2011 FITCH FORUM: PART TWO

KEYNOTE DISCUSSION

Moderator: Ms. Anne Van Ingen

Panelists: Mr. Tersh Boasberg, Mr. Paul Emondson, & Mr. Jerold Kayden

MR. SCHNAKENBERG: Thanks Jerold, so much. That was terrific, really that was great. We're now going to have sort of a keynote discussion where we're going to invite some people, also very talented and experienced lawyers, to come and respond to Jerold's comments. In order to do that, we wanted to moderate this conversation. The question is who could we have to moderate our response to Jerold's comments? Who's going to take the broadest possible view of preservation? Who knows everything that's going on and can focus that into a short response to a keynote that was so extensive? And you know, the solution was actually very easy—Tony immediately said, "Well there's only one person we can ask to do that, and that's Anne Van Ingen," who's going to join us as moderator of this discussion and she'll introduce her panelists to you.

Anne is the former Director of the Architecture, Planning and Design and Capital Projects at the New York State Council of the Arts, and she has run preservation consulting businesses. She works for a number of nonprofit agencies, or she has in the past. She's currently the President of the St. Regis Foundation, which is the land trust in the Adirondacks, and serves as Secretary of the James Marston Fitch Charitable Trust. In addition to the other things she's done, she is also an Adjunct Professor at the School of Architecture at Rensselaer Polytechnic Institute in Troy, New York. So what we'd like to do now is welcome Anne and her panel to come up. Let's welcome Anne Van Ingen to the podium. Thank you Anne.

MS. ANNE VAN INGEN: Good morning. Thank you all very much. I am, as you heard, between opportunities at the moment. I am a preservationist at large. I think that's how I'm describing myself at this moment in my life. I'm enjoying very much the opportunity to focus on particular projects. Tony and Carol, thank you very much for creating such an extraordinary day. It's some real serious substance, and I'm very happy of be a part of it. My role on the Board of the James Marston Fitch Charitable Trust is what brought me here today, and we're very happy to be co-sponsors and supporters today. Just as a quick side bar to all of you who are students here at Columbia, just as I was these many decades ago, I remember conferences just like this held in this room. This was Fitch's idea of how to bring preservation to people, and this was very much his idea of what this program should be; bring the smartest people from around the country to this room for your benefit. I remember well several conferences that were held here then, and what an important

impact it had on my own career. So I urge you all, I'm sure you're not shy, but don't be shy. Introduce yourselves to the people here today. This is an extraordinary line-up of people with some really remarkable intellectual firepower, and I hope you'll take advantage of it. Don't be shy.

I'm glad to be here to orchestrate this response to Jerold. Thank you very much for your particularly thoughtful comments, and I think what we're trying to do at this moment is operate, if you will, at the 50,000 foot level. We'll get down to the specifics of places and issues and cases in later sessions; but what we're trying to do now is set the content for those conversations. As we work through the day, we'll focus back in on New York City, but I think setting this national context is very important.

So, let me introduce our very distinguished respondents today, and I will do them simply in the order in which they're sitting. The first one being Paul Edmonson, who is and has been for many years, the Vice President and General Counsel of the National Trust for Historic Preservation in Washington. He serves as that organization's Chief Legal Officer, and in that role he oversees all legal services for the organization, including an active program of advocacy and litigation for historic preservation. He also oversees the organization's in-house corporate legal services in support of its broad preservation programs and activities, its regional offices, its historic sites, etcetera. He also supervises the Trust's Preservation Easement Program and legal education and outreach activities, all of which are, I'm sure you know, extensive. He's worked over the years with the Trust, with a wide variety of legal issues pertaining to the protection of historic resources in the United States, including constitutional issues, federal and preservation law matters, issues pertaining to local landmarks law, tax incentives for preservation, and preservation easements. Paul certainly has a broad and deep knowledge of national preservation issues, and I also know that Paul is very helpful. He always picks up the phone when people from around the country call for advice and counsel. He received his undergraduate degree from Cornell in Anthropology and Archeology, and then received his law degree from American University in 1981.

Sitting next to Paul at the end is Tersh Boasberg, who is a lawyer in Washington D.C., specializing in historic preservation. He was the Chair for the last ten years of their D.C. Historic Preservation Review Board, and has also been Chair of the D.C. Zoning Commission. He is also an Adjunct Professor of Law at Georgetown University Law Center, and teaches as well at the University's Master of Historic Preservation Program. He's been active in D.C. neighborhood and downtown preservation and zoning battles, as well as regional growth issues and Civil War battlefield protection. He was lead attorney, importantly, for protecting the Virginia battlefields of Manassas, Randy Station, and Kernstown and that grew his current Presidency of the Alliance to Preserve the Civil War Defenses of Washington. He is a founder of Preservation Action, a national grassroots organization of lobbying

organizations, where I first met Tersh, many years ago. He is a graduate of Harvard University and Yale Law School.

I've been told they don't care in which order they respond, so Paul, let's hear your response to Jerold's very thoughtful comments. Then, when the two of you have spoken, I will toss in a couple of general questions for your consideration, and then importantly, open it up to all of you. So if you all have questions, there will be an opportunity in a little bit to speak with any or all of our speakers. Thank you.

MR. PAUL EDMONSON: Well Anne, as always, I agree with everything that Jerold had to say.

MS. VAN INGEN: Of course.

MR. EDMONSON: Tersh?

MR. TERSH BOASBERG: I agree with you Paul.

MR. EDMONSON: Let me just go through a couple of the points that Jerold made, and comment on them, and then I'm going to bring up a couple of things that Jerold touched upon a little, but didn't go into much detail on. Just in order of the kind of outline of the framework that he laid out.

First of all, the value of having a separate legal regime for the regulation of preservation of historic properties, I think, has been demonstrated. Jerold made a strong case for that over the last forty-five years and we would get down to the legal precedence of *Penn Central*.[1] The effect of that case across the country has really been just tremendous, and we have a regime of landmark preservation in many cities and communities that is effective and important.

There is also a flipside of this. I think there's also been a significant level of influence because of zoning and planning in the last forty-five years, another tremendous benefit and advance in the field of preservation law. In many cases, when the Trust or statewide organizations are fighting, we're not fighting demolition of properties or inappropriate development effecting historic properties. We're not doing so under the rubric of the landmarks laws that were really the principal topic of Jerold's discussion and one of the reasons that we're here, but because of the influence of recognition of landmarks in the broader framework. It's the planning laws and the zoning laws that have some type of component for recognition of historic preservation. In many, many cases—we just actually completed one in Virginia with the situation of a Wal-Mart superstore on the battlefield—it has nothing to do with local landmark regulation, and everything to do with state and local

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

planning laws and ignoring the preservations of the state scheme that require consideration of impacts on historic property. So, I just want to point that flipside out.

There's also, I would say over the last forty-five years, and Jerold alluded to this more in his closing statement, a recognition of the broader values in historic preservation, the contextual value. That's reflected both in zoning and planning, but also in preservation laws themselves; it's not simply whether something directly affects a particular building, but the setting of that building, and the broader contextual values that make that property important. It's also a recognition that there are a variety of criteria and factors that lead us to recognizing this has historical landmark value. A recognition that we're not simply trying to preserve, necessarily, the best and brightest or the particular landmark where George Washington slept, but individual properties that have meaning from a neighborhood value standpoint. And this expands well beyond the typical landmarks framework into cultural values for Native American and other types of cultural resources that are important for Native Americans across the country. I think that's one of the evolutions in historic preservation law over the last forty-five years—the broadening recognition of the values of culture and character.

I think whenever Jerold and I get together we're always talking about *Penn Central* because that's one of our favorite topics, since it really has stood the test of time. It is critically important; I call it a movement validator. When *Penn Central* was decided, I think Justice Brennan referenced 500 ordinances around the country. That's just in the years between 1965 and 1978, because many of those 500 ordinances were copycats—as D.C.'s was—of the New York City landmarks ordinance. Today that number stands closer to 2,600 across the country, and I think that's largely due to the *Penn Central* decision, the kind of stamp of approval by the U.S. Supreme Court. That doesn't mean—Jerold was clear that the issues of property rights are not behind us.

Certainly, we have a strong framework in the courts, leading with the *Penn Central* decision, for validating the rights of communities to protect these properties, but there are still tremendous property rights challenges that go on, as much in terms of rhetoric as in terms of legal action. We see it all the time. Tersh can probably speak to this in terms of Washington D.C. I experienced it in my own neighborhood in Washington D.C., with the attempt to designate parts of Chevy Chase with this surge of rhetoric in the framework of property rights, and it's been effective. It's blocked designations, even in cities which have sophisticated preservation regulatory schemes.

This framework has also impacted, and continues to impact, existing valid preservation laws in different places. Last year, there were attempts in Utah, at a state level, and at the community level in Houston, to dismantle the framework of preservation laws to one degree or another. I think every year we continue to deal with the issue of owner consent. And the attempt, if it's not in a local preservation ordinance, it's often sought to be added to the

preservation ordinance so that the property cannot be designated without the consent of the property owner.

These are all kind of framed in terms of property rights, but there's this other, more recent evolution of the concept of property rights, getting away from the takings clause and getting deep into the due process clause—Jerold's reference to the *Hanna*[2] decision in Chicago, there was also the *Conner*[3] decision in Seattle. Luckily, the *Conner* decision was a very strong rejection. It was a similar claim where a vagueness challenge to Seattle's preservation law was mounted under the theory of violations of both substantive and procedural due process, and we're seeing that kind of framework more commonly cited. I think that we still have to be very conscious of the fact that preservation, even though it stands on firm judicial grounds, is still very susceptible to these types of rhetorical challenges, and is sometimes creeping into the law itself.

There's RLUIPA.[4] Jerold talked about the fact that judicially, we have some strong decisions that really suggest that the statute is not really the threat, at least, again, from a legal action standpoint, that many of us feared when the law was being passed. Actually, I have to tell you, when the law was being passed, the Trust and our preservation partners were up on Capitol Hill trying to ensure that the standards that were included in the law were in fact tied to the constitutional standards, because we knew if that were the case, from a judicial standpoint, the impact would be fairly minimal. We have some strong cases at the judicial level but, again, as is the same in terms of the taking clause, we see the impact more in the rhetorical framework. I have to tell you there are many communities around the country where religious property owners are simply able to get local commissions to ignore, or to find a way to really not apply the laws. In some cases where the authority devolves to the city council it's really a political decision. In many cases we're seeing that there is a substantial impact of this federal law, again, not in the courts, but in the realm of rhetorical framing.

Let me just mention a couple other things that Jerold mentioned. This was also the 45th Anniversary of the National Historic Preservation Act,[5] it's also the 45th Anniversary of Section 4(f) of the Department of Transportation Act,[6] probably one of the strongest federal preservation laws on the books, and I guess I would use his analogy to a middle-aged person. I think the same kind of analogy can be applied both to the National Preservation Act,

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2. Hanna v. City of Chicago, 907 N.E.2d 390 (Ill. App. 2009).

3. Conner v. City of Seattle, 223 P.3d 1201 (Wash. Ct. App. 2009).

4. Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc5 (2006)).

5. The National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470x-6 (2006)).

6. The Department of Transportation Act of 1966, § 4(f) Pub. L. No. 89-574 , 80 Stat. 771 (codified as amended at 23 U.S.C. § 138 (2006)).

probably less so to Section 4(f). There was a time, probably about ten years after its enactment in the '70s, where there was a real invigoration, and we had the expansion of the scope of the National Historic Preservation Act for the properties that are eligible for the national register. There was a strengthening of the interpretation of Section 4(f) to be applied to constructive use of historic resources in parks.

Since that time though, looking back at that forty-five year framework, there has been some comfort—maybe too much comfort—on the part of federal agencies with process, and not so much with substance, and the Trust has actually done a study on this subject. I'm speaking particularly about Section 106 of the National Preservation Act,[7] which is really the part that has procedural control. We're finding that agencies in many cases have become very adept at essentially complying with the Act in terms of process, but without really taking a lot of effort to find substantive solutions to preservation issues, which was really the intent of the statute. So, we issued a report a couple of months ago called Back to Basics,[8] where we're urging federal agencies to re-look at their responsibilities under the National Historic Preservation Act.

It's interesting because these two legal frameworks really grew up side by side, which is another point. The federal preservation law and the National Preservation Act set out a partnership between the federal government, the state and local governments, and private entities of the private sector to advance historic preservation. This has become the core of the team of development of the national register, which is often brought in at the local level as the basis for local designation. And again, kind of looking back at that forty-five years and looking forward to the 50th anniversary coming up, I think it may be time for us to hit the reset button and identify where we are in this framework. There are some real challenges and there has been a recent survey done by the task force, Preservation Action. It hasn't been fully realized, but there is clearly a lot of satisfaction among the preservation community with the administration of the federal preservation program; and I think there is a real need to examine the structure and the way they interact with the state and local programs as well.

One final point, and I'll turn it over to Tersh. The time that we live in is particularly challenging at all of these levels and we're seeing the impacts at the federal, state, and local level with the cutbacks in funding. Preservation laws, whether we're talking about local preservation laws or federal preservation laws, are only as strong as the administrative structure that's there to

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7. National Historic Preservation Act § 470f (The above-referenced section can now be found here).

8. LESLIE E. BARRAS, NAT'L TRUST FOR HISTORIC PRES., SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT: BACK TO BASICS (2010), *available at* http://www.preservationnation.org/resources/legal-resources/understanding-preservation-law/federal-law/section-106/back-to-basics.html.

administer them. That's just an obvious truth, and that administrative structure is really in danger right now, simply because of the economy, the cut backs at the federal level in terms of federal funding, and the trickledown effect at the local level. Many localities have been understaffed for years and now. They're actually at a point where they're having to cut back, they may have one person, and that one person is now gone, and their responsibilities have been passed along to someone in the planning office without the same level of specialty. So, there really is a crisis in the administrative structure that I think we need to really pay close attention to. It really can affect the way this whole movement is directed in the next five to ten years.

MR. BOASBERG: I agree with almost everything that you said Paul, but I do want to say, "Oh, to be middle-aged again." Working toward that, I want to thank all of you for being here. It's nice to see so many friends, so many people who I worked with in Chicago, Seattle, New York, Los Angeles, and other places. It's a really great tribute to the leadership that New York has shown. And a special thanks to Adele who starts off everything. I did happen to hear her as a keynote speaker in Washington, when she received an award from the National Building Museum; it was well deserved. I also want to nod toward Dorothy Miner and Paul Byard. In a very personal connection, Dorothy was in my wife's class at Smith, and was actually at our wedding fifty years ago, and Paul Byard's older sister was one of two bridesmaids. So I feel very, very connected to all of you. And more than that, as Paul said, the Washington D.C. law, which was not enacted until 1978 because it didn't get self-rule until 1973—which is a sore subject in Washington and we're still trying to get a vote—was modeled after New York City law. We look to New York City, as so many other cities around the country do, for the interpretation. The problems come to New York City in much larger numbers than they do in any other city. They also seem to come first. You have a very active preservation constituency. I happen to think you have a very fine Landmarks Commission. You have a lot of intelligent people around the edges, and you have new groups like the Historic Districts Council. We model ourselves on you, and what you do here is so important to us, I cannot tell you. We're very grateful that the *Penn Central* case arose in New York, that the *St. Bart's*[9] case arose in New York, *Sailors' Snug Harbor*,[10] all of the other cases. These are cases which we rely on all the time.

Briefly, let me just say, Jerold, your first point in terms of keeping separate the zoning and the historic preservation, certainly the statutory scheme, I think is worth a great advantage. The only people that hate it are the developers. They hate it because they have to go both before a historic preservation commission, and a zoning commission; and they don't know where to start,

9. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990)

10. *In re* Trs. of the Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968).

and we don't really know where to start either. We have a Commissioner that says it doesn't matter where you start. To us it does matter because so much of what you do in one case can influence the others. When we make a decision on a case that's pending before a commission we always say, "Nothing herein shall influence in any way the decision of the body making announcements on zoning." So I think that's very important.

The other thing is, after having served ten years as Chair in Washington and a couple years as Chair in the zoning commission, I'm very scared about historic preservation. An actual truth: there are not a lot of people in our city, probably here, that really understand historic preservation has a very esoteric feel. You have to have some kind of background, you have to have some kind of field, you have to have traveled. It takes a lot to understand the nuances of historic preservation, and if it were broader applied, like the universal right to historic preservation, there's nothing that scares me more than to put it up by the First Amendment or the Fourth Amendment. I like operating under the radar. I like being somewhat difficult.

In a class we teach at Georgetown, one of the questions always is, "Well why don't you have all of the District of Columbia declared a historic preservation district?" And, in truth, it all probably qualifies because it's all more than fifty years old. We don't even have a fifty-year rule in the District, but most of the buildings are older. If we propose to have the whole District of Columbia become a historic district, they would not only kill that, but they would probably start reversing all the historic districts that are already there. So we've begun very, very gradually by taking the most obvious individual historic districts—in Washington's case Georgetown and Capitol Hill—and then slowly move in to add others, as there is local interest in the neighborhood.

Our staff, unlike New York City's staff, which of course is much larger, gets a lot done with a small amount of people; they do the research. We don't have the money or the staff to do research on historical districts. We leave it up to the community, and that generally works very well, and we have a very long process to become a historic district. Paul's comment about owner consent is a genuine worry. One of the things that worries me—a number of things worry me about owners consent in historic landmarks—is once they get a statute that says you have to have owners consent in historic districts, there's going to be an order of consent in landmarks, and then you will not have another landmark in the city of Washington, or in any city of the United States. So this is very scary stuff as Jerold rightfully pointed out. Rehnquist's dissent in *Penn Central*[11] is still very alive, and I am scared to death if *Penn*

11. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138-53 (1978).(Rehnquist, J., dissenting). The general idea behind Justice Rehnquist's dissent is that it is unfair to declare a building a landmark and impose the costs of such a declaration solely on the owner of the building. Rather, such costs should be distributed to the community as a whole. His opinion reads,

Central got to the Supreme Court out of an owner's consent, I'm not sure it would've passed at all. It may have been alright for historic districts, but I'm not sure. So I am very worried about that, and I am also very worried about the RLUIPA. As Paul says, a lot of it is in the rhetoric. Although there are a couple of cases which are a little bit scary, the threat is that now there is a religious institution or foundation which will seek out any case that it can find and take it to higher court.

We had a test case, in a way, in Washington on the Third Church of Christ, Scientist,[12] which was a perfect storm for anti-preservation cases. It was a 1971 building that everyone called ugly. It was not only that, but it was Brutalist, even though it was built by the Pei firm. It was built one year before the National Gallery, but it was unfinished concrete, or "brute" as the French would say. The congregation had fallen. It was built to house 400 people. There were forty people in the church, and they basically couldn't afford to keep it up. So, we had to landmark the building because it was extremely prominent as a modernist building. But Jerold, you're absolutely right, people don't understand modernism. Even the mayor came out; luckily our mayor doesn't have anything to do with designation. In fact, we have, in many ways, an under the radar scheme. Only the Historic Preservation Commission can decide whether to designate landmarks or historic districts, and there is no appeal to City Council, or to the mayor, and any appeal to the court is based on traditional law of administrative appeals. You have to be arbitrary and capricious, and believe me, we are not arbitrary and capricious. We may be slow, and we may be labored, but we are not arbitrary and capricious, which means it's virtually impossible to upset anything we do. So we have to be extremely careful about that.

We had, in the testimony, forty experts talking about why this building was important, and how in Washington D.C. it was one of the most important buildings built in 1971. Not that 1971 was the greatest year for buildings and for religious architecture, but as a subcategory it was heralded. It even had the Dean of the Catholic University School of Architecture say that this was the

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> In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all owners of a landmark site, was placed under an affirmative duty, backed by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property.

Id. at 140-41. Mr. Boasberg contends that that if owner consent were required under the statute at issue in *Penn Central* then the case would have been decided differently.

12. Llewellyn Hinkes-Jones, *The Case for Saving Ugly Buildings*, THE ATLANTIC, http://www.theatlanticcities.com/design/2012/01/case-saving-ugly-buildings/913/ (last visited Jan. 10, 2012); Marc Fisher, *D.C. Lets Church Tear Down Brutalist Atrocity*, WASH. POST (May 13, 2009, 7:30 AM), http://voices.washingtonpost.com/rawfisher/2009/05/dc_lets_church_tear_down_bruta.html.

one building he really liked more than any in D.C.. Now, I'll leave that to your judgment as to what other things the Dean would've liked in Washington, but this was the best one.

Anyway, we had nobody to testify against it, so we had to designate it. We had a lot of political pressure not to designate. There was a lawsuit filed by the Church and I won't go into detail. The developer claimed not only First Amendment, but RLUIPA, and we were worried about RLUIPA, because it was picked up by the press. When it got into court, the first thing the federal Judge, hearing a motion said was, "You mean to tell me there's no restriction at all on a church that you're going to landmark and there's no cost involved? Who's paying you? Don't you have to hire a lawyer?" And he threw us all back because this was designation. It wasn't even a denial of a Certificate of Appropriateness and all we did was deny a demolition from it. We didn't even deny something else that they could've done to the church. Anyway, to make a long story short, the case was settled, but it went off on an interesting ground, which I think is a reason that RLUIPA may be less worrisome; it went off on the ground of hardship. It went off on the Fifth Amendment ground that they didn't have enough money, which is in our statute, as you know. We have a built-in hardship amendment clause, at least most of you do. Therefore, rather than decide whether fixing up the church would have been a substantial burden on the religion, it was much easier to decide that yes indeed, it would've been a substantial hardship. So it went off on Fifth Amendment ground, not that it ever got decided in court, but that was the basis of the settlement and I'm glad it was settled. Had that gone up to the Court of Appeals and maybe the Supreme Court, I don't think we would've had a landmark church in the country. I'm very worried about that going up to the Supreme Court.

Let me just say a couple of things constructively and then I'll stop. One of the things I would like to see—one of the most constructive things in terms of local law, and I agree with Jerold, a lot of the Historic Preservation Act, a lot of the national, a lot of the federal stuff is leadership national—but, I would like to see the tires really hit the road at the local level. You've got to have local laws protect your buildings. There's no other answer to demolition provisions, and we at the local level are pretty ignorant of what one another is doing. We don't have the Preservation Law Reporter anymore. It's very hard to find out what other local communities do, and you have to pay $1500 for the Trust conference, so that's a serious problem. Of course you can get an advisor that's a speaker, but if you can't, I hope someone would take the leadership role, and maybe have a conference on local laws, maybe have a once-a-year meeting someplace.

Get together, that's the first thing. The second thing is, we also have a kind of perfect storm case at 227 Pennsylvania Avenue, which is a block right north of Congress, where we had a 122-year-old row of buildings. There was one two story building in a row of three story and four story buildings. Of course

somebody comes in and wants to put a third floor. Why? To get a view of the Capitol for the office executives. That's Washington. You talk about tyranny of context. This was a terrible problem, because on Capitol Hill, the houses are small and very fragile, and most of them are two stories. If you allow a third story on every house in Capitol Hill, it would completely change the nature of Capitol Hill. Here was this building where its two neighbors were slightly taller; what to do? Anyway, we approved the building, but it was later turned down. Which brings up the vagueness of statutes and the value of precedent in administrative cases. This is the problem, I am always arguing for more and more rules so that we don't have arbitrariness, so we don't have capriciousness, and basically, so you take the political equation out of it permanently. If you have raw discretion which doesn't have some kind of basic growth, then you get right back into the old days. So that is the problem, and I think that will go on. So anyway, that's all I have. Thank you.

MS. VAN INGEN: Well, thank you both very much. I marched in here with a list of questions, thinking if they don't touch on these things, I will ask these questions, and well you've touched on virtually everything; we certainly appreciate it. Thank you. Again, keeping this at the general level, you talk about there being 2600 global ordinances across the country—that's a lot of legal matter, a lot of issues that come up across the country—but looking ahead, do you see what's next? Any of the three of you? Jerold you sort of had your shot at this, but Paul and Tersh, do you see what's next? What are we missing in some of these laws? Do you see new developments in the law? Anything exciting coming out from these 2600 ordinances around the country that we can look to? Perhaps some positive new development?

MR. BOASBERG: Let me just speak very quickly. Our law is working, we have a terrific law. We have lots of statutory interpretation, we have a website which records all these cases, and we don't have any problems with the law. We have problems with educating people, and we have age-old problems with building political consensus, but the law itself I think has been pretty good.

MR. EDMONSON: I would agree with that. There have been a number of phases in terms of development of historic preservation of local landmarks. There were quite a few cookie cutter laws based on New York's. In the '70s, there was another kind of phase. In the late '80s, I'm probably dating myself here, D.C. had done a number of updated versions that were adopted and added things, for example, like stronger economic hardship provisions which require much more detail on what actually is the economic hardship that faces the property owner. That's the kind of detail that makes it easier to understand and administer the laws. There have been a number of additional provisions over the years, such as demolition by neglect, which is a big issue in many communities. Now we're seeing many have good landmark laws with good

provisions in them, but there are administrative issues in terms of whether there is political will to litigate against property owners, or take the step of actually fencing and fixing and putting liens on properties that are in need of repair.

There are those phases, but I think I agree with Tersh, that it's really more in—well there are two things. One is the actual administration of the laws and the education of the commissioners in many cases, making sure that they understand their responsibility and actually follow a fairly sophisticated process in applying their responsibilities. After Penn Station, Bob Stipe, another person who has really led this movement over the years, said, "Now that the Supreme Court has come out with that, we need to turn our attention to what is the other area of vulnerability, and that is procedure." Procedures, due process, and failure to comply with procedural requirements of law. It's still an issue, and that leads the kind of decisions that Commissions make every day. In some cases, they are vulnerable. We're seeing that in terms of some of the more recent challenges. So, there are plenty of those types of challenges ahead.

MS. VAN INGEN: Jerold, do you want to add anything?

MR. KAYDEN: No.

MS. VAN INGEN: Alright. I do have one other quick question. You touched briefly on the skyline protection issue, certainly with the recent issue of the Empire State Building, I'm just wondering if any of you know of other situations, or can you reflect on other communities that have dealt with that particular issue? I suspect this is one that's going to be lingering for a bit in New York City.

MR. KAYDEN: It's a totally standard kind of thing we've been doing through legislation; "viewshed protection." It's normally been a natural phenomenon, natural elements that have been protected in terms of buildings that mar the view, but it's very, very standard, and it's been done for a decade. Nothing revolutionary in the United States whatsoever. We have, of course, had concerns about skylines in New York City itself. Just months ago, the Jean Nouvel Tower design proposed to be at the Museum of Modern Art wanted to be 200 feet higher than what was otherwise allowed, and was turned down by the City Planning Commission on the basis, in part, that it was going to interfere with the Empire State Building.[13] So, it's not as if we don't make

13. *See* Nicolai Ouroussoff, *Next To MoMA, A Tower Will Reach for the Stars*, N.Y. TIMES, Nov. 15, 2007 at E1, *available at* http://www.nytimes.com/2007/11/15/arts/design/15arch.html; Justin Davidson, *Colossus*, N. Y. MAGAZINE, May 10, 2010, *available at* http://nymag.com/arts/architecture/features/65749/.

decisions in New York City and elsewhere that deal with the potential impact of a building on a skyline.

Now, it's true that within existing historic preservation laws, it's hard to see how they can be administered in a way to address this at all, and I don't suggest that it necessarily be handled within existing historic preservation laws. I do want to keep them fundamentally cabined to deal with the traditionally understood issues. But I do point out that, yes, there are these laws that exist as separate and distinct laws. I don't know exactly where they would go. I can imagine them being in the zoning regime. It's dealing with new development just as the Nouvel design was dealing with the City Commission.

There have been, by the way, other efforts. There's a case called *United States v. Arlington County and Arland Towers*,[14] which was a United States District Court case dealing with a proposal by a developer to build four office towers and a hotel in Rosslyn. The United States government brought a public nuisance suit claiming that the construction of those four office towers, plus the hotel, would indeed be a public nuisance. Why? Because they would be a visual intrusion on the core of our Capital City, the District of Columbia, and the plan, which emphasized, among other things, horizontality, and seeing in the background these towers across the Potomac, would interfere with that. That was an actual case that went before a judge. He heard expert witnesses, he looked at photographs, he did an onsite visit. He finally concluded that, for the average person, these four office towers and the hotel, would not mar the experience of visiting the Washington Monument and the Lincoln Memorial and other parts of the core of the capital. But, it was discussed, and one can imagine experts coming forth with all the tools we have now that suggest that it would indeed mar things.

The most up to date sort of treatment of this was done by the Mayor of London, Red Livingston, formerly known as "Red Ken," who did his London Management View Framework[15] and laid out a series of protective corridors dealing with river viewsheds and townscape viewsheds. There are lots of view sheds that are protected by this London plan which is effectively a planning law in London, including a view from Richmond, going to St. Peter's and it's a powerful instrument, totally uncontroversial. We simply want this skyline, which provides us with a sense of who we are, where we are, a pneumonic device as Kevin Lynch would put it or as Mumford would've put it, or Costonis in *Icons*; we protect it. So it's certainly something that's on the table. I'm not saying one way or the other what should happen with Vornado's whatever it is, 1500-foot tower.[16]

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14. United States v. Cnty. Bd. of Arlington, 487 F. Supp 137 (E.D. Va. 1979).

15. GREATER LONDON AUTH., PROTECTING LONDON'S STRATEGIC VIEWS (2012), *available at* http://www.london.gov.uk/priorities/planning/vision/supplementary-planning-guidance/view-management.

16. Charles V. Bagli, *A Fight on New York's Skyline*, N.Y. TIMES, Aug. 23, 2010, at A18 *available at* http://www.nytimes.com/2010/08/24/nyregion/24empire.html.

AUDIENCE QUESTION & ANSWER

MS. VAN INGEN: Should we open it up to questions from the audience? So, there must be questions. Yes?

AUDIENCE MEMBER: I'm wondering if Mr. Kayden knew the particulars of the *Kelo* case?

MR. KAYDEN: Sure, *Kelo v. City of New London*,[17] a 2005 case, five to four decision, very close at the Supreme Court, upholding a broad notion of public purpose of what would justify the government's exercise of its so called eminent domain. *Penn Central* was about regulations, and whether regulations go too far and can be similar to the more classic, eminent domain taking where government actually takes your property from you. The government now owns it, pays you, as some property owners would say, just compensation, and now you don't have it, and turns it over to a private developer. This has been a controversial thing, by the way, for the historic preservation movement, because a lot of historic buildings were in fact taken and destroyed into urban renewal. So we have a sort of conflicted attitude towards this, though there are other cases where it enhances historic preservation.

The court legally released what to many of us was an uncontroversial decision, which allowed the government through its planning, the taking of existing, non-blighted single family houses; that was what was so controversial there. Kelo was just an average person, not a poor person—oh, there we can take automatically—but this was just an average person, someone that actually looked like everybody. This was on *Parade Magazine*, yet the government took her house and gave it over to a big, bad, nasty Boston developer. By the way, none of this is even happening anymore. The house hasn't been moved at all, not true, no development has occurred, in order to create jobs and additional tax revenues. And the Court said five to four, from a constitutional point of view, with all of our legal precedents starting with *Berman v. Parker*,[18] and going through *Hawaii Housing Authority v. Midkiff*[19] it's no problem, five to four. The outcry politically, what was shocking to people, was Justice Stevens, now off the court but who wrote the *Kelo* opinion, a month or so later in Las Vegas, said something interesting. He said, "Had I been a legislator I would've not done what I did as a judge. I was forced as a judge to do this, but I wouldn't have done it." It's a politically controversial issue, and it has led to roughly forty or so states amending their eminent domain statutes, to make it harder for governments to exercise the power of eminent domain, especially when

17. Kelo v. City of New London, 545 U.S. 469 (2005)
18. Berman v. Parker, 348 U.S. 26 (1954).
19. Hawaii Housing Auth. V. Midkiff, 467 U.S. 229 (1984).

the object that's being taken is not blighted or otherwise downtrodden, and of course when it's being given from one private owner to another.

MR. EDMONSON: Let me just tag onto that. One aspect of the shift by legislatures addressing the *Kelo* issue has been, as Jerold said, these forty or so laws around the country to restrict the ability of government to exercise the power of eminent domain. But often attached to these laws are provisions that are also intended to restrict the regulatory takings authority. Buried in some of these laws is language that's often essentially designed to undo some of the provisions, or some of the principles that we're seeing in the *Penn Central* case. So, you have to be really careful in reading and parsing through some of the legislative proposals that have come out in the name of fixing the *Kelo* problem, because they often go much beyond the issue of eminent domain.

MS. VAN INGEN: Yes?

AUDIENCE MEMBER: I just wanted to make a correction about what you said about the Empire State Building having something to do with getting rid of those 200 feet on the top of the Nouvel building. I was on the team that defeated that building. Hopefully, they're not building it, regardless of how many feet it is, because I believe the bank building is over 200 feet. It had something to do with light and air, although it's a silly decision, because 200 feet isn't going to do anything for us, but it did not have anything—they may have mentioned it, they did mention it, but that was not the major reason.

MR. KAYDEN: Right. No, as I said it as among other things. I referenced that because, of course, Vornado presents a similar situation.

MS. VAN INGEN: Thank you. Yes, in the back right there with the glasses?

AUDIENCE MEMBER: Thank you. Regarding references made to the dissent in *Penn Central*; what's the best shot that the dissent took at *Penn Central* that preservationists need to be on guard about in cases of this kind for resurrection that we're talking about? What was the best argument?

MR. KAYDEN: It's unfair. That's it. I just can't emphasize how important that is. Paul, he has the landmark building, just Paul, and he turns to Tersh, Anne, and I, and says "Why me?" And we can say, "Well you have a great beard and more hair," well not more than Anne of course, "and you're historic and you're special." And he says, "Well, but I didn't know at the time when I bought it and now it's coming." It's just unfair. It's not comprehensive, and that attitude still prevails. That's what the whole private property movement is about, picky-choosy kind of regulations. It's one thing that applies across the board. That's why zoning was done in zones, to be across the board. All of us

in this room are in the same zone, so fine. Misery loves company, fine we're all restricted. The restrictions on Paul, Tersh, and I benefit Anne, just as the restrictions benefit them.

The best argument I've got is: read the *Penn Central* case, six to three, 1963. It's many, many years later, and Justices will keep arguing that way. It's a political battle, I don't know what would happen now. I am nervous about the *Penn Central* case. I think it's the one shoe I'm still waiting to drop. I think the reaction to *Kelo* was astonishing. I think it all depends on who's on the Court, it really does. I mean, let's face it, these appointments are outcome determinative on the opinions and what they say.

MR. EDMONSON: I think life and law are not fair is the bottom line.

MS. VAN INGEN: As a comment, I think a thread through what we heard today, the underpinning of much of what we do in this field, historic preservation, needs to be better with its messaging; we need to master the mass communication systems. We need to go viral; we need to be reaching out way beyond those that are sitting in the room today. I know that's an obvious statement, but we have to keep thinking about that. The world is changing, our ability to message has changed, and we really need to be in control of that and get out to a much broader audience. There needs to be an understanding of what we're trying to do here, so these nuances are not just in these little esoteric conversations we have. I need to give us time for one more question, right there.

AUDIENCE MEMBER: Actually it relates to what you just said, and when Mr. Kayden says "popularly understood." There's no popular understanding. There might be popular understating amongst historic preservationists, but amongst people broadly, it is obscure, as Tersh said. Not only that, it's obscure to people in the field you know, to commissioners on historic preservation commissions. From an Olympian point of view, I just wonder why can't the law be easier? Why is it that to explain to even someone who's interested in this it takes like five lectures? You know, there is a lecture for where the federal role is, where the state role is, where the local role is, where there are landmarks and there are districts, and where there's design guide. It's just so complicated, and it would be wonderful if it could be simpler. I think one could spread the message better if it wasn't so complicated. That's it.

MR. KAYDEN: See, I think you're right. I think you're absolutely right but I would say two things. I think it's crucial that it be very, very technical. It's just what Tersh actually said and what I suggested as well. This is a technical area and it's fine that we've got historic preservation, it has a traditional definition. I do suggest that we stick with traditional ideas of what historic preservation is so people don't begin to say, "Well, that's not historic preservation, you're

really sort of going well beyond what it is." So within our area, I don't mind because that's what ends up being legally challenged. The notion that it has a technical aspect to it which requires expertise, I think that's great for the sort of ongoing protections.

I think the point you're making though, which is a powerful one, and what I've suggested, is there is a rhetorical positioning that could be detached from the technical aspects of the law itself. And that rhetorical position; that's the point I was trying to make, Tersh. It's not that I want there to be a universal human right that's actually enforced in law, it's not going to happen anyway, but I do think that people should understand that historic preservation is much more than George Washington slept here or a particular architectural style. It's really something about human psychology, emotional stability, of giving us sort of a tether, an anchor, something that's physical so we know who we are and where we are at a time when we're looking more at brain and MRI scans. This is, I think, a very powerful, important part. I think we all know it intuitively, we may not have loved the World Trade Center towers but boy, did we miss them when they were finally gone. This notion of the built environment as being part of who we are as human beings, I think has a rhetorical positioning, a powerful place to put historic preservation without changing the technical nature of what the legal regime is such that when we go to court we are dealing with expertise.

MR. BOASBERG: This would be an appropriate point to remember the wonderful *New Yorker* cartoon out in front of a complex which says "The Andersons: A Complex Relationship."

MS. VAN INGEN: And on that note, thank you very much.

MR. SCHNAKENBERG: Thank you Anne and Jerold and Paul and Tersh.