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Are We Protecting the Past - Dispute Settlement and Historical Property Preservation Laws

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ARE WE PROTECTING THE PAST? DISPUTE SETTLEMENT AND HISTORICAL PROPERTY PRESERVATION LAWS

I. INTRODUCTION

The battle between historical preservation and urban progress represents one of the most difficult balancing acts in the law today. It is a question of whether cities should turn away from their historic past to make room for future developments. It is an issue between preservation and progress, and it affects nearly every part of the country as this nation grows older.

In the historic Reeves Drive area of Grand Forks, North Dakota, the twin aims of preserving our past while ensuring the city's growth and prosperity are currently clashing.[1] Proposed changes in the roadways and driving patterns threaten one of the oldest residential neighborhoods in the state.[2] The Reeves Drive example[3] represents just one of the problems surfacing in North Dakota in the area of historical preservation.[4] With such instances on the rise, it is important to evaluate North Dakota's historical preservation law and determine its effectiveness and ability to balance the twin aims of preservation and progress.[5]

A. HISTORICAL PRESERVATION IN GENERAL

Historical preservation is generally a statutory provision which prohibits the alteration or demolition of certain historic buildings without consent.[6] Historical preservation is quite often accomplished by using the historical easement as a tool to preserve specific property.[7] Statutory in nature, historical easements have been held to be a viable restraint

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1. *See* Lori Nitschke, *Over the River and Through the Granitoid*, GRAND FORKS HERALD, Aug. 15, 1994 at B1. The article discusses proposed changes to the streets and traffic patterns in the Historic Reeves Drive Area of Grand Forks. *Id.* The streets are predominantly paved with Granitoid, a surface which provided solid traction for both horse drawn carriages and early cars. *Id.* Granitoid was invented by R.S. Blome in the 1910s, and Grand Forks is believed to have more Granitoid surface left than any other city in North America. *Id.* In the Reeves Drive Area, property found on thirty two blocks is listed on state and national historical registers. *Id.*

2. *Id.*

3. *Id.*

4. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994). Mr. Hafermehl commented on current problems with renovations to the Cass County Courthouse in Fargo, North Dakota, property which is on the National Register of Historic Places. *Id.*

5. *Id. See also* Robert Beck, *North Dakota's Historical Preservation Law*, 53 N.D. L. REV. 177, 194-95 (1976) (stating that the North Dakota's historical preservation law is not unified and the law's precise authority is unclear).

6. BLACK'S LAW DICTIONARY 730 (6th ed. 1990).

7. *See* 3 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 34A.03 (Supp. 1995) (stating that conservation easements are used to create historically protected easements on property).

upon the use of property.[8] This is true, even though historical and conservation easements reject the most basic common law requirements of easements,[9] and amount to a property restriction which is in gross, assignable, and runs with the land.[10] Also, even though the conservation easement is named an easement, common law terminology associated with easements is generally not helpful and the easements should be interpreted based on their statutory language alone.[11]

Historical easements, like conservation easements, are easements in name only.[12] Many states,[13] including North Dakota,[14] place in their statutory preservation schemes specific affirmative burdens on owners of historically designated parcels of real property.[15] Therefore, because of these affirmative burdens, a historical easement should not be considered an easement in the classical, common law sense: It is not a right to move across another's property.[16] Instead, historical easements should be considered restrictive covenants or negative easements.[17]

Because of the restrictions and duties associated with historical easements, a major issue regarding the placement of these burdens is whether there a system of review for the owner of the historically designated property to challenge the designation. If owners wish to alter or demol-

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8. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). The United States Supreme Court found that the application of New York City's Historical Preservation Law, N.Y.C. ADMIN. CODE ch. 8-A, § 205-1.0 (1976) (currently codified at § 25-303 (1990)), did not amount to a constitutional taking of property rights, and the protections provided by the City's ordinance were substantially related to the proper use of historical landmarks. *Penn Cent. Transp.Co.*, 438 U.S. at 138. *See infra* Part II.B (discussing the *Penn Cent.* case and its significance).

9. 3 POWELL, *supra* note 7, § 34A.01. *See also id.* § 34.02[1] (stating that common law elements for an easement are: 1) an interest in land in the possession of another, 2) an interest of a limited use or enjoyment of the land, which 3) can be protected against interference by third persons, and 4) cannot be terminated at the will of the possessor of the servient land, and 5) is not a normal incident of a possessory land interest, and 6) is capable of creation by conveyance). Because of their statutory nature, conservation easements reject these principles. *Id.*

10. *Id.* § 34A.01. The lack of such restrictions demonstrates the rejection of the basic common law principles.

11. *Id.*

12. *Id.* § 34A.01.

13. *See infra* note 113 and accompanying text (providing a complete listing of all states which use historical easements in their historical preservation efforts).

14. N.D. CENT. CODE § 55-10-08(3) (1993) North Dakota defines historical easements as:

> a. A nonpossessory interest in the real property, imposing limitations or affirmative obligations the purposes of which include preserving the historic aspects of the property as so restored, reconstructed, or improved;
>
> b. Created and capable of being conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except as otherwise provided in this subsection; provided, that no right or duty in favor of or against a holder or another party having a right of enforcement arises under a historic easement before it is accepted by the holder and the acceptance is recorded.

Id.

15. *Id.*

16. 3 POWELL, *supra* note 7, § 34A.01.

17. *Id.*

ish any historical property, do the statutes which created the preservation law allow for an efficient and simple way to achieve their desires?

B. OUTLINE OF THIS NOTE

This Note, generally, will explore the process of review for alteration and demolition requests involving historically protected property. Specifically, it will detail the process that North Dakota has created. Furthermore, this Note will propose possible changes to the current North Dakota system of review.[18]

Part II will discuss the scope and constitutionality of historical easements. Part III will detail the development of historical preservation law and analyze the current federal and state review systems, as well as North Dakota's review system. Part IV will discuss the consequences of North Dakota's current historical preservation law. Lastly, Part V will propose possible changes to the North Dakota system of review and demonstrate how these proposals could better serve North Dakota and its preservation efforts as the state moves further into its second century.

II. DEFINITION, SCOPE, AND CONSTITUTIONALITY OF HISTORICAL EASEMENTS

A. DEFINITION AND SCOPE OF HISTORICAL EASEMENTS

Historical easements fall under the larger category of conservation easements.[19] Conservation easements have been described as nonpossessory interests in real property which impose certain limitations and/or affirmative obligations to preserve the historical, cultural, architectural, or archeological qualities of the property.[20] This language is

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18. N.D. CENT. CODE § 55-10-08 (1993). Currently, the North Dakota system provides that:

> 1. The state . . . each city, county, school district, and other body corporate and politic, are . . . notified of the existence of state historic sites . . . .
> 2. Neither the state nor any of the instrumentalities of government . . . may demolish or cause to alter the physical features or historic character of any site listed in the state historic sites registry . . . without first obtaining the prior approval thereof from the superintendent of the state historical board upon authorization of the state historical board. It is the responsibility of the state or instrumentalities of government . . . to cooperate with the state historical board in identifying and implementing any reasonable alternative to demolition or alteration of any state historic site before the board approves such demolition or alteration.

N.D. CENT. CODE § 55-10-08(1)-(2) (1993). *See infra* notes 183-200 and accompanying text (discussing the creation and application of North Dakota's arbitration system of review).

19. 3 POWELL, *supra* note 7, § 34A.02[1]. The conservation easement developed with the idea of protecting scenic views. *Id.* Today, this has expanded to include nearly all forms of open space protection, as well as preservation of historical facades and historical property. *Id.*

20. UNIF. CONSERVATION EASEMENT ACT § 1, 12 U.L.A. 70 (1995 Supp.).

embodied in North Dakota law.[21] These statutorily created easements, in most states, have the broad purpose of protecting natural, scenic, and open-space areas of real estate.[22] The easements can also be used to preserve the historic, archaeological, architectural, or cultural character of the property.[23]

B. CONSTITUTIONALITY OF HISTORICAL EASEMENTS

In 1978, the United States Supreme Court decided what is undoubtably the most important case dealing with a challenge to historical preservation efforts accomplished through historical easements.[24] In *Penn Central Transportation Co. v. City of New York*,[25] the Court faced the issue of whether placing property on the National Register of Historic Places and giving it heightened protection under New York City's historical preservation law[26] amounted to an unconstitutional taking.[27]

Penn Central was challenging a New York City ordinance[28] that prohibited it from building a fifty-three story office tower over Grand Central Station, property which Penn Central owned.[29] Penn Central argued that the statutory prohibition was a taking in violation of the Fifth and Fourteenth Amendments and therefore required just compensation by the city of New York.[30] The regulations, Penn Central argued, prohibited owners from using property as they wished.[31]

Justice Brennan, writing for the Court, stated first that a city may enact land-use restrictions to preserve the character and enhance the quality

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21. N.D. CENT. CODE § 55-10-08(3) (1993). Although North Dakota adopts part of the Uniform Act's language, North Dakota provisions go on to further define historical easements as property:

> Created and capable of being conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, . . . provided, that no right or duty in favor of or against a holder or another party having a right of enforcement arises under a historic easement before it is accepted by the holder and the acceptance is recorded; [and] [h]eld by the grantee for the benefit of its citizens and the people of the state generally . . . .

N.D. CENT. CODE § 55-10-08(3)(b)-(3)(c).

22. 3 POWELL, *supra* note 7, § 34.03[1]. Statutory easements generally extend protection for agricultural, recreational, natural resource, and forest lands. *Id.* Protection through statutory easements has also been extended to protect and improve water and air quality. *Id.*

23. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 72 (Supp. 1995). This act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. 12 U.L.A. 68 (Supp. 1995).

24. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (involving the preservation of Grand Central Station in New York City).

25. 438 U.S. 104 (1978).

26. N.Y.C. ADMIN. CODE ch. 8-A § 205-1.0 (1978) (currently codified at § 25-303 (1990)).

27. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

28. N.Y.C. ADMIN. CODE ch. 8-A § 205-1.0 (1978).

29. *Penn Cent. Transp. Co.*, 438 U.S. at 116-17.

30. *Id.* at 119.

31. *Id.*

of their city.[32] To support this position, the Court cited *City of New Orleans v. Dukes*,[33] *Young v. American Mini Theatres, Inc.*,[34] and *Village of Belle Terre v. Boraas*.[35] In *City of New Orleans v. Dukes*,[36] the Court had stated that the New Orleans government could enact administrative code provisions which controlled the number of street vendors in the French Quarter during peak traffic periods of the day.[37] Furthermore, in *Young v. American Mini Theatres, Inc.*,[38] the Court held that cities were constitutionally permitted to create special zoning requirements for adult pornographic theaters.[39] The Court also cited to *Village of Belle Terre v. Boraas*,[40] which provided that a city may restrict residential land use to single family dwellings.[41]

Next, the Court held the historical preservation of Grand Central Station could not be considered an unconstitutional taking in the traditional sense, which required a complete deprivation of the economic use of the property.[42] For the basis of what a traditional taking was, the Court cited *United States v. Causby*,[43] *Pennsylvania Coal Co. v. Mahon*,[44] *Armstrong v. United States*,[45] and *Hudson County Water Co. v. McCarter*.[46]

In *United States v. Causby*,[47] the Court held that government air flights over property which served as a chicken farm was a taking, because the flights acquired part of the property used for a uniquely public function.[48] The Court in *Pennsylvania Coal v. Mahon*,[49] found that a complete destruction, under statutory authority, of the property holder's use and value of the property constituted a taking.[50] *Pennsylvania Coal* stands for the basic idea that when there is an action which causes

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32. *Id.* at 138.
33. 427 U.S. 297 (1976).
34. 427 U.S. 50 (1976).
35. 416 U.S. 1 (1974).
36. 427 U.S. 297 (1976).
37. City of New Orleans v. Dukes, 427 U.S. 297, 304-05 (1976) (stating that the legislature could have intended to preserve the historic charm of the city).
38. 427 U.S. 50 (1976).
39. Young v. American Mini-Theaters, Inc., 427 U.S. 50, 62-63 (1976).
40. 416 U.S. 1 (1974).
41. Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974).
42. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136-38 (1978).
43. 328 U.S. 256 (1946).
44. 260 U.S. 393 (1922).
45. 364 U.S. 40 (1960).
46. 209 U.S. 349 (1908). *See* Penn Cent. Transp. Co., 438 U.S. at 124, 127-28 (discussing unconstitutional takings).
47. 328 U.S. 256 (1946).
48. United States v. Causby, 328 U.S. 256, 267 (1946).
49. 260 U.S. 393 (1922).
50. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

complete destruction of the owners use, a taking has occurred.[51] Examples of this are *Armstrong v. United States*,[52] where the Court found a taking for the complete destruction of a materialman's lien,[53] and *Hudson County Water Co. v. McCarter*,[54] where it was held that property restrictions which made property useless were not within the state's police power and amounted to a taking.[55]

Using this reasoning, the Court found that the historical preservation protection did not deprive Penn Central of the designated use of the property, and thus was not a taking.[56] Furthermore, even if the Court had determined a taking occurred, they had previously stated that an ordinance which denied the use of property with a substantial public purpose in mind was not a taking.[57] In *Penn Central*, the Court and the parties recognized the substantial value of historical preservation.[58] Thus, historical easements created for preservation which do not deny the owner the designated use of the property are not considered an unconstitutional taking requiring adequate compensation.[59]

III. DEVELOPMENT AND ANALYSIS OF HISTORICAL PRESERVATION LAWS

A. HISTORY OF HISTORICAL PRESERVATION

1. Federal Efforts

Historical preservation law was first addressed at a national level in the late Nineteenth Century.[60] Citizens, concerned with the deterioration of President George Washington's home, sought ways to preserve the landmark, but neither the state of Virginia nor the federal govern-

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51. *Id.* at 414.
52. 364 U.S. 40 (1960).
53. Armstrong v. United States, 364 U.S. 40, 48 (1960).
54. 209 U.S. 349 (1908).
55. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).
56. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).
57. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). In *Goldblatt v. Hempstead*, the Court stated that when an ordinance does not prohibit reasonable use for the land, and is done in the best interest of the public, no taking has occurred. *Id.*
58. *Penn Cent. Transp. Co.*, 438 U.S. at 129.
59. *Id.* at 138. The Court held that the restrictions imposed by the city were related to the general welfare of the citizens. *Id.* Also, the restrictions still allowed Penn Central "reasonable beneficial use" of the property. *Id.*
60. HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL HISTORICAL PRESERVATION ACT AMENDMENTS OF 1980, H.R. REP. NO. 1457, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N 6378, 6381 [hereinafter PRESERVATION ACT AMENDMENTS]. This material gives an excellent history of federal efforts directed toward historical preservation. *See also* Melissa E. Honsermyer, Comment, *The Fate of Historical Preservation Laws in Pennsylvania*, 97 DICK. L. REV. 719, 726-27 (1993) (discussing the historical development of federal historical preservation).

ment offered any assistance.[61] Thus, the task was left to private organizations, most notably the Mount Vernon Ladies' Association.[62]

The next preservation effort was attempted in the early Twentieth Century, when Congress passed the Antiquities Act of 1906.[63] This Act was primarily passed to create the Mesa Verde National Park and protect it from over-zealous treasure hunters.[64] However, the 1906 Act also included provisions which allowed the President to establish historical landmarks on federal lands and give these landmarks special protection.[65]

Federal preservation efforts continued in 1935 with the passage of the Historical Sites Act.[66] The 1935 Act was created to preserve objects of national significance[67] and was the forerunner to the National Historical Preservation Act of 1966.[68] The legislation also created the National Park System Advisory Board, whose duties were to oversee historical matters in the National Park System.[69]

In 1949, the federal government chartered the National Trust for Historical Preservation.[70] The National Trust was established as a non-profit organization whose mandate was to "encourage public participation in the preservation of America's historic and architectural heritage."[71] Under the National Trust, historical preservation efforts expanded in the Post-World War II years.[72]

No other separate national legislation was passed regarding historical preservation and property protection for the next sixteen years. But in 1965, under the guidance of President Lyndon Johnson,[73] Congress

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61. PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N at 6380-81.

62. *Id.*

63. Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (1988)). *See also* PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N. 6381 (stating the passage of the 1906 Act was directed at protection of federal lands).

64. PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N. 6381.

65. *Id.*

66. Pub. L. No. 74-292, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461-467 (1988)).

67. 16 U.S.C. § 461 (1988).

68. *Id.* § 470 (1988). *See* discussion *infra* Part III.B.1 (discussing the method of application for the 1966 National Historic Preservation Act).

69. 16 U.S.C. § 463 (1988).

70. *Id.* § 468 (1988). *See also* PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N. 6381 (stating that the National Trust was created to strengthen the private sector's role in historical preservation).

71. J. Jackson, National Trust for Historic Preservation President, *Forward* to MARGARET DAVIS, NATIONAL TRUST FOR HISTORIC PRESERVATION, STATE LEGISLATION PROJECT: STATE SYSTEMS FOR DESIGNATING HISTORIC PROPERTIES AND THE RESULTS OF DESIGNATION (1987).

72. PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N. 6381. This expansion included, with the help of the Smithsonian Institution, the establishment of the River Basin Surveys. *Id.* This survey was created to salvage historical artifacts damaged during the massive Federal reservoir construction in the late 1940s. *Id.*

73. HOUSE PUBLIC WORKS COMM., HIGHWAY BEAUTIFICATION ACT OF 1965, H.R. REP. NO. 1084, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710.

passed the Highway Beautification Act of 1965.[74] The Act provided for the upkeep, general maintenance, and landscaping of the federal highway system.[75] This legislation, providing for the cleaning up of America's highways, has been considered the basic foundation for conservation and historical protection found in the 1966 Historical Preservation Act.[76]

The 1966 Historical Preservation Act[77] [hereinafter, the 1966 Act] was the first major piece of federal legislation dedicated to the preservation of all of the nation's historical property.[78] The 1966 Act stated that preservation of the United States' historical property should be a major goal of the federal government.[79]

In the 1966 Act,[80] Congress laid out specific goals of preserving all buildings and areas of real property which provide substantial benefits to the heritage of the country.[81] However, the statute gives deference to the State Historical Preservation Officer [hereinafter, SHPO] of each state to determine which property in their respective state is worthy of national historical recognition and preservation.[82] The legislation also created the National Register of Historic Places[83] [hereinafter, the National Register] and provided a listing of criteria which the SHPO

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74. Pub. L. 89-285, 79 Stat. 1028, 1030, 1032 (codified as amended at 23 U.S.C. §§ 131, 136, 319 (1988)).

75. 23 U.S.C. § 319 (1988). Furthermore, the Highway Beautification Act also called for restrictions on billboards, 23 U.S.C. § 131 (1988) and junkyards, 23 U.S.C. § 136 (1988).

76. *See* 3 POWELL, *supra* note 7, § 34A.02[1] (stating that the creation of scenic highway easements gave way to the use of easements for broader purposes). *See also* WILLIAM H. WHYTE, THE LAST LANDSCAPE 287-88 (1968) (discussing the historic value of scenic roadways, particularly in the Cape Cod area of Massachusetts).

77. 16 U.S.C. § 470 (1988).

78. *Id. See also* PRESERVATION ACT AMENDMENTS, *supra* note 60, 1980 U.S.C.C.A.N. 6382 (stating that the 1966 Act was the first statute which recognized the importance of historical preservation on national, state, and local levels). *Compare*Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (providing legislation that dealt primarily with historical preservation within the context of the National Park System). *See supra* notes 66-69 and accompanying text (discussing the scope and reasons for passage of the 1935 Act).

79. 16 U.S.C. § 470 (1988). The legislation recognized that historical preservation actions prior to 1966 were mainly taken by private organizations, but provided that::

> [I]t is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist state and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(b)(7).

80. *Id.* § 470.

81. *Id.* § 470(a).

82. *Id.* § 470(a)(b)(3)(A). *See also* 36 C.F.R. § 60.6(a) (1993) (stating that "[t]he State Historic Preservation Officer is responsible for identifying and nominating eligible properties to the National Register").

83. 16 U.S.C. § 470(a)(1)(a) (1988).

should consider when nominating property for placement on the National Register.[84]

The 1966 Act received a major overhaul in 1980, when it was amended to include, most notably, an owner consent provision.[85] This provision enables the owner of property recommended for designation to object to the designation.[86] Until the objection is withdrawn, the property cannot be placed on the National Register.[87]

The 1966 Act has no provisions regarding any alteration or demolition requests, except for requests of boundary and relocation changes of historical property.[88] However, when federal funds, licensing, or involvement are present, there are special procedures to review alteration and demolition requests.[89] When there is no federal involvement, review processes for state or private projects are determined by individual states.[90]

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84. 36 C.F.R. § 60.4 (1993). The criteria for consideration includes property which has:

> [A] quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a)that are associated with events that have made a significant contribution to the broad patterns of our history, or . . . (c)that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction[.]

Types of sites which should be considered include religious property, birthplaces and gravesites, cemeteries, buildings, and property primarily of commemorative value. *Id.*

85. Pub. L. No. 96-515, 94 Stat. 2988 (codified as amended at 16 U.S.C. § 470a(6) (1988)).

86. 16 U.S.C. § 470(a)(6) (1988).

87. *Id.*

88. 36 C.F.R. § 60.14 (1993).

89. 16 U.S.C. § 470(f)(1988). *See* Pub. L. 89-665, Title I § 106, Oct. 15, 1966, 80 Stat. 917 (providing that the head of any federal agency must take into account the effect that any federally funded or licensed project will have on historical property). *See also* 36 C.F.R. §§ 800.3-800.9 (1993) (providing that all agency heads or officials, at the commencement of a federally funded project must identify all historic property, and assess the effects the project will have on such property). Section 470(f) provides that prior to any expenditure of federal funds or any undertaking in which the federal government is a party to, there must be consideration as to whether the proposed undertaking will impact property on the National Register or property eligible for placement on the National Register. 16 U.S.C. § 470(f). Inquiries are made to the Advisory Council on Historical Preservation, and the petitioners must give this board a "reasonable opportunity to comment with regard to such [an] undertaking." 16 U.S.C. § 470(f). This has become known as a "section 106 review process." 36 C.F.R. § 800.1 (1993).

90. 16 U.S.C. § 470(a)(1)(B)(3)-(4) (1988). The federal statute, when there is no federal involvement, defers to the states by providing that::

> (3) Subject to the requirements of paragraph (6), any State which is carrying out a program approved under subsection (b) of this section, shall nominate to the Secretary properties which meet the criteria promulgated under subsection (a) of this section for inclusion on the National Register. . . .
>
> (4) Subject to the requirements of paragraph (6) the Secretary may accept a nomination directly from any person or local government for inclusion of a property on the National Register only if property is located in a State where there is no program approved under subsection (b) of this section.

Id.

2. *North Dakota's Historical Preservation Efforts*

Following the lead from the federal government's decision that historical preservation should be a national goal,[91] North Dakota, in 1967, passed the Preservation of Historic Sites and Antiquities Act [hereinafter, the North Dakota Act].[92]

The North Dakota Act basically follows the preservation goals established by the federal government.[93] However under North Dakota law, there is no definitively spelled out review process for any action which may have an adverse effect on historical property when the actors are private property owners.[94] But, even though there is no legislatively declared process for private citizens, the North Dakota Act has created a very unique review process for actions which affect historical property when the actor is a public body or political subdivision.[95] The review process involves the use of a specially impaneled arbitration review board.[96] When a public body submits an application to the Historical Board to alter or demolish historical property, and the application is denied, the political subdivision can file for arbitration.[97] This review process, created in 1987 by legislative amendment,[98] has never been tested, but it appears that future challenges could be very near.[99]

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91. *Id.* §§ 470-71.

92. N.D. CENT. CODE §§ 55-10-01 to -13 (1993).

93. *Id.*

94. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept 30, 1994). Mr. Hafermehl did state that it appears possible that a private citizen could seek what would likely amount to a form of administrative review by the state historical board, but no distinct challenges of this nature have been made. *Id.*

95. N.D. CENT. CODE § 55-10-08(6) (1993).

96. *Id.*

97. *See infra* notes 183-200 and accompanying text (discussing the creation the application of North Dakota's arbitration review system).

98. *North Dakota Senate Comm. on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387* (April 3, 1987). The amendment was debated following the first challenge to North Dakota's historical preservation law. *See* County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321 (N.D. 1985) (challenging the authority of the State Historical Society).

99. Telephone interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994). Currently, there are pressing issues involving historical preservation in North Dakota. *Id.* The most visible of these are the proposed traffic changes to the Reeves Drive area of Grand Forks and the proposed alterations to the Cass County Courthouse in Fargo. *See supra* notes 1-3 (discussing the preservation of Grand Forks' Granitoid streets and the Cass County Courthouse, both current historical preservation problems in North Dakota).

B. ANALYSIS OF THE LAW

1. The Federal Review System

The Federal government's system of review provides great deference to the SHPO's determination of property eligible for inclusion on the National Register.[100] This also applies to any applications for changes and revisions of property on the National Register.[101] Federal agencies have the ability to nominate property as well, but such nominations must be made with the advice of the SHPO of the state in which the property is located.[102] It is the duty of the SHPO to recommend any property within the state which they deem eligible for inclusion on the National Register.[103] The SHPO must also assist the federal government in any historical preservation undertaking which the federal government has initiated.[104]

When a federal agency or federally funded project seeks to alter or destroy historic property, the federal government is required seek the advice of the SHPO to aid in the project.[105] Here, the SHPO is required to determine if an adverse effect to the historical property will result if the proposed alterations or demolitions occur.[106] If there is such an effect, the SHPO must consider any possible alternatives to minimize the effect on the historical property.[107]

The federal review process requires the presence of federal funds or assistance,[108] and the property must be on, or eligible to be on, the

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100. *See* 36 C.F.R. § 60.6 (1993) (stating that the SHPO is responsible for "identifying and nominating eligible properties to the National Register").

101. *See Id.* § 60.14 (stating that it is the duty of the SHPO to review all proposed boundary alterations and proposed relocations of historical property.)

102. *Id.* § 60.9(a). The regulation requires that all National Register nominations by federal agencies be submitted to the SHPO for comment. *Id.* § 60.9(c).

103. *Id.* § 60.6(a).

104. *Id.* § 60.3(m)-(n).

105. 36 C.F.R. § 800.1(c)(1)(ii) (1993). It is the duty of the SHPO, under the § 106 process, to assess any effects upon historical property, and consider any possible alternative measures which may reduce the effect of any alterations or demolitions. *Id. See supra* note 89 (explaining the § 106 process).

106. 36 C.F.R. § 800.9 (1993). The SHPO should consider these factors: Physical damage or destruction, isolation of the property, introduction of elements outside the character of the property, neglect of the historic property, lease, or transfer or sale of the property. *Id.* The SHPO is not limited to these items alone and may consider any aspect of change which may affect the property's setting, location or use. *Id.*

107. *Id.* § 800.1(c)(1)(ii).

108. *See supra* note 89 and accompanying text (discussing the federal, or § 106, review process). *See also* 36 C.F.R. § 800.3(c) (1993) (stating that a § 106 process must be completed by an agency official prior to the commencement of any federally funded project).

National Register.[109] If these criteria are not present, the federal system of review, or Section 106 review process, will not come into effect.[110]

2. State Systems

Because of the limited applicability of the federal Section 106 review process,[111] every state has adopted legislation providing for protection of historical property, and for review processes which aid the state in historical preservation.[112]

However, although all states have legislation to preserve historical property, they all use different review processes to achieve their individual preservation goals.[113] Many of the states use a review process similar to a federal Section 106 review.[114] In these states, political subdivisions must inform the state historical preservation officer of any work which may encroach on historical property or property eligible for preservation protection.[115] Any decision made by the state historical board is

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109. *See supra* note 89 and accompanying text (discussing the federal § 106 review process); *see also* 36 C.F.R. § 800.2(e) (1993) (stating that historic property is property which is on or eligible to be on the National Register, including artifacts, records and any remains located within the historical property).

110. 36 C.F.R. § 800.3(c) (1993); *see supra* note 54 and accompanying text (discussing the Federal section 196 review process).

111. *See supra* note 89 and accompanying text (discussing the federal § 106 review process).

112. ALA. CODE § 11-68-13 (1994); ALASKA STAT. §§ 41.35.070, 41.35.090 (1993); ARIZ. REV. STAT. ANN. §§ 41-863, -864 (1992); ARK. CODE ANN. § 13-7-109 (Michie Supp. 1993); CAL. PUB. RES. CODE § 5024.5 (West 1984 & Supp. 1994); COLO. REV. STAT. ANN. § 24-80.1-104 (West 1988); CONN. GEN. STAT. ANN. § 22a-1h(b)(4) (West 1985); DEL. CODE ANN. tit. 29, § 551 (1991); FLA. STAT. ANN. § 267.061(2)(d) (West 1991); GA. CODE ANN. § 44-10-27 (Harrison 1991); HAW. REV. STAT. §§ 6E-8, -10 (1985 & Supp. 1992); IDAHO CODE § 67-4601 (1989); ILL. ANN. STAT. ch. 20, para. 3410/7 (Smith-Hurd 1993); IND. CODE ANN. § 14-21-1-18 (Burns 1995); IOWA CODE ANN. § 303.30 (West 1988); KAN. STAT. ANN. § 75-2724 (1989 & Supp. 1993); KY. REV. STAT. ANN. § 171.381(7)(d) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 38:2212.1 (West 1989); ME. REV. STAT. ANN. tit. 33, § 1553 (West 1988 & Supp. 1993); MD. ANN. CODE of 1957 art. 83B, § 5-617 (1991); MASS. GEN. LAWS ANN. ch. 9, § 27B (West 1986 & Supp. 1994); MICH. COM. LAWS ANN. § 399.205 (West 1989 & Supp. 1994); MINN. STAT. ANN. § 138.665(1) (West 1994); MISS. CODE ANN. § 39-7-11 (1990); MO. ANN. STAT. § 253.408(7) (Vernon 1990); MONT. CODE ANN. § 22-3-431 (1993); NEB. REV. STAT. 72 § 810 (1990); NEV. REV. STAT. ANN. § 383.085 (Michie 1993); N.H. REV. STAT. ANN. § 227-C:26 (Supp. 1993); N.J. STAT. ANN. § 13:1B-15.131 (West 1991); N.M. STAT. ANN. § 18-6-9.1 (Michie 1991); N.Y. PARKS REC. & HIST. PRESERV. § 37B-14.09 (McKinney 1984); N.C. GEN. STAT. § 121-12(a) (1987); OHIO REV. CODE ANN. § 149.55 (Baldwin 1990); OKLA. STAT. ANN. tit. 53, § 355 (West 1991); OR. REV. STAT. § 358.640 (1993); 37 PA. CONS. STAT. ANN. § 510 (Supp. 1993); R.I. GEN. LAWS § 42-45.1-7 (1993); S.C. CODE ANN. § 4-17-20 (Law Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 1-19A-11.1 (1992); TENN. CODE ANN. § 4-11-111 (1991); TEX. GOV'T CODE ANN. § 442.016 (West 1990); UTAH CODE ANN. § 9-8-404 (1992); VT. STAT. ANN. tit. 10, § 6092 (1992); VA. CODE ANN. § 15.1-503.2 (Michie 1989 & Supp. 1994); WASH. REV. CODE ANN. § 27.34.220 (West Supp. 1994); W. VA. CODE § 29-1-8 (1992); WIS. STAT. ANN. § 44.22.1 (West Supp. 1993); WYO. STAT. §§ 36-4-108, -113 (Supp. 1994).

113. 3 POWELL, *supra* note 7, § 34A.03[4].

114. *See supra* note 89 and accompanying text (discussing application of the federal § 106 review process).

115. ALASKA STAT. §§ 41.35.070, 41.35.090; ARIZ. REV. STAT. ANN. §§ 41-863, -864; CAL. PUB. RES. CODE § 5024.5; COLO. REV. STAT. ANN. § 24-80.1-104; CONN. GEN. STAT. ANN. § 22A-1H; FLA. STAT. ANN. § 267.061(2)(D); HAW. REV. STAT. §§ 6E-8, -10; ILL. ANN. STAT. ch. 20, para. 3410/7; IND.

appealable to higher authorities.[116] Other states provide little or no protection of the historical property and the owners or occupiers can use the property as they please.[117] Some states, such as New Mexico, require the owner to obtain a special permit prior to any alteration or demolition.[118]

New Jersey, for example, which has an administrative review process similar to the federal Section 106 process,[119] provides that the state historical board must make a decision either to grant or deny an alteration or demolition request within one hundred and twenty days, or the application is deemed granted.[120] This provision is intended to give the historical preservation office time to gather information and make an informed judgment as to the historical value of the property, and whether the proposed changes would have an effect on that value.[121]

There are no state historical preservation laws which provide for an arbitration review system like North Dakota's.[122] Most states provide for an administrative process reviewable by the court systems of the state.[123] However, Minnesota's review process seems to provide the most similar review process.[124] Minnesota provides for mediation service between the state historical preservation office and the aggrieved party.[125]

CODE ANN. § 14-21-1-18: KAN. STAT. ANN. § 75-2724; LA. REV. STAT. ANN. § 38:2212.1; ME. REV. STAT. ANN. tit. 33, § 1553; MD. ANN. CODE OF 1957 ART. 83B, § 5-617; MASS. GEN. LAWS ANN. ch. 9 § 27C; MICH. COM. LAWS ANN. § 399.205; MINN. STAT. ANN. § 138.665(1); MONT. CODE ANN. § 22-3-431; NEB. REV. STAT. 72 § 810; N.H. REV. STAT. ANN. § 227-C:26; N.J. STAT. ANN. § 13-6-9.1; N.Y. PARKS REC. & HIST. PRESERV. § 37B-14.09; N.C. GEN. STAT. § 121-12(a); OHIO REV. CODE ANN. § 149.55; R.I. GEN. LAWS § 42-45.1-7; S.D. CODIFIED LAWS ANN. § 1-19A-11.1; TENN. CODE ANN. § 4-11-111; TEX. GOV'T. CODE ANN. § 442.016; UTAH CODE ANN. § 9-8-404; VT. STAT. ANN. tit. 10, § 6092.

116. *See id.* (listing all the states which provide for a review system similar to the federal § 106 process).

117. *See* ARK. CODE ANN. § 13-7-109 (Mitchie Supp. 1993) (providing that any listing will not abridge the owner's rights to use the property); OKLA. STAT. ANN. tit. 53 § 355 (West 1991) (providing that any listing will not abridge the owner's right to use the property).

118. N.M. STAT. ANN. § 18-6-9.1 (Mitchie 1991).

119. *See supra* note 89 and accompanying text (discussing the federal § 106 review process).

120. N.J. STAT. ANN. § 13:1B-15.131 (West 1991).

121. *See* In Re North Jersey Dist. Water Supply Comm'n, 417 A.2d 1095, 1115 (N.J. 1980) (holding that the 120 day period was a valid exercise of the historical preservation office's power, and was intended to be a fact gathering period).

122. N.D. CENT. CODE § 55-10-08(6)(1993). *See infra* notes 183-200 and accompanying text (discussing the creation and application of North Dakota's arbitration system of review).

123. *See supra* note 115 and accompanying text (listing those states which have review systems similar to the federal § 106 review process and provide for greater involvement of the state's historical agency in preservation issues).

124. MINN. STAT. ANN. § 138.665 (West 1994).

125. *Id.* § 138.665(3).

Many states use the historical preservation district to protect large areas of historical property.[126] These states, when dealing with property in the historical district, use a system of review for alteration and demolition requests called a certificate of appropriateness.[127]

Under the certificate of appropriateness process, the request to alter or demolish the historical property is made to the SHPO.[128] The SHPO holds hearings to review the application.[129] At the hearing, the applicants present their case, and bear the burden of persuasion to show the SHPO the necessity for the alteration or demolition.[130] It is within the power of the SHPO or review commission to deny the application for alteration or demolition.[131] If the request is denied, the applicant can appeal to the district court[132] or a general governing body of the county in which the property is located.[133]

a. Examples of Historical Preservation Issues in State Courts

While the effectiveness of historical preservation efforts differ from state to state, it is generally believed that historical preservation is gaining greater acceptance.[134] The trend is to follow the 1966 Act and provide legislation which states that historical preservation of landmarks is in the state's best interest.[135] The trend towards historical preservation acceptance can be seen in several recent decisions in state cases where courts have shown their willingness to accept historical preserva-

126. *See* ALA. CODE § 11-68-13 (1994); CONN. GEN. STAT. § 7-147e (1989); GA. CODE ANN. § 44-10-27 (Harrison 1991); IND. CODE ANN. §§ 36-7-11-1 to 36-7-11-18 (Burns 1989 & 1994 Supp.); IOWA CODE ANN. § 303.34 (West 1989); LA. REV. STAT. ANN. § 25:738 (West 1989); NEV. REV. STAT. ANN. § 384.120 (Michie 1993); N.C. GEN. STAT. § 160A-397 (1987); S.D. CODIFIED LAWS ANN. § 1-19B-42 (1992); TENN. CODE. ANN. § 13-7-407 (1992).

127. *See infra* notes 129-134 and accompanying text (discussing the application of the historical preservation district and the use of the certificate of appropriateness review system).

128. *See, e.g.*, ALA. CODE § 11-68-9 (providing that nothing can be done to historical property until the certificate of appropriateness is granted).

129. *Id.*

130. *Id.*

131. *See, e.g.*, Sherman v. Dayton Bd. of Zoning Appeals, 616 N.E.2d 937 (Ohio App. 2d 1992). In *Sherman*, the court found that it was within the City of Dayton's authority to deny an alteration application from an owner of historical property. *Id.* at 937. The owner wished to place wrought iron bars on the windows of his shop. *Id.* The court held that the denying the placement of the bars was not outside the historical commission's authority in protecting the historical district. *Id.* at 940.

132. *See* ALA. CODE § 11-68-10 (1994 Supp.) (providing an appeal to the circuit court where the property is located).

133. *See, e.g.*, GA. CODE ANN. § 44-10-28(j) (Harrison 1991) (providing an appeal process to the municipal governing body of the area in which the property is located).

134. MARGARET DAVIS, NATIONAL TRUST FOR HISTORIC PRESERVATION, STATE LEGISLATION PROJECT: STATE SYSTEMS FOR DESIGNATION HISTORIC PROPERTIES AND THE RESULTS OF DESIGNATION 32 (1987).

135. *Id.*

tion, even in situations where the preservation is accomplished through means other than the state's historical preservation statute.[136]

For example, the Indiana Supreme Court, in *Whiteacre v. State of Indiana*[137] found that the provisions of Indiana's historical preservation law[138] applied to private landowners as well as public.[139] This decision affirmed rulings at the trial court and appellate court levels.[140]

In *Whiteacre*, two amateur archaeologists, Robert Whiteacre and his wife, discovered a Hopewell Indian site on their property and began excavating the site in search of historical artifacts.[141] After being informed by the local Indiana Department of Natural Resource office (INDR) that a permit was required to excavate the site, Whiteacre researched the law and concluded the permit was not necessary because the site was on private land.[142] The appellate court held that private property is subject to the historical preservation law in the same manner as public property.[143] The court based its reasoning largely on the intent of the historical preservation statute.[144] The policy portion of the statute[145] provided that the state encouraged preservation and continuous protection of historic sites and aided in the organization of local historical societies, both public and private.[146] Thus, to effectively pursue the goal of historical protection for the citizens of the state, the appellate court found that the inclusion of private property within the provisions of the statute was necessary.[147] This reasoning was affirmed by the Indiana Supreme Court.[148] *Whiteacre* represents an example of the expansive reading that historical preservation statutes are more readily receiving today.

Another example of a state court's acceptance of historical preservation ideals can be found in Minnesota.[149] Minnesota has a

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136. *See infra* notes 138-182 and accompanying text (discussing several decisions in state courts which deal with historical preservation issues, and the general acceptance that historical preservation has gained judicially).

137. 629 N.E.2d 1236 (Ind. 1994).

138. IND. CODE ANN. §§ 14-21-21-1-1 to 14-21-1-31 (Burns 1995).

139. Whiteacre v. State of Indiana, 629 N.E.2d 1236, 1237 (Ind. 1994).

140. *Id.* (adopting the decision of Whiteacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993)).

141. *Whiteacre*, 619 N.E.2d at 606.

142. *Id.*

143. *Id.* at 607-08.

144. IND. CODE ANN. § 14-3-3.4-14 (Burns 1990) (currently codified at IND. CODE ANN. §§ 14-21-1-12, 14-21-1-13 (Burns 1995)).

145. IND. CODE ANN. § 14-3-3.4-2 (Burns 1990) (currently codified at IND. CODE ANN. § 14-21-1-12 (BURNS 1995)).

146. *Whiteacre*, 619 N.E.2d at 606 (citing Indiana Dept. of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1005 (Ind. 1989)).

147. *Whiteacre*, 619 N.E.2d at 607-08.

148. *Whiteacre*, 629 N.E.2d at 1236.

149. State by Archabal v. County of Hennepin, 495 N.W.2d 416 (Minn. 1993).

mediation system of review which more closely resembles North Dakota's arbitration system of review than any other state's historical preservation statute.[150] Even though Minnesota's historical preservation statute is unchallenged, the state has dealt with challenges to historical preservation decisions.[151]

In *State by Archabal v. County of Hennepin*,[152] the Minnesota Supreme Court held that Hennepin County could not destroy the Minneapolis National Guard Armory, which was listed on the National Register.[153] This holding was based on the building's protected status under the Minnesota Environmental Rights Act.[154] This Act, unlike Minnesota's historical preservation statute,[155] does not provide for a mediation process to review proposed alterations and demolitions to historical property.[156]

The case went to the Minnesota Supreme Court on appeal from a declaratory judgment action where the Minnesota historical preservation office sought to enjoin Hennepin County from tearing down the Armory.[157] The District Court for Hennepin County declared that the destruction of the building did not violate any environmental protection laws, and denied the injunction.[158]

On appeal, the Supreme Court held that the Armory was a natural resource deserving of protection, even though the building was no longer in use.[159] The court realized that allowing the old, unused building to stand rather than tearing it down and building a much-needed jail was an unpopular decision.[160] However, the court determined that "to fashion an exception for historic buildings such as this one is not within the province of this court."[161] Therefore, the court reversed the decision of the district court and the Armory was left standing.[162] *Archabal* is an example of how one court is willing to apply broad historical preservation principles and support historical

150. *See infra* notes 183-200 and accompanying text (discussing the creation and application of North Dakota's arbitration review system).

151. *State by Archabal*, 495 N.W.2d at 416.

152. 495 N.W.2d 416 (Minn. 1993).

153. State by Archabal v. County of Hennepin, 495 N.W.2d 416, 426 (Minn. 1993).

154. *Id.* at 418. *See* MINN. STAT. ANN. § 116B.02(4) (1992) (stating "scenic and esthetic resources shall aslo be considered natural resources when owned by any governmental unit or agency").

155. MINN. STAT. ANN. § 138.665(2) (1994).

156. MINN. STAT. ANN. § 116B.02(4).

157. *Archabal*, 495 N.W.2d at 417.

158. *Id.*

159. *Id.* at 426.

160. *Id.*

161. *Id.*

162. State by Archabal v. County of Hennepin, 495 N.W.2d 416, 426 (Minn. 1993).

preservation, even when the state's historical preservation statute is not at issue in the action.

A further example of a state court decision accepting historical preservation can be found in Kansas.[163] The Kansas historical preservation statute[164] is generally considered one of the strongest statutory protections for historical property in the country.[165] Recently, there has been a challenge regarding the preservationist's ability to control property within the "environs" of historical property.[166]

In *Lawrence Preservation Alliance v. Allen Realty*,[167] the Kansas Court of Appeals held that before any hearing on historical property can be held, the state historical preservation agency must be notified and allowed to participate at the hearing.[168] If the state historical agency is not allowed to participate, any decision made regarding the historical property would have failed to consider all "relevant factors,"[169] as required by Kansas law.[170] Any decision made by the city in such a manner is subject to remand by the courts for proper consideration.[171] The result in *Lawrence Preservation Alliance* shows that courts are willing to accept historical preservation efforts as a valuable tool for preserving the past for future generations and providing a benefit to the state's citizens, despite the effort or statute's restrictive nature.

On the other hand, despite many courts' acceptance of historical preservation, it has been held that historical preservation laws cannot be used to abridge the basic constitutional rights, such as freedom of religion, of the property owner.[172] This is especially true when the preservation action attempts to designate and protect the interior of the

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163. Lawrence Preservation Alliance v. Allen Realty, 819 P.2d 138 (Kan. Ct. App. 1991).

164. KAN. STAT. ANN. § 75-2724 (1989). The statute provides that no historical property on the National Register or within the "environs" of property on the National Register can be altered or destroyed until the SHPO has had time to investigate and comment on the proposed actions. *Id.*

165. DAVIS, *supra* note 134, at 72. The Kansas law protects property within the environs of historical property. No other state provides such extensive protection for historical property. *Id. See infra* notes 167-172 and accompanying text (discussing the application of this statute and the Kansas' courts general acceptance of the restrictions).

166. *See* Lawrence Preservation Alliance v. Allen Realty, 819 P.2d 138, 148 (Kan. Ct. App. 1991) (holding that the protection of historical "environs" by the Kansas historical preservation statute, KAN. STAT. ANN. § 75-2724 (1989), provided that the protection is exercised in compliance with the statute, is a valid means of preserving historical property).

167. 819 P.2d 138 (Kan. Ct. App. 1991).

168. Lawrence Preservation Alliance v. Allen Realty, 819 P.2d 138, 147 (Kan. Ct. App. 1991). This case was an appeal from a remanded decision, Allen Realty, Inc. v. City of Lawrence, 790 P.2d 948 (Kan. Ct. App. 1990), which stated the provisions of § 75-2724 did not amount to a deprivation of the plaintiff's constitutional rights. *Allen Realty, Inc.*, 790 P.2d at 954.

169. *Lawrence Preservation Alliance*, 819 P.2d at 148.

170. KAN. STAT. ANN. § 75-2724(a) (1989).

171. *Lawrence Preservation Alliance*, 819 P.2d at 148.

172. *See* Society of Jesus of New England v. Boston Landmarks Comm., 564 N.E.2d 571, 574 (Mass. 1990) (holding that restrictions covering the interior of a historic church amounted to an abridgment of religious freedom).

property.[173] For example, in *Society of Jesus of New England v. Boston Landmarks Committee*,[174] the Massachusetts Supreme Court held that the Boston Landmark Commission could not protect the interior of a historical church.[175] The court stated that such a designation amounted to an unconstitutional restraint on the owners' First Amendment religious freedom and the use of such property to exercise that freedom.[176]

However, when there are provisions which provide for designation of interiors which do not affront the owner's constitutional rights, most states are split as to the validity of such provisions. For example in *United Artists' Theatre Circuit, Inc. v. City of Philadelphia*,[177] the Pennsylvania Supreme Court held that the protection of the interior of a historically famous art-deco theatre amounted to an unconstitutional taking.[178] In contrast, in *Teachers Ins. & Annuity Ass'n of America v. City of New York*,[179] the New York Court of Appeals held that the preservation of the interior of a building which housed the famous Four Seasons Restaurant was a valid exercise of the city's historical commission.[180] The plaintiffs, who owned the building, were unable to alter the main floor area, for this would destroy the historical value of the restaurant.[181]

Thus, despite the variety of historical preservation statutes and preservation schemes,[182] there is a common trend among state courts to apply historical preservation principles as a way to provide a benefit for the citizens of their state.

3. *North Dakota's Experience with Historical Preservation Issues*

Generally, North Dakota has followed the trend of creating and accepting historical preservation statutes under the principle that historical preservation is a worthwhile goal for the state, as well as a

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173. *Id.*
174. 564 N.E.2d 571 (Mass. 1990).
175. *Society of Jesus of New England*, 564 N.E.2d 571, 574.
176. *Id.* at 574.
177. 635 A.2d 612 (Pa. 1993).
178. *See* United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 622 (Pa. 1993).
179. 603 N.Y.S.2d 399 (1993).
180. Teachers Ins. & Annuity Ass'ns of America v. City of New York, 603 N.Y.S.2d 399, 403 (1993).
181. *Id.*
182. *See supra* notes 112-134 and accompanying text (discussing the various types of historical preservation statutes used by states).

benefit to its present and future citizens.[183] However, in furthering that goal, North Dakota uses an arbitration system of review for alteration and demolition requests.[184] The arbitration system involves a specially impaneled board of arbitration to decide alteration or demolition requests.[185] North Dakota is the only state which uses this type of system.[186] However, it is interesting to note that the arbitration review system is only applicable when a political subdivision is involved in historical preservation.[187] For private citizens, there is no review process for their alteration and demolition requests.[188]

When a political subdivision makes an alteration or demolition request, it first must present its proposal to the state superintendent of historical preservation before any work can be done.[189] If the proposal is denied, the political subdivision can file for arbitration.[190] This demand for arbitration must be made in writing, and the political subdivision must name three arbitrators.[191]

Once arbitration review has been demanded, the opposing party, generally the historical preservation office, has ten days in which to present three arbitrators.[192] If this is not done, the moving party, generally the political subdivision, may apply ex parte to the district

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183. *See supra* notes 135-182 and accompanying text (describing the acceptance of historical preservation statutes by many state courts based on the principle that historical preservation provides a benefit to the citizens of their states, and thus should be pursued). *See also* N.D. CENT. CODE § 55-10-01 (1993) (providing that preservation of historical sites is in the public interest).

184. *See* N.D. CENT. CODE § 55-10-08(6) (1993) (providing for an arbitration system of review for demolition and alteration requests filed by political subdivisions). *See infra* notes 185-200 and accompanying text (detailing the arbitration review process).

185. N.D. CENT. CODE § 55-10-08(6)(1993).

186. *See supra* notes 112-134 and accompanying text (discussing the various types of state systems of review for alteration and demolition requests).

187. N.D. CENT. CODE § 55-10-08(6)(1993).

188. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer, (Sept. 30, 1994).

189. N.D. ADMIN. CODE § 40-02-01-10 (1986). The section states that the political subdivision must first notify the superintendent by writing and the notice shall include:

> a. Name and address of the property.
> b. A description of the proposed action.
> c. Reasons for proposed action.
> d. A copy of any building inspector, fire marshal, workmen's compensation bureau, planning department, or other official inspection or planning report which forms the basis for proposing the action.
> e. An assessment of all alternatives considered in reaching the decision to propose alteration or demolition, and the reasons for rejecting those alternatives.
> f. A copy of any supporting documentation, such as architect's plans and specifications, which graphically explains the result of the proposed action if approved by the superintendent.

Id. These matters must be presented and the request denied before the arbitration process can be demanded. *Id.*

190. N.D. CENT. CODE § 55-10-08(6) (1989).

191. *Id.*

192. *Id.*

court where the property is located and this court will appoint three arbitrators.[193] Once the six arbitrators have been chosen, the appointed arbitrators have five days in which to appoint a seventh.[194] In the event of a failure to do this, the moving party may again ask the district court to step in and appoint a seventh arbitrator.[195] It is interesting to note that in all of the time restrictions that are placed on the selection process for the arbitrators, there is no such time limit in which the dispute is to be arbitrated and a decision made.[196] When a decision is made, however, that decision is binding,[197] and is appealable to the district court and beyond.[198]

The arbitration review system of the North Dakota Act[199] was an amendment added in 1987[200] after the North Dakota Supreme Court's decision in *County of Stutsman v. State Historical Soc'y of North Dakota*.[201] In *County of Stutsman*, the State Board and State Historical Society wanted to place the Stutsman County Courthouse on the State Historical Sites Register.[202] The principle issue of the case was whether the State Historical Society had the authority to place and remove property off of the State Registry.[203] Stutsman County claimed that property could only be removed if it lost its historical significance or was destroyed.[204] Stutsman County wanted to refuse placement of the courthouse because of the cost required to renovate and maintain the property.[205]

The State Historical Board, having heard the County's appeal, decided to place the property on the State Registry.[206] Stutsman County appealed from this decision to the District Court for the Southeast Judicial District.[207] The district court held that because there was no language in North Dakota Century Code section 55-10-02(4)[208]

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193. *Id.*
194. N.D. CENT. CODE § 55-10-08(6) (1989).
195. *Id.*
196. *Id.*
197. *Id.*
198. N.D. CENT. CODE § 32-29.2-19 (Supp. 1995).
199. N.D. CENT. CODE § 55-10-08(6) (1989).
200. 1987 N.D. Laws 667, § 1. *See North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387* (April 3, 1987) (providing the reasoning behind the legislature's decision to amend the historical preservation statute).
201. 371 N.W.2d 321 (1985).
202. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 323 (N.D. 1985).
203. *Id.* at 324.
204. *Id.* at 323.
205. *Id.*
206. *Id.* at 324.
207. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 324 (N.D. 1985).
208. *Id.* at 323 (quoting N.D. CENT. CODE § 55-10-02(4) (1983)). Section 55-10-02(4) provides that::

> The 'state historic sites registry' shall be a listing of sites designated by the state historical

providing a definition of "historical value," the legislature had not granted the authority to the board to add new sites to the State Registry.[209] The authority to place property on the state historical register was reserved for the state legislature.[210] When the County sought to destroy the courthouse, the historical society filed an appeal with the supreme court and a motion to stay judgment with the district court.[211] The latter motion was denied by the district court.[212] On appeal, the supreme court reversed the denial to stay judgment and stayed judgment pending a hearing on the merits of the case.[213]

The supreme court determined that the failure of the legislature to define "historical value" did not destroy the board's authority to place property on the state registry.[214] Secondly, the court determined that this authority was not granted in violation of the legislature's power.[215] Thus, the supreme court found that the power of the state board was valid and the placement of the courthouse on the State Registry was within this authority.[216] The decision demonstrates the supreme court's willingness to provide protection for historical preservation efforts.[217]

Following the decision in *County of Stutsman*, the Legislature determined that the controversy surrounding the case merited an amendment to the state's historical preservation law.[218] The Legislature

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board of the state historical society as possessing historical value, as defined in this section, and including but not limited to sites enumerated in this chapter. This registry shall be published and updated annually and distributed in accordance with state law dealing with publications.

N.D. CENT. CODE § 55-10-02(4) (1983).

209. *County of Stutsman*, 371 N.W.2d at 324.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 326 (N.D. 1985). The court stated that it must read statutes to give effect to each section in order not to have idle acts. *Id.* at 325. The court determined that North Dakota Century Code § 55-10-02(4) does not define historical value, but to allow this omission to destroy the entire authority of the statute would run counter to the intent of the historical preservation statute, North Dakota Century Code § 55-10-01, which states historical preservation is a goal for the state. *Id.* at 326.

215. *Id.* at 327. The court stated that prior to the passage of the historical preservation statute, the legislature had placed property on historically protected status. *Id.* The court noted, however, that because the state was growing more complex, such legislative work was no longer convenient, and thus, because the legislature has the authority to delegate powers which it no longer has time to perform, this delegation of power to the state board was valid. *Id.*

216. *Id.* at 329.

217. *See supra* notes 134-181 and accompanying text. This section details the trend that shows a number of instances where state courts have held in favor of preservation efforts. The decision in *County of Stutsman* follows that trend to the extent that the supreme court was willing to accept the principle, as stated by the legislature, that historical preservation is a valuable goal for the state. 371 N.W.2d at 326.

218. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 1 (February 13, 1987).

debated several review process options.[219] Included in these discussions was a public referendum, held in the county of the property's location, on whether the property should receive protection.[220] This option, however, was rejected because, generally speaking, historical property has an impact far beyond the boundaries of one county or city.[221] Therefore, by limiting the referendum to only the county where the property was located, the public referendum would deny many of the state's citizens the right to vote on the issue.[222]

The proposal for an arbitration review system was under criticism during the debate,[223] even though the proposal was presented early in the legislative process by the Association of Counties.[224] Some legislators argued an arbitration process removed some of the board's power, and left the decision in one person's (the seventh arbitrator) hands.[225] Others stated that arbitration would put preservationists in a no-win situation.[226] At one point, there were thoughts to kill the entire bill, but many legislators stated it was better to pass something than do nothing at all.[227] Despite misgivings, the arbitration review was passed.[228]

Thus, under North Dakota law, political subdivisions must contend with an elaborate system to request and review alteration and demolition proposals to historical property.[229] There is nothing in the legislative record to show why it was thought appropriate to subject the political subdivision to such a process and how it would be valuable.[230]

IV. CONSEQUENCES OF NORTH DAKOTA'S HISTORICAL PRESERVATION LAW

A. USE OF ARBITRATION TO SETTLE DISPUTES

Currently, North Dakota is the only state which uses a system of arbitration in reviewing historical property alteration and demolition

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219. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 1 (April 3, 1987).

220. *Id.*

221. *Id.* at 3.

222. *Id.*

223. *Id.* at 1-3.

224. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 1 (February 13, 1987).

225. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 8 (April 3, 1987).

226. *Id.*

227. *Id.* at 2.

228. *Id.* at 9.

229. N.D. CENT. CODE § 55-10-08(6) (1993).

230. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 1 (April 3, 1987).

requests by political subdivisions.[231] Arbitration has been a successful way to settle disputes in many areas.[232] Also, most of the litigants involved in arbitration feel that they have received justice equal to that which they would have received through the courts.[233] Furthermore, many judges believe that arbitration provides a faster means of settling disputes.[234] This decrease in time results in savings of attorney's fees and other related costs.[235]

While arbitration has been generally accepted by many federal judges,[236] arbitration programs in state courts have not achieved the same level of uniform success or acceptance.[237] Also, there is no hard evidence that arbitration is applicable to all situations or that it will provide successful dispute settlement for all types of cases.[238] There has been commentary stating that arbitration is not entirely applicable when dealing with issues of public law, such as environmental and land disputes.[239] Also, there are suggestions that arbitration should be restricted to areas where there are clearly defined legal rules.[240]

The type of disputes that arise out of historical site alteration or demolition requests[241] may not be a proper area to exercise an arbitration system because of the nature of the dispute.[242] Generally, a historical preservation dispute is an all or nothing proposition.[243] One

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231. *See supra* notes 112-134 and accompanying text (discussing the different historical preservation statutes currently used in other states).

232. BARBARA S. MEIEHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 123 (1990). This work discusses data generated by the ten federal district courts (Eastern Pennsylvania, Middle Florida, Western Missouri, Western Oklahoma, Middle North Carolina, Northern California, Western Michigan, New Jersey, Eastern New York, and Western Texas) which have mandatory programs for arbitration. *Id.* at 1. The data revealed no evidence that arbitration is applicable to all types of cases. *Id.* at 123.

233. *Id.* at 82.

234. *See* Raymond J. Broderick, *Court-Annexed Compulsory Providing Litigants with a Speedier and Less Expensive Alternative to the Traditional Court Room Trial*, 75 JUDICATURE 41, 41 (1991) (stating that many judges in the Eastern District of Pennsylvania prefer arbitration for its expediency).

235. *See id.*

236. *See* Lynn A. Kerbeshian, *ADR: To Be Or . . .?*, 70 N.D. L. REV. 381, 415 (1994) (discussing the success of summary jury trials method of alternative dispute resolution).

237. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 674 (1986).

238. MEIERHOEFER, *supra* note 233, at 123. *See also* Kerbeshian, *supra* note 237, at 412-13 (stating that the successs of arbitration in all areas is an unresolved issue).

239. Edwards, *supra* note 237, at 676-77.

240. *Id.* at 680.

241. *See, e.g.*, County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321 (N.D. 1985) (providing an example of where one party wants the historical structure to remain, while the other wants to completely remove it).

242. *See North Dakota Senate Committee on Political Subdivisions, Senate Standing Committee Minutes of SB 2387*, at 2 (April 3, 1987). One member of the conference committee, Representative Soreson, was concerned with the ability to arbitrate a decision where he felt there would be little compromise. *Id.* at 1. Sorenson felt that the issue of historical preservation would often be an all or nothing debate with little middle ground in which arbitrators could find agreement. *Id.* at 2.

243. *Id.* at 2. Historical preservation is often not easy to debate and find agreement on the issue,

party wants the structure down or altered and the other party wants to preserve it.[244] Even when the North Dakota arbitration amendment[245] was discussed, many legislators argued that the decision to maintain or destroy the property should be based on the expertise of the preservationists.[246] Many doubt that an arbitration process involving seven arbitrators and possibly two ex parte proceedings will come to an agreement that is fair to all and meets a general compromise for all parties.[247] Furthermore, the lack of time constraints on the arbitration panel to issue a decision could likely cause problems.[248] Finally, the arbitration system for the historical preservation statute is unique in North Dakota law. The system does not follow, to the letter, the state's Uniform Arbitration Act[249] in its selection of the arbitrators.[250] It is highly likely that the six partisan arbitrators will be unable to reach a consensus, and the decision to keep, alter, or destroy the property will come down to one person, the seventh arbitrator.[251]

Lastly, there is the worst case scenario for the arbitration process.[252] Because the statute does not impose time limits to settle the dispute,[253] the arbitration panel could become hopelessly deadlocked, and the historical property would be neglected.[254]

There should also be concerns regarding the legal development of historical preservation law in North Dakota, and how an arbitration

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and this all or nothing principle was a concern for Representative Shaw as well as Representative Sorenson. *Id.*

244. *Id.*

245. N.D. CENT. CODE § 55-10-08(6) (1993).

246. *North Dakota Senate Committee on Political Subdivisions, Senate Standing Committee Minutes of SB 2387*, at 8 (April 3, 1987).

247. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994). Interview with the Honorable Bruce E. Bohlman, Judge of the District Court of North Dakota, Northeast Cent. Judicial District, in Grand Forks, N.D. (Sept. 12, 1994). *See also North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 2 (April 3, 1987) (discussing concerns over the applicability of a seven member arbitration review board to settle preservation disputes). The type of arbitration system was a concern even in the passage of the legislation, where Representative Shaw voiced an opinion that such disputes would likely prove to be very difficult to arbitrate. *Id.*

248. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994).

249. N.D. CENT. CODE §§ 32-29.2-01 to -20. (1995).

250. *Id.* Under the North Dakota Uniform Arbitration Act, there is no defined process for the appointment of arbitrators, except for by agreement of the parties or by appointment by the court. *Id.* § 32-29.2-03.

251. *See North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 2 (April 3, 1987) (stating that this was a concern voiced during the discussion of the legislation).

252. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994).

253. *See* N.D. CENT. CODE § 55-10-08(6) (1993) (providing that once the seven arbitrators are selected, that they "shall proceed to resolve the controversies brought before them").

254. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994).

system would effect this development. When arbitration is applied to unsettled areas of the law, there should be cause for alarm[255] because of the possibility of establishing rules and regulations in the unsettled area outside of the democratic system of checks that is part of the governmental process.[256] This process generally includes review by administrative agencies by officers appointed by elected officials, and a final review by elected judges.[257] This would better facilitate the creation for the proper legal foundation. When arbitration is in a position to "delimit" public duties and have an impact on social concerns, there should also be concern over the application of an arbitration process.[258]

There has only been one case in North Dakota involving the state's historical preservation statute.[259] The decision in *County of Stutsman*,[260] was the motivation behind the arbitration amendment.[261] Although *County of Stutsman* clarified many of the issues of historical preservation,[262] there are many areas in which the historical preservation statute[263] has not been interpreted.[264] Because of uncertainties surrounding North Dakota historical preservation law, there is a danger that standards for preservation could be set by private groups - the arbitrators - outside the democratic checks of the government.[265] It would be better to settle the issues of historical preservation through a series of administrative reviews with judicial appeals.[266] After the basic

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255. Edwards, *supra* note 237, at 680.

256. *Id.*

257. *See infra* notes 294-318 and accompanying text (discussing the proposed plan for changes to North Dakota's review system, and the effect that such changes would have on North Dakota's historical preservation efforts).

258. Edwards, *supra* note 237, at 676.

259. *See* County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 327 (N.D. 1985) (holding that the North Dakota Historical Board had the authority to place property under historical preservation). *See supra* notes 201-216 and accompanying text (discussing the *County of Stutsman* case in greater detail).

260. 371 N.W.2d 321 (N.D. 1985).

261. N.D. CENT. CODE § 55-10-08(6) (1993). *See supra* notes 218-231 and accompanying text (examining the discussions by North Dakota Legislators during the debate for the passage of the arbitration system of review). *See also North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Minutes of SB 2387*, at 2 (Feb. 13, 1987) (detailing the discussions of legislators during the initial passage of the arbitration amendment).

262. *County of Stutsman*, 371 N.W.2d at 327. The *County of Stutsman* court held that the state historical board did have the authority to place sites on the State Historical Register and that defining property as having "historical value" was not unconstitutionally vague. *Id.*

263. N.D. CENT. CODE §§ 55-10-01 to -13 (1993).

264. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994). Mr. Hafermehl stated that questions as to the extent of the burden which could be placed on the owner and how much of an alteration, if any, could be made without first consulting the preservation office were examples of two unresolved areas. *Id.*

265. *See* Edwards, *supra* note 237, at 677 (stating that arbitration on unsettled areas of law could result in limitations set by private groups with no governmental oversight).

266. *Id.* at 676. Judge Edwards states that it is better to solve many public disputes by using public officials, not strangers, who are more out to maximize the end for a private party. *Id.* at

ground rules for settling disputes are established, perhaps then an arbitration system could be implemented.[267]

Although such outcomes are not certainties, North Dakotans should not have to wait to find out. The goal of North Dakota's historical preservation law[268] is to preserve property in its original state for the people of North Dakota and future generations of North Dakotans.[269] Because of the inadequacy of arbitration to settle alteration and demolition disputes, it is questionable whether the arbitration system would effectively achieve such a goal.

B. EFFECTIVENESS OF STATUTE IN PRACTICE

Referring back to the Reeves Drive situation,[270] the possible problems of the arbitration system, one of which is its preclusion of private citizens, can be seen. If the city seeks to change the historical property, the city will first inquire with the SHPO.[271] If any alteration or demolition requests are denied, the city will be forced to enter into arbitration to seek a reversal of the SHPO's decision.[272]

However, if a private homeowner in the area wishes to challenge any proposed changes, they would be unable to participate in the arbitration because the statute limits the arbitration to political subdivisions.[273] Their only recourse would likely be through the courts, seeking injunctive relief.[274]

Thus, the city of Grand Forks would be in the position of arguing its requests in an arbitration proceeding as well as defending its actions in court. However, if the state were to use an administrative hearing process, all parties could have their cases heard at once, and any appeals could then proceed to the courts.

Also, the arbitration system could possibly affect private citizens who need approval for demolition or exterior alteration by the way of

676-77. By using public officials, the settlement is made by individuals whose job is to give force to the statutory provisions with which they work. *Id.* (quoting Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984)).

267. *See Edwards, supra* note 238 at 680 (stating that after an area of the law is settled, arbitration can be a useful tool to reduce an increase in the caseload).

268. N.D. CENT. CODE § 55-10-01 (1993).

269. *Id.* The preservation statute provides: "It is hereby declared . . . [that] the preservation of historic sites, buildings, structures . . . [are for the] benefit of the people of the state of North Dakota." *Id.*

270. *See supra* notes 1-3 and accompanying text (discussing the possible application of the preservation statute to the preservation of historical Granitoid streets in Grand Forks, North Dakota).

271. N.D. CENT. CODE § 55-10-08(2) (1993).

272. *Id.* § 55-10-08(6).

273. *Id.*

274. *See* Archabal v. County of Hennepin, 495 N.W.2d 416, 417 (Minn. 1993) (showing an example of where private citizens filed for injunction to stop the demolition of a historically recognized property). *See supra* notes 150-163 and accompanying text (discussing, in detail, the *Archabal* case and its effect on Minnesota preservation efforts).

city permits.[275] When a private citizen seeks a city permit to demolish his or her historical property, does the city become involved in the demolition of historic property? This is essentially a question of state action.[276] The main issue in a state action question is: Is it fair to attribute the actions of a private citizen to the state?[277]

There are two major analyses used to determine whether it is fair to attribute private action to the state. The first is the public function doctrine.[278] Under the public function doctrine, the exercise of power by the private citizen must be involved with a power that is traditionally "exclusively reserved for the state."[279] The second analysis is the nexus theory. Under this analysis, there are four ways by which the action of the private citizen can be attributable to the state. First, the action of the citizen can be done by command by the state.[280] Second, the state may have encouraged the private citizen to perform a function as a public actor.[281] Third, the action of the private citizen may have created a "symbiotic relationship" between the private citizen and the public actor.[282] Lastly, if the action was done under some state authority, it can be attributed to the private citizen.[283]

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275. *See, e.g.*, GRAND FORKS CITY CODE, § 18-0506 (1993). The code states that a building permit is a prerequisite for any construction, repair, alteration or enlargement of any building or structure within the city limits of Grand Forks. *Id.*

276. DAVIS, *supra* note 134, at 16-17.

277. *See generally* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

278. *See* Marsh v. Alabama, 326 U.S. 501, 505, 507 (1946) (determining that a person cannot be criminally punished for constitutionally protected activity in a company owned town simply because it was against the wishes of the town's management).

279. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). In *Jackson*, the exercise of power was the furnishing of electrical power. *Id.* at 353. The Court stated that if the action was more closely related to the state, such as elections or eminent domain, state action could be more easily found. *Id.* at 352-53.

280. Shelley v. Kraemer, 334 U.S. 1, 19 (1948). The Court held that the judicial enforcement of a valid contract which excluded blacks from purchasing land amounted to a judicial command, and thus the state action was created. *Id.* This ruling, however, has been narrowly interpreted by the Supreme Court in following decisions, and some private/state distinction was to be maintained. GERALD GUNTHER, CONSTITUTIONAL LAW 902 (12th ed. 1991). *See* Barrows v. Jackson, 346 U.S. 249, 254 (1953) (holding that a restrictive covenant enforced against a co-coventor is not a state action); *contra* Pennsylvania v. Board of Trusts, 353 U.S. 230, 230-31 (1957) (holding that an educational board appointment by state statute and given authority to disburse private funds for educational purposes is a state actor).

281. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). The case involved the proposed sale of goods, seized in an eviction, and stored at a warehouse. *Id.* at 151. The Court found that the sale by the private owner of the warehouse did not amount to a state action, even though there was encouragement from the state to sell the goods. *Id.* at 164-65. The Court stated that mere acquiescence by the state is not enough to create a state action. *Id.* at 164.

282. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (ruling that a multitude of relationships in the right context constitutes state action). In *Burton*, the issue was whether a city-backed parking ramp could discriminate against blacks in a coffee shop located in the ramp. *Id.* at 716. The Court stated that because the ramp had been built by public funds, was devoted for public parking, and the state was in joint participation of the operation of the coffee shop, there was the necessary relationship to create a state action. *Id.* at 721-26.

283. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982). The Court, in *Lugar*, stated that

Under these types of analyses, there is the possibility that a private citizen may become a state actor when a building permit is required prior to any alterations of their property.[284] In the Reeves Drive example,[285] it is doubtful that the public function doctrine[286] would apply because the action of altering or destroying privately owned property has never been exclusively reserved for the state. However, under the nexus theory,[287] there are areas in which a private citizen seeking a permit to alter or destroy their property could be considered a state actor.

While there is likely not enough state or city involvement to indicate that the state commanded the private citizen to act by getting a license, the licensing requirement might be enough state involvement to create a symbiotic relationship.[288] The private building alterations might then be attributed to the state.[289] Also, because of the state's authority to require a building permit, there may be an issue of fair attribution of the private action to the state. Admittedly, research shows that the state action issue has never been raised in a historical preservation context, either in North Dakota or elsewhere.[290] However, based on previous decisions by the United States Supreme Court, the possibility for such an application exists. Such application is not inherently good or bad; the real issue is one of clarification. Until the private citizen is assured of either their private or public status, and thus the applicable review processes available to them, there will likely be private individuals unwilling to take historical preservation action.[291]

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because it is necessary to find a fair attribution of the private action to the state, there must be some exercise of action created by the state. *Id.* at 937.

284. DAVIS, *supra* note 134, at 16-17.

285. *See supra* notes 1-3 and accompanying text (discussing the preservation issues surrounding the preservation of several historic Granitoid streets in Grand Forks, North Dakota).

286. *See supra* notes 278-286 and accompanying text (discussing the creation and application of the public function doctrine).

287. *See supra* notes 282-285 and accompanying text (discussing the creation and application of the nexus theory of state action).

288. *See supra* note 282 and accompanying text (discussing the creation and application of the symbiotic relationship).

289. DAVIS, *supra* note 134, at 16-17. *But see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175-76 (1972) (holding that a state liquor license did not create enough of a symbiotic relationship to create state action). Even though the Court in *Moose Lodge* did comment on the complete lack of relationship found when purchasing a liquor license, it did not comment on permits which provide for a greater relationship between the private and public actors. *Id.*

290. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994).

291. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Jan. 23, 1994).

V. PROPOSAL AND ANALYSIS

The North Dakota arbitration system of review for historical property will not adequately resolve the issues involved with alteration and demolition requests made by political subdivisions and private citizens. By making two changes to the current review process, North Dakota's historical preservation law would be better suited to handle demolition and alteration review applications.[292]

First, North Dakota should consider adopting a system under which any political subdivision, prior to the commencement of ANY state or locally funded project, would submit an alteration or demolition proposal to the SHPO.[293] This requirement, would enable the SHPO to ensure the impact, if any, on historical property within the context of the state or locally funded project. The requirement of a historical review proposal for any state or locally funded project has previously been discussed in North Dakota, but no action towards this requirement has even been taken.[294] The SHPO would then be required to review the proposal and to determine the proposal's effect on the historic property.[295] The SHPO would then have 60 days in which to either grant or deny the proposal.[296] If the proposal is not acted upon in sixty days, it would be deemed granted.[297] The SHPO would also be required to determine, through discussions with the applicant, any possible reasonable alternatives to the proposed alterations or demolitions.[298]

During the sixty day interim, the SHPO would be required to hold hearings regarding the property where interested parties could be heard.[299] The location of the hearings would be at the discretion of the SHPO.[300] The hearings would provide a forum in which the applicant,

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292. *See* Appendix.

293. Requiring that alteration or demolition requests be submitted to the SHPO in accordance with N.D. CENT. CODE § 55-10-08(2) (1993).

294. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Jan. 23, 1995).

295. *See supra* notes 115-117 and accompanying text (discussing the alteration review process used by the majority of states). The proposed system of submitting an alteration request which would be reviewed by the SHPO would be analogous to the majority of review systems found in other states which place more emphasis on the expertise of the state historical preservation office. *Id.*

296. The 60 day waiting period provision is taken from N.J. STAT. ANN. § 13:1b-15.131 (West 1991). However, the New Jersey statute allows for 120 days for the state historical board to make a ruling on any proposal. *Id. See also* IOWA CODE ANN. § 303.30 (West 1988) (applying a sixty day rule).

297. *See supra* note 295 and accompanying text (discussing the time restriction on review of a proposal application).

298. N.D. CENT. CODE § 55-10-08(2) (1993).

299. IOWA CODE ANN. § 303.30 (West 1988).

300. SEE S.D. CODIFIED LAWS § 1-19B-47 (1992) (stating that the SHPO may hold a public hearing if deemed necessary).

concerned citizens, and the Historical Board could have their arguments heard.[301] By providing this type of open forum, the SHPO would be able to gather as much information as possible from as many different sources as possible in a limited amount of time.[302] If the SHPO denies the proposal, the political subdivision could appeal to the district court for the county in which the property is located.[303]

Second, North Dakota should require private citizens operating under authorized construction permits to comply with this system of review for alteration and demolition requests.[304] If historic property is owned by a private citizen, the owner must notify the SHPO of any changes or alterations prior to the commencement of such actions.[305] The notification would commence the above stated review process.[306]

This inclusion should be made in an effort to clarify the issue of state action within the historical preservation context. Applying of this review process to private citizens would not be a per-se restriction on property-use.[307] By limiting application of the process to those who are required to obtain a permit, the issue of whether that individual is or is not a state actor is removed.[308] Also, the creation of this process would clarify what is an uncertain area in North Dakota historical preservation law: Are private citizens required to notify the state historical office regarding any changes to historical property, and if so, what type of review process are they afforded?[309] The placing of both private and public actors under the same system would legislatively end this confusion. Furthermore, by placing private citizens under the same type of review process as political subdivisions, the process would likely

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301. IOWA CODE ANN. § 303.30 (West 1988).

302. DAVIS, *supra* note 134, at 25. The project editor states that a review process would draw attention to a proposed project which is damaging to historical property. *Id.* Also, the interim time period gives both sides the opportunity to develop their arguments and develop possible alternatives. *Id.*

303. *See* ALA. CODE § 11-68-10 (Supp. 1994) (providing appeal to the circuit court in which the property is located).

304. *Supra* note 134, at 16-17.

305. *See* ALASKA STAT. § 41.35.090 (1993); HAW. REV. STAT. § 6E-10 (1985 & Supp. 1992) (both providing that private landowners can be placed under the states' historical preservation statute).

306. *See supra* notes 294-305 and accompanying text (discussing the proposal, for North Dakota, of a review process where proposed alterations or demolitions are reviewed with more input from the state historical preservation office than the current arbitration system allows).

307. DAVIS, *supra* note 134, at 16. *But see* ALASKA STAT. § 41.35.090 (providing when a private person proposes a project on historic property, the state process applies, regardless of permit issue); HAW. REV. STAT. § 6E-10 (providing that any construction or alteration, in "any nature, by, for, or permitted" by a private citizen evokes the state review process).

308. *See supra* notes 275-291 and accompanying text (discussing the legal possibilities of a private citizen becoming a state actor due to the requirement of a municipal building permit for alterations or demolitions). *See also* DAVIS, *supra* note 134, at 16-17 (commenting that most states have required private citizens operating under permits to file an application for review).

309. Telephone Interview with Louis Hafermehl, North Dakota Deputy State Historical Preservation Officer (Sept. 30, 1994).

become more streamlined. In a joint proceeding, where a political subdivision and private owner are involved in a historical preservation issue, the arguments for both sides could be heard in one proceeding.[310]

This type of review system, when applied to both political subdivisions and private citizens, would better serve the state's goal of preserving historical property for North Dakotans.[311] The removal of the arbitration system would allow for the development of the body of law by both the public preservationists and the courts, and would eliminate the possibility of privately created regulations on historical property.[312] By placing the development of this legal area in the hands of those public officials most familiar with it, there is better assurance that the development would be in accord with North Dakota law.[313]

Also, the changes would give more power to the State Historical Preservation Officer and her staff.[314] The advantages of giving the state historical preservation office a powerful hand was recognized by the legislature even as they passed the arbitration amendment and effectively removed much of the SHPO's power.[315] The proposed plan would also do away with the possibility of two ex parte judicial proceedings,[316] thus reducing as well as streamlining the judicial involvement in the review process. The courts' involvement would be limited to an appeal from the decision of the Historical Preservation Board.

Furthermore, because the current arbitration system puts no time restrictions on decisions,[317] there is the possibility that an arbitration could continue indefinitely. Under the proposal made by this Note, the State Historical Preservation Board would have sixty days to review an application. Thereafter, the review process would be subject to the more efficient and timely action in the courts. Admittedly, because the arbitration review system has never been challenged, it is difficult to say

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310. *See supra* notes 272-276 and accompanying text (discussing the possible problems involved where both private and public entities have concerns regarding the same piece of historical property).

311. *See* N.D. CENT. CODE § 55-10-01 (1993). The statute provides that the goal of historical preservation is for the inspiration, benefit, and use for all North Dakotans. *Id.*

312. *See* Edwards, *supra* note 237, at 676-77. Judge Edwards stated his concerns about the use of arbitration in areas of the law which had not yet seen a full body of law created by the courts from which arbitrators could draw on in making their decisions. *Id.*

313. *Id.*

314. The apparent removal of the historical board's authority and power in dealing this historical preservation was one of the concerns when the legislation providing for the arbitration system was passed in 1987. *North Dakota Senate Committee on Political Subdivisions, 1987 Senate Standing Committee Reports of SB 2387*, at 4 (April 3, 1987). Some legislators were concerned that by moving to arbitration or a popular vote, the decisions of what property is protected and what property is not would be in the hands of those who were not qualified to make such decisions. *Id.*

315. *Id.*

316. N.D. CENT. CODE § 55-10-08(6) (1993).

317. *Id.*

that the stated problems would ever become a reality.[318] It is also possible that the application of an administrative review process could spawn another bloated government bureaucracy. Nevertheless, the commentary surrounding the application of arbitration systems suggests that applying arbitration to issues of historical preservation would result in an improper development of the law, as well as inadequate protection for the historical property.[319] Furthermore, because of the defined time limits placed on the administrative review, the foot-dragging that is often associated with administrative review would likely be alleviated. Therefore, the proposed changes would not force anyone down a long grind of administrative review. Rather, it would help facilitate the protection of historical property by providing for the proper development of the law and providing greater efficiency in the review process.

VI. CONCLUSION

Adopting a review system that emphasizes the expertise of the North Dakota State Historical Preservation Officer and the members of her staff would provide benefits for North Dakotans not currently available. Alteration and demolition requests filed under an administrative review system would allow for expert review of all requests, would develop historical preservation law under trained public officials, and would provide a much more economical system for the courts and their role in historical preservation. Also, it would do away with the unwieldy and likely time consuming arbitration system currently in place. As a whole it would make North Dakota's alteration and demolition review process much more effective. Because of this, North Dakota's historic preservation goals would be achieved more effectively, and the balancing needed to reach the twin aims of progress and preservation would be more readily achieved.

James E. Smith[320]

318. *See supra* notes 231-269 and accompanying text (discussing the application of arbitration in different legal contexts, and the conclusion that there has been no information on the applicability or effectiveness of an arbitration review system to historical preservation issues).

319. *See supra* notes 246-269 and accompanying text (pointing out that several legislators were concerned about the application of the arbitration review system and several commentators have voiced their opinions regarding the use of arbitration in unsettled areas of the law).

320. The author would like to thank Judge Bruce E. Bohlman of the Northeast Central Judicial District of Noth Dakota for providing the initial information which led to the writing of this article.

APPENDIX

PROPOSED STATUTORY SUPPLEMENT

This is a statutory proposal based upon the research and writing of this article. This appendix borrows from the historical preservation statutes of Alaska (Alaska Stat. §§ 41.35.070 & 41.35.090 (1993)); Hawaii (Haw. Rev. Stat. § 6E-10 (1985)); Iowa (Iowa Code Ann. § 303.30 (1988)); and South Dakota (S.D. Codified Laws Ann. § 1-19B-42 (1992)).

I. Alteration and demolition made by political subdivisions:

Prior to the commencement of any project by a political subdivision which may effect historic property, the agency or officer shall advise the state historical board and allow the state historical board an opportunity to review the effect of the proposed project on historic properties. No project shall be commenced until the state historical board has been given the opportunity to review the project.

The state historical board shall have sixty (60) days in which to review the proposal. If no action is taken by the state historical board within this period, the proposal will be deemed granted.

During the sixty day period, the state historical board shall hold hearings where all interested parties shall have the opportunity to be heard. The location of these hearings will be determined by the State Historical Preservation Officer.

If the state historical board deems that the project does not have an adverse effect on the historical property, the state board shall issue to the political subdivision a certificate of appropriateness. This certificate of appropriateness will detail the project and the result the project will have on the historical property. This certificate of appropriateness will become part of the historical property's official record.

If the state historical board determines the project will have an adverse effect on the historical property, the project may not commence. The political subdivision may alter the project and reapply to the state historical board. Any decision made by the state historical board which

is adverse to the intended project by the political subdivision may be appealed to the district court for the county in which the property is located.

Any action taken without the consent of the state historical board will cause the political subdivision to be subject to suit for enjoinment of such action by the state historical board.

II. Alteration or demolition made by private citizens:

Any private citizen, prior to the commencement of any project which may effect historical property, must notify the state historical board of any proposed changes or alterations. No project shall be commenced until such notice has been given. This section pertains only to those private citizens who have obtained construction permits as required by the political subdivision of residence.

The state historical board shall have sixty (60) days in which to review the proposal. If no action is taken by the state historical board within this period, the proposal will be deemed granted.

During the sixty day period, the state historical board shall hold hearings where all interested parties shall have an opportunity to be heard. The location of these hearings will be determined by the State Historical Preservation Officer.

If the state historical board deems that the project does not have an adverse effect on the historical property, the state board shall issue to the private citizen a certificate of appropriateness. This certificate of appropriateness will detail the project and the result the project will have on the historical property. This certificate of appropriateness will become part of the historical property's official record.

If the state historical board determines the project will have an adverse effect on the historical property, the project may not commence. The private citizen may alter the project and re-apply to the state historical board. Any decision made by the state historical board which is adverse to the intended project by the private citizen may be appealed to the district court for the county in which the property is located.

Any private citizen that takes action without the state historical board's review of the proposed action will be subject to suit for enjoinment by the state historical board.