Virginia Department of Conservation and Historic Resources, Division of Historic Landmarks, Governor’s Commission to Study Historic Preservation (Mar. 2, 1988).

103. *Id.*

104. *Id.*

105. The Smithfield ordinance requires that buildings in the Historic Preservation District be:

[P]reserved against decay and deterioration and maintained free from structural de-



a Smithfield property owner challenged the validity of this provision, claiming that the preservation statute does not authorize a locality to impose mandatory maintenance on property owners.<sup>106</sup> The town of Smithfield admitted that the preservation statute did not provide for maintenance and repair regulation. Instead, the town relied on the general zoning statutes that do authorize localities to regulate repair and maintenance.<sup>107</sup> The court, in a one-page letter opinion, held that the provision was a valid exercise of police power.<sup>108</sup>

Despite Smithfield's successful defense of the mandatory maintenance requirement, there are two essential reasons for the General Assembly to include a definition of "demolition" which encompasses demolition by neglect. First, the Smithfield decision was a circuit court decision and has no precedential effect outside the jurisdiction. Another court could hold that the general zoning statutes do not authorize mandatory maintenance requirements. Second, even if mandatory maintenance provisions are implicitly authorized, localities have demonstrated their unwillingness to enact any historic preservation regulation not expressly authorized. Localities are unlikely to utilize an implicit grant of power found in the general zoning statutes to enforce preservation purposes.

To avoid further disputes, the definition of "demolition" should encompass, in addition to demolition by neglect, every action which may result in the elimination of a character-defining element of a historic district. To prevent financial hardship to property owners, however, the locality should have the option of exempting demolition by neglect from regulation under certain circumstances.

*Demolition* means the razing or destruction, whether entirely or in significant part, of a building, structure, site, or object. Demolition includes the removal of a building, structure, or object from its site or the removal or destruction of the facade or surface.<sup>109</sup> Demolition also means "any wilful neglect in maintenance and repair of a structure . . . that threatens to result in any substantial deterioration of the exterior features of the struc-

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fects to the extent that such decay, deterioration or defects may, in the opinion of the Board of Historic and Architectural Review, result in the irreparable deterioration of any exterior appurtenance or architectural feature or produce a detrimental effect upon the character of the district as a whole or upon the life and character of the structure itself.

Smithfield, Va., Ordinance § 11.14, *quoted in* 5 PRESERVATION L. REP. 3007 (1986).

106. *Harris v. Parker*, No. 3079 (Isle of Wight County Cir. Jan. 20, 1983), *noted in* 5 PRESERVATION L. REP. 3007 (1986). The court later ordered the property owner to make extensive repairs. *Id.*

107. VA. CODE ANN. § 15.1-486(b) (Repl. Vol. 1981) (localities regulate "construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures").

108. *See supra* note 106.

109. This portion of the proposed definition was quoted from the PHILADELPHIA, PA. CODE § 14-2007(2)(f) *reprinted in* BOASBERG, COUGHLIN & MILLER, HISTORIC PRESERVATION LAW AND TAXATION, app. 7-B (1988).

ture."<sup>110</sup> *Provided*, however, that the local governing body may, at its option, specify in its ordinance that neglect in such maintenance or repair which results from the owner's financial inability shall not be subject to regulation.

#### d. Reconstructed, Altered or Restored

The preservation statute authorizes localities to provide that no building or structure shall be "erected, reconstructed, altered or restored" without approval of the local governing body.<sup>111</sup> Again, these terms are undefined in the Code. Although no locality surveyed for this study reported a specific dispute over the meaning of this phrase,<sup>112</sup> such a dispute is entirely foreseeable. This phrase coupled with "razed, demolished or moved,"<sup>113</sup> substantially defines and limits the extent of local regulatory authority. Therefore, local governments need to know exactly what actions the terms encompass.

The terms, "erected, reconstructed, altered or restored" should be broadly defined to provide localities with maximum flexibility in drafting their ordinances. If a particular locality wishes to limit its own regulatory authority, it can draft the language of its ordinance restrictively. The definition of this term should encompass every action of a property owner which may result in a change in the character-defining visual elements of the historic district:

*Reconstruction, alteration and restoration* encompass a change in the appearance or architectural features of a structure, or in the interior of any structure whose features are specifically included in the relevant designation. Reconstruction, alteration and restoration include, but are not limited to, reroofing, cleaning, and painting.<sup>114</sup>

## 2. Clarification of Local Powers

Many localities have expressed a need for clarification of the local powers granted in the preservation statute. The statute provides four bald grants of power: 1) to designate historic resources to be protected by a historic preservation ordinance; 2) to establish an ARB; 3) to regulate construction and alterations within historic districts; and 4) to regulate razing, demolition and moving of buildings and structures within historic districts. Localities, however, are unsure of what specific actions the statute permits them to undertake in exercising these powers.

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110. The wording of this portion of the proposed definition is based on MD. ANN. CODE, art. 66B, § 8.01(a)(3) (Repl. Vol. 1988).

111. VA. CODE ANN. § 15.1-503(A)(1) (Cum. Supp. 1988).

112. Survey, *supra* note 42.

113. VA. CODE ANN. § 15.1-503.2(A)(2).

114. See A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 59, at 77.

One power particularly in need of clarification is the power to establish an ARB. The statute allows local governments to establish ARBs to administer historic district ordinances.<sup>115</sup> It does not, however, provide any guidance for the establishment, role, or function of an ARB. Consequently, many localities have expressed considerable confusion as to the necessity of and the procedures for establishing an ARB.<sup>116</sup>

Members of the Roanoke Planning Office have identified a common local perception.<sup>117</sup> This perception is that when a district is designated, the statute requires the local government to establish an ARB, and that the ARB is required to regulate all construction, alteration and demolition with the district.<sup>118</sup> Although the language of the statute is permissive, stating that "[t]he local government *may* provide for an architectural review board,"<sup>119</sup> and the ordinance "*may* include a provision that no building or structure . . . shall be erected, reconstructed, altered or restored" without the ARB's approval,<sup>120</sup> most city and county attorneys counsel that the statute's provisions are mandatory.<sup>121</sup>

The Roanoke City planners noted that residents in a neighborhood eligible for historic district designation may resist the designation because they do not want to be subjected to the restrictions an ARB will impose on their property. In addition, the local government may not wish to establish an ARB because the ARB will add a needless layer of complexity to the regulatory scheme.<sup>122</sup>

Absent a statutory mandate, however, establishment of an ARB is not necessary in many historic districts. This is particularly true of the residential neighborhoods which presently concern the Roanoke officials. The resource to be protected in such neighborhoods is the ambiance and residential character of the area, rather than specific architectural features. Special expertise is usually not necessary to make effective decisions, and the Planning Commission is capable of administering the ordinance.<sup>123</sup> If historic district ordinances have not been enacted in some localities solely because of resistance to ARBs, and if the statute permits, but does not

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115. VA. CODE ANN. § 15.1-503.2(A)(1) (Cum. Supp. 1988).

116. Survey, *supra* note 42.

117. Reynolds and Gunter, *supra* note 63.

118. *Id.*

119. VA. CODE ANN. § 15.1-503.2(A)(1) (emphasis added).

120. *Id.*

121. Mitchell, *supra* note 98.

122. Reynolds and Gunter, *supra* note 63.

123. In localities where the local planning commission is hesitant to exercise final design approval, a system could be established where the landowner works with the planning commission to develop a design which is likely to be acceptable to the ARB. The planning commission's positive recommendation could expedite the ARB's review process.

require, the establishment of ARBs, then it is obvious that some resources which could be protected by historic district designation are needlessly unprotected.

Enabling legislation from other states includes lists of the powers granted to local governments or historic district commissions.<sup>124</sup> Such a list serves two functions. First, it provides unambiguous authorization for localities to exercise the enumerated powers. Second, it provides guidance for localities to draft their own ordinances. The local government may choose to include the list of powers, or a portion thereof, in the local ordinance.

It should be noted, however, that accepted principles of statutory construction dictate that such a list of powers will be construed as exclusive unless the statute specifies otherwise. Where a locality devises a novel preservation program, an exclusive list of powers may prove limiting, rather than permissive. The locality may choose to work for preservation in ways that the state legislature did not contemplate. If the goal of the legislation is to provide flexibility for local preservation initiative, then the statute must specify that the list is illustrative only.

The following provisions should be added to the statute to clarify the power of local governing bodies:

The governing body may, but is not required to, provide for an architectural review board to administer the ordinance. The powers which the governing body, or if established, the architectural review board, is hereby authorized to exercise in the establishment and administration of historic districts may include, but are not limited to, the following:

- (1) To accept such gifts, grants and money as may be appropriate to accomplish the purposes of the ordinance;
- (2) To conduct a survey of the community's buildings, structures, places, areas, and archaeological sites for the purpose of identifying those having an important historic, architectural, or cultural interest;
- (3) To designate buildings, structures, places, areas, and archaeological sites as landmarks and to protect such landmarks by establishing historic districts;
- (4) To determine an appropriate system of markers for designated landmarks and historic districts;
- (5) To undertake educational programs and similar activities;
- (6) To keep a register of all properties and structures that have been designated as landmarks or historic areas;
- (7) To nominate landmarks and historic districts to the Virginia Landmarks Register and the National Register of Historic Places;
- (8) To consider applications for variances due to economic hardship;
- (9) To develop procedural regulations;

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124. See, e.g., GA. CODE ANN. § 44-10-25 (1982); IDAHO CODE § 67-4604 (1980); LA. REV. STAT. ANN. § 25:758 (West 1975).

- (10) To develop design guidelines for new construction or reconstruction, alteration, or restoration of existing buildings and structures within historic districts;
- (11) To review permit applications for new construction, reconstruction, alteration, or restoration of existing buildings or structures, and for demolition, razing and moving of existing buildings or structures within historic districts;
- (12) To administer any property or full or partial interests in any property, including easements, that the community may receive; and
- (13) To make recommendations regarding zoning amendments and components of a preservation plan.<sup>125</sup>

### C. *Statutory Deficiencies*

Defining terms used in the statute and clarifying the statute's grant of power will alleviate some of the legislation's perceived deficiencies. Other deficiencies will require amendment of present statutory provisions.

#### 1. Aesthetic Regulation

Many local government officials have expressed frustration at not being able to establish design control for aesthetic purposes.<sup>126</sup> Although the connection between historic preservation and aesthetics has been accepted and approved by a number of courts, including the United States Supreme Court,<sup>127</sup> the Supreme Court of Virginia has consistently held that aesthetic considerations, standing alone, are not a permissible state objective. In *Kenyon Peck Inc. v. Kennedy*,<sup>128</sup> the Supreme Court of Virginia held that a county "cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations."<sup>129</sup> In *Board of Supervisors v. Rowe*,<sup>130</sup> the court considered aes-

125. See 1 BOASBERG, COUGHLIN & MILLER, *HISTORIC PRESERVATION LAW AND TAXATION* § 7.03[4][a] (1988).

126. Survey, *supra* note 42.

127. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (aesthetic considerations a permissible government objective). In the 1978 landmark case, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court specifically reaffirmed that a position in preservation context:

[W]e emphasize what is not in dispute. Because this Court has recognized, in a number of settings, 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 a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural or cultural significance is an entirely permissible governmental goal.

*Id.* at 129 (citations omitted).

128. 210 Va. 60, 168 S.E.2d 117 (1969).

129. *Id.* at 64, 168 S.E.2d at 120.

130. 216 Va. 128, 216 S.E.2d 199 (1975).

thetics in the context of historic preservation. The local ordinance required approval of an Architectural Design Review Board for all construction in a commercial district near Colonial Williamsburg. Ostensibly, the ordinance was passed to preserve property values and promote general welfare. The court, however, found that "the predominant purpose of the ordinance was to promote aesthetic values and the purpose recited in the ordinance to protect property values was merely an incidental goal."<sup>131</sup> The court gave no reason for this finding. Nevertheless, the court invalidated the ordinance.<sup>132</sup>

Design control for aesthetic purposes has received widespread support and application in other states.<sup>133</sup> Many Virginia localities have expressed a willingness and a desire to enact similar controls here.<sup>134</sup> The General Assembly must specifically reverse established judicial precedent against such regulations to allow these localities such control.<sup>135</sup> The General As-

131. *Id.* at 146, 216 S.E.2d at 213.

132. *Id.* at 148-49, 216 S.E.2d at 215; *see also* Planning Comm'n v. Berman, 211 Va. 774, 180 S.E.2d 670 (1971) (ordinance restricting restaurants invalidated); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 282, 192 S.E. 881, 885 (aesthetic purpose alone insufficient to justify zoning ordinance), *appeal dismissed*, 302 U.S. 658 (1937), *reh'g denied*, 302 U.S. 781 (1938).

133. *See* 3 ROHAN, ZONING AND LAND USE CONTROLS § 16.05 (1985). Twenty-five jurisdictions have upheld the validity of regulations which are based on purely aesthetic objectives. These jurisdictions are Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kentucky, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Utah, and Wisconsin.

134. Survey, *supra* note 42.

135. The *Berman* and *Penn Central* decisions are not binding on state courts. One commentator has stated that:

Courts have never been explicit in explaining the constitutional sources of limitation on the police power insofar as they relate to aesthetic regulation. *Berman*, however, makes it clear that, at least since 1954, these constitutional sources cannot be found in the United States Constitution. The only alternative is that substantive due process limitations on the police power in the area of aesthetic regulation must be derived from state constitutions. . . . The limits of the police power, in consequence, are a matter of state law, and each state must itself decide where these limits lie.

It follows that *Berman* is no more aesthetic precedent for *authorizing* regulation based solely upon aesthetic considerations in a given jurisdiction than any other decision from a respected court in another jurisdiction. Of course, if *Berman* had gone the other way, there would be binding precedent *forbidding* aesthetic regulation.

Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. Rev. 125, 165 (1980) (emphasis in original).

The Virginia court has never justified its decisions by reference to the Virginia Constitution. In fact, the court has never advanced any satisfactory justification at all. It has merely recited the talisman that localities are not permitted to zone for aesthetic objectives. *See* Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 64, 168 S.E.2d 117, 120 (1949); Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1975). Consequently, a legislative endorsement of aesthetics should not require an amendment to the Virginia Constitution.

sembly should amend the preservation statute to specifically authorize aesthetic regulation in historic districts.

## 2. Use Regulation

One preservation tool which is apparently not permitted under the preservation statute is use regulation based solely on historic preservation considerations. Although the statute permits localities to control the design of alterations and new construction within historic districts, it does not permit them to establish particular use categories exclusively for historic buildings.

To be economically feasible, preservation of historic buildings must contemplate modern uses for the buildings. Some buildings may be used as residences or museums, but others are suitable only for commercial purposes. Also, it may be economically impossible to renovate the property without recouping of the cost through income. The federal rehabilitation tax credit,<sup>136</sup> often an important, or even essential, incentive in the expensive and time-consuming process of rehabilitating older structures, is available only for income-producing property.<sup>137</sup>

A number of historic structures, however, are located in residential areas. Under many local ordinances, no commercial uses are permitted in residential areas, even with a special exception or variance.<sup>138</sup> The local government has determined that the benefit of allowing commercial uses to some residents is outweighed by the possibility that such uses would represent a burden to other residents or to the locality.<sup>139</sup>

Historic buildings present a special problem. They are expensive to renovate and maintain and are less likely to be preserved if financial assistance is unavailable. Consequently, the locality is likely to lose these

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136. I.R.C. § 46(a) (West Supp. 1988).

137. Treas. Reg. § 1.48-1 (1987).

138. Special exceptions are available to allow the landowner to use his property in certain specified ways when he has met particular conditions. Special exceptions in residential areas are not generally available for commercial uses. A variance may be granted only when the landowner can show that by reason of the unusual size, shape, or topographical features of his property, literal enforcement of the ordinance would work a hardship amounting to confiscation. Variances are not available to allow the applicant a special privilege or convenience. See, e.g., HANOVER COUNTY, VA., CODE art. 8, sec. 5 (1982); HENRICO COUNTY, VA., CODE § 22-116 (1980).

139. See *City of Manassas v. Rosson*, 224 Va. 12, 294 S.E.2d 799 (1982), *appeal dismissed*, 459 U.S. 1166 (1983).

The Henrico County Code, for instance, prohibits all commercial activities in single-family residential districts except the home office of resident professionals. Tourist homes (bed-and-breakfast operations), child-care centers, artists' studios, nursing or convalescent homes, general professional offices, private clubs, and antique shops are all prohibited even though any of these could conceivably be accommodated in a residential area without disruption of the residential atmosphere. HENRICO COUNTY, VA., CODE § 22-13(d), (e) (1980).

structures to neglect or outright demolition. The benefits of prohibiting all commercial uses in residential districts may be outweighed by the loss of the historic character of the locality. If local governments were able to establish certain commercial use categories specifically for historic structures located in residential areas, they could encourage the rehabilitation of such structures by making otherwise unavailable financial incentives available to the property owners. Therefore, the preservation statute should be amended to specifically authorize local governments to establish special use categories for historic structures.

#### IV. CONCLUSION

Virginia is a beautiful state. Its richness manifests itself in natural features from the gentle swell of the Tidewater to the lovely, wild beauty of the western mountains. The state's wealth is evident in such diverse man-made reminders as the magnificent proportions of Thomas Jefferson's architecture, the comfortable ambiance of quiet old neighborhoods, the charm and character of a row of Victorian townhouses, and the graceful timelessness of a plantation manor house. Virginians are proud of their heritage. They have established themselves as national leaders in the field of historic preservation. They have enacted laws designed to protect the irreplaceable historic resources with which they have been entrusted.

Virginians must, however, remain vigilant. As the field of historic preservation changes, Virginia must change. The historic preservation statute was passed in 1973. At the time, the statute was a strong, bold preservation statute. The General Assembly made the statute broad to allow localities flexibility in designing their local preservation programs. In many ways, the statute works. During its fifteen-year lifetime, however, localities have identified necessary improvements. A statement of legislative intent would clarify the statute's intended purpose and effect, allowing localities to interpret its provisions more effectively. Definitions of key terms and clarification of the regulatory powers delegated to local governments would eliminate local timidity in implementing the statute's provisions. Expansion of the statute's grant of power to encompass certain preservation tools which are presently unavailable would expand the statute's reach.

The Governor's Commission, after nineteen months of exhaustive study of Virginia's historic preservation program has recommended a program of changes which, if enacted, will enable Virginia to return to a position of national leadership in the field of historic preservation. It is now the responsibility of the General Assembly to enact those changes. The statutory amendments and clarifications proposed in this Note should be included in the General Assembly's agenda.

*Virginia Epes McConnell*



