

# The Local Landmarker

Issue 7, March 2008



*On the Cover: The dramatic central building of the Henry Hobson Richardson-designed Buffalo Psychiatric Center. Constructed between 1870 and 1896, in its final form the complex contained over 11 connected buildings. Richardson, the foremost American architect of the time, partnered with Frederick Law Olmsted to create a safe, peaceful, and rehabilitating environment for patients, including pleasure grounds and working gardens as well as a farm. This magnificent complex is the subject of a renewed and multi-faceted effort to find a suitable reuse to allow it to serve Buffalo in a new capacity. Buffalo has been a CLG since 1987.*

## From the Coordinator

### **This issue**

This issue of *The Local Landmarker* deals with hardship, an issue identified by many member communities as one where they need clarification or guidance. Hardship is the point of local review where a building owner, after being denied a demolition or alteration permit, can work within the law to make the case that there are no other alternatives to the proposal and it must proceed as submitted. Since this can mean either alterations not meeting your law's criteria for work at a designated property, or even the demolition and loss of a historic resource, hardship is a matter not to be taken lightly and should be thoroughly understood.

### **Grants are coming up soon!**

The 2008 round of CLG grants will be announced in May, with an anticipated due date in the middle of July. It is never too early to be thinking of projects you'd like to apply for. As usual, I'd be glad to discuss any ideas you might have for a project, so that there is less mystery or anxiety about the application. Remember that it is unlikely everyone will be funded: There are 58 CLGs across New York State and a limited supply of cash in the grants pool. I always advise people to apply for projects that can be done in a single calendar year even if the project covers 2 fiscal years. The highest ratings go to projects that have the potential to have a state-wide or regional impact, such as conferences or pilot projects that can be taken to a larger audience. In the "Back Page" section of the December 2007 issue of the Landmarker I included a "wish list" of projects I'd like to see picked up by communities. Re-check this list and see if any of them might appeal to your commission or municipality.

As usual, I'll be around the state meeting with member communities and those interested in becoming members. Please let me know what I can do to help as you work to preserve your community's sense of place.

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## Hardship

The mention of a possible hardship proceeding seems to strike fear into many commission members hearts. This is somewhat understandable, because it is quite different in many regards to the more common work of a commission, reviewing proposals and making decisions to either approve, deny, or recommend modifications to proposed work. Also, it is fairly rare, and most commissions have not had to deal with a hardship in the course of their work. However, every denial has the potential to start a hardship process if the owner feels that he or she can make the case. As in many things, it is unfamiliarity that causes the most fear, and education can take the sting out of the unknown. While hardship isn't the simplest thing a commission will have to do, it is logical and fairly straightforward in regard to process, so one shouldn't look at it with trepidation and trembling.

Hardship comes directly from the Just Compensation or "Takings" clause of the United States Constitution, Fifth Amendment, as made applicable to the States through the 14<sup>th</sup> Amendment. These amendments prohibit the taking of private property without just compensation. This was a direct reaction to the Crown taking private property for official use *without* compensation in the period leading up to the American Revolution (i.e. an actual physical invasion of private property for government use, with no payment or other compensation). Beginning in the 20<sup>th</sup> Century, the Supreme Court recognized that regulatory takings were also covered under the Just Compensation clause, meaning that a regulation could have the same effect as a physical invasion, denying an owner the economically viable use or enjoyment of their property. Therefore, the hardship section of a preservation ordinance is there to maintain both the constitutionality of your local law as well as the rights of the property owner.

In order to start thinking about hardship review, you must first know what your law says about the criteria and process. For purposes of this article, I am using the Model Law, since many of your local laws are based on it. If you do not have a very clear hardship section in your law, or one is missing altogether, the hardship section of the model law can serve as a template for possible amendments.

**REMEMBER!:** Hardship is not considered during the designation process. Although an owner might try to argue this point, the economic impact of a designation is purely speculative until a property owner makes a specific proposal. Hardship is only considered after denial of a specific, serious proposal. Also it is imperative that the process focus on the usability and economic viability of the property in regard to the local preservation ordinance and NOT the current owner's checkbook. I'm always asked about the owner who has bitten off more than he can chew in a commercial building purchase and rehab or some other potential situation. It might sound hard hearted, but the only consideration in the case of a demolition or an alteration hardship is the economic impacts of the local law in regards to the use of a property and/or economic return (more on all this below).

### ***Section 7: Hardship Criteria for Demolition***

An applicant whose certificate of appropriateness for a proposed demolition has been denied may apply for relief on the grounds of hardship. In order to prove the existence of hardship,

the applicant shall establish that:

- (i) the property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible;
- (ii) the property cannot be adapted for any other use, whether by the current owner or by a purchaser, which would result in a reasonable return; and
- (iii) efforts to find a purchaser interested in acquiring the property and preserving it have failed.

### ***Section 8: Hardship Criteria for Alteration***

An applicant whose certificate of appropriateness for a proposed alteration has been denied may apply for relief on the grounds of hardship. In order to prove the existence of hardship, the applicant shall establish that the property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible.

### ***Section 9: Hardship Application Procedure***

- (A) After receiving written notification from the Commission of the denial of a certificate of appropriateness, an applicant may commence the hardship process. No building permit or demolition permit shall be issued unless the Commission makes a finding that a hardship exists.
- (B) The Commission may hold a public hearing on the hardship application at which an opportunity will be provided for proponents and opponents of the application to present their views.
- (C) The applicant shall consult in good faith with the Commission, local preservation groups and interested parties in a diligent effort to seek an alternative that will result in preservation of the property.
- (D) All decisions of the Commission shall be in writing. A copy shall be sent to the applicant by registered mail and a copy filed with the Village/Town/City Clerk's Office for public inspection. The Commission's decision shall state the reasons for granting or denying the hardship application. If the application is granted, the Commission shall approve only such work as is necessary to alleviate the hardship.

Well that's clear, isn't it? On the surface it is, but it is simply a very basic structural framework for what can be a more complicated process once it starts. To start understanding the overall process better, let's break these sections down as to language, intent, and use.

### **Section 7: Hardship Criteria for Demolition**

Since demolition means the permanent removal of a building or structure, it is the most significant impact that can ever occur to a historic resource. The loss of a landmark structure that marks a corner, defines a street, or is a centerpiece of a commercial district

can be physically and psychologically devastating to a community. The loss of even a single building can affect an entire historic district; create a gap in an otherwise intact streetscape and impact your community's physical identity to visitors and residents. Therefore, by definition, the answer to the proposed demolition of a designated resource should always be a denial unless a catastrophic occurrence such as fire or major structural failure has impacted its historic materials and/or integrity. It is no accident that proving hardship is not an easy task.

If, after a denial, an owner then decides to move ahead with hardship, Section 7 of the Model Law sets forth the criteria that both the owner and you as a commission/board member will be using to frame the process and make decisions. The introduction to the criteria for demolition reads "*In order to prove the existence of hardship, the applicant shall establish that...*" Note that the following criteria are not multiple-choice in nature. **All** must be addressed and adequately met.

- (i) the property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible;
- (ii) the property cannot be adapted for any other use, whether by the current owner or by a purchaser, which would result in a reasonable return; and
- (iii) efforts to find a purchaser interested in acquiring the property and preserving it have failed.

In other words, the building cannot secure an income for the current owner, a potential owner, or placed in *any* use that would secure a reasonable return for the current or potential owner, and therefore must be demolished.

### **Section 8: Hardship Criteria for Alteration**

Demolitions are, of course devastating. However, alterations can have the potential to be extremely damaging to the character of the subject historic property or the overall character of an entire historic district. If, after a denial for a proposed alteration, an owner decides to move ahead with a hardship proceeding, Section 8 comes into play. The criterion for hardship in the case of alteration is exactly the same as Section 7 (i): *the property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible*. In other words, the building cannot continue in its current form, materials, or details and still secure an income for the owner or any other potential user, and therefore must be modified in a way that does not meet the local design guidelines.

### **Reasonable Return**

In Section 7, Criteria (i) and (ii) deal with "reasonable return," as does the lone Criterion in Section 8. Reasonable return is a concept that is confusing to many people. It is important to understand as this is the key point on which most of the hardship processes turn. If the regulatory constraints placed on the property under local law completely blocks the owner from a *reasonable return* on that property, then a taking has occurred (Note: This concept is universal and this applies to any local law, not only historic preservation). The issue that stumps most people is understanding what a reasonable return is. Making it less clear is that under New York State law, there is no "hard and fast" rule as to rate of return: each

case turns on facts that are dependent to the individual circumstances of that hardship proceeding.

The key issue here is whether or not the *building* is capable of generating a reasonable return, not necessarily the current owner in his financial situation. The true issue before the commission is: do the restrictions placed upon the property by the local preservation ordinance prevent the current or any other owner from seeing a reasonable return? It is important to realize that under federal law, an owner has no right to the *maximum profit* possible or the most lucrative use of a property, simply a reasonable return. The argument that a local preservation ordinance has impinged upon the “full” speculative development potential of a property is fairly common in hardship cases. Again, the owner has the right to a reasonable return, nothing more.

Making the case that no reasonable return is possible under the law requires a thorough submission of financial information from the owner and a careful examination of the materials by the commission. Issues to be examined can include purchase price, nature of purchase (to examine any potential collusion between seller and buyer to create the hardship), assessments and taxes, mortgage balances and debt services, appraisals, sale listings, adaptive reuse considerations by the owner, gross income and cash flow from the property, ownership structure, cost of proposed work and costs if the work was performed in accordance with guidelines, and any others that might be useful to the process. Some of these questions might seem to be prying, but they are legitimate in determining whether or not a true hardship exists. Remember, a part of your community’s history, physical appearance, and future is in the balance.

### **Use and Ownership in Demolition Hardship Cases**

Section 7, letters (ii) and (iii) both address the use of a property as well as how a change of ownership might affect the financial feasibility of a property. Letter (ii) states that it must be determined that *“the property cannot be adapted for any other use, **whether by the current owner or by a purchaser, which would result in a reasonable return.**”* This is an important phrase; it recognizes that it is a legitimate part of the process to examine whether or not a building can be passed on to an owner who can find an appropriate use for the property. It also recognizes the historically fluid nature of real property ownership and building usage and the appropriate role that fluidity can play in allowing a property to remain standing.

I’m certain that you are familiar with people purchasing property without any regard for the existing building, either speculating on the land or simply wishing to own the location, without the existing building in their future plans. Some owners might have “bitten off more than they can chew” in developing a building and are looking for relief by demolishing part or all of a property. In these cases, an owner has essentially created his own hardship, since he purchased the building in spite of knowing the ordinance provisions and how they might affect the property in regard to appropriate changes or maintenance requirements (demolition by neglect provisions). Without letter (ii), a local commission would have no way to address that type of property owner, and buildings could be lost simply due to the current owner’s potentially short-sighted or inappropriate plans, or allowing the property to fall into serious disrepair. The key consideration is not the current owner, but the condition, materials, and other issues dealing with the usability of the structure for any use, *under any*

*owner*, that would generate a reasonable return. Government has no obligation to help a property owner out of a bad business decision, assist in the maximization of profits, or be party to a speculative venture that can have disastrous effects on the local historic character.

Letter (iii) goes one step further and requires that the current owner trying to make a hardship case for demolition make a good faith effort to find a purchaser for the building who would preserve it in keeping with the guidelines of the commission/board. The key is that the property might have quite a bit more life in it, just not with the current owner. Proof of adequate property listing at fair market prices for a sufficient period of time is crucial to have as part of the hardship hearing.

### **Not-For-Profit Owners**

Case law in New York State has developed a separate set of hardship standards for not-for-profit owners of locally designated properties. Since by the nature of the institution, there is no profit and thereby no test of reasonable return, the determining factor is whether the restrictions placed on a property by the designation either seriously interferes with or prevents the owner's chartered purpose. The mission of the owner has to be considered; however, even if the case for hardship is made, the owner still has to work with the commission or board to ensure that the changes made to the property are the minimal required for the use. The owner cannot proceed with a project as if the designation did not exist or as if the commission or board did not exist.

Some not-for-profit owners have been known to challenge designation of their property as a hardship in its own right. The basic test for hardship applies here: designation does not cause hardship. Rather, the determination is made at the time of a specific proposal by the owner whether or not the proposal meets the local criteria and is either denied or approved.

### **Home Owners**

The issue of home owners and hardship is different from both income producing and not-for-profit owners. Also, New York State's own model law is silent on home owners and hardship, adding to the confusion. Working from the other hardship processes, the logical question would be "is the house capable of continuing to serve as a home?" This certainly punches a hole in arguments such as "it's too expensive to paint", or "it's too difficult to install the wooden storm windows, so I want to buy new vinyl windows." These may be issues for the owner, but they do not rise to the level of hardship; rather, they are handled through the usual Certification of Appropriateness application and review process. As such, a commission reviews the proposal and work with the owner to find a solution to the issues that might address their concerns while preserving the historic features and materials of the building.

There are cases where a home owner may be able to make a hardship case, but these typically have to do more with local zoning/use provisions than historic preservation and material issues. There may be legitimate cases where a house is extremely large by today's standards, and the local zoning does not allow either multi-family, institutional, or commercial use, and adequate marketing has shown that there is truly no one who can or is able to "take it on" as a single family. The first approach to that in my thinking would be to work towards a zoning variance (working with the neighbors of course) for a use that would

allow the building to remain standing, such as a Bed and Breakfast or another creative and appropriate use appropriate to its location.

### **Financial Tools**

New York State General Municipal Law 96-a allows municipalities who have local historic preservation ordinances to allow “due compensation” for “takings,” which is another way of saying that a hardship has been found to exist. This compensation “*may include the limitation or remission of taxes.*” In other words, a local government, after a finding of hardship, can choose to relieve the local tax burden from a property, thereby making it potentially possible for a business to meet its business plan while reusing the historic building in keeping with the local preservation guidelines. Don’t forget that there is also the “Ithaca Bill” that allows for municipalities with local preservation commissions to freeze property taxes for a period of 10 years after any initial investment that might increase the property’s assessment and therefore the property taxes.\* Finally, there are the Federal and State Investment Tax Credits for the rehabilitation of historic properties.\*\* While both the Ithaca Bill and the Tax Credit assume investment rather than a demolition proposal, a combination of all these tools might give a new or potential purchaser’s project the financial edge that would allow a happy outcome for the property and your community.

Additionally, your commission might work with the local government and/or local banks to develop additional incentive programs to assist property owners. These can include low or no interest loans or grants for owners of historic buildings.

### **Summing Up**

Hardship is an important process, since it protects both the right of property owners and the constitutionality of your local law. Hardship will never be the easiest thing you will have to deal with as a preservation commission or board member. By its very nature, it can be an emotional process on both the applicant’s and commission member’s part. However, it is an important process to understand and have a procedure prepared in case it is made in your community. A commission can also prepare itself in advance of potential hardship cases by, for example, identifying potential “expert witnesses” that can provide assistance for both property owners and the commission during a hardship hearing.

I know that I have not dealt with every question about the hardship process, but hopefully I have introduced the idea and we can all go forward from this point, learning together. Don’t forget that part of a commission’s responsibilities under the local ordinance is to educate and assist property owners to comply with local laws and design guidelines to facilitate a spirit of collaboration and stewardship of the community. Taking the mystery out of hardship can be an important part of that local education.

\* *More information about the Ithaca Bill (known as the Real Property tax exemption) can be found at: <http://www.nysparks.state.ny.us/shpo/investment/property.htm>*

\*\* *More information on the federal rehabilitation tax credit can be found at: <http://www.nps.gov/history/hps/tps/tax/index.htm>. More information about the New York State Tax Credit program can be found at: <http://www.preservenys.org/policy.htm>. Once there, click on “Implementation memo, Feb. 2008”*



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## Featured Website

### City of Urbana, Illinois's Hardship Process

The City of Urbana, Illinois has a very well developed hardship process as part of its local historic preservation review process. The overall website materials are clear and helpful, and if you scroll to the bottom of the page, there is a link to a "Form to petition for a Certificate of Economic Hardship" that is very thorough. You may wish to adopt this process for your use.

[http://www.city.urbana.il.us/urbana/community\\_development/planning/historic\\_preservation/economic\\_hardship.html](http://www.city.urbana.il.us/urbana/community_development/planning/historic_preservation/economic_hardship.html)



*The dramatic interior court of the Daniel H. Burnham designed Ellicott Square Building in Downtown Buffalo. When completed in 1896, it stood 10 stories tall, and included 60 offices, 40 stores and a central court, and was claimed to be the largest office building in the United States. It remains one of the key historic commercial buildings in downtown Buffalo. Root was just one of the many luminaries of American architecture who left their mark on Buffalo, a list that includes Frank Lloyd Wright, Richard Upjohn, Eliel and Eero Saarinen, Louis Sullivan, Stanford White, and Gordon Bunshaft.*

## The Back Page

The following list is lifted directly from the publication “Law and the Historic Preservation Commission: What Every Member Needs to Know” written by James K. Reap and Melvin B. Hill, Jr. and published by the National Park Service as part of their Cultural Resources Partnership Notes series. It sums up many points made in this issue and can serve as a handy reference sheet for hardship cases.

- Do not consider economic hardship arguments during the designation process. Economic impact is only speculative until a property owner makes a specific proposal. Further, it clouds the issue of significance, the primary concern for designation.
- In considering economic hardship, it is crucial that the preservation commission focus on the property and not the particular economic circumstances of the owner. While the impact on a “poor widow” may appear unreasonable, the inquiry should be whether the restrictions prevent the owner from putting the property to a reasonable economic use or realizing a reasonable profit.
- Put the burden of proof on the property owner, not the commission.
- Evidence of cost or expenditures alone, is not enough. The commission should require information that will assist it to determine whether application of the ordinance will deny reasonable use of the property or prevent reasonable economic return. The evidence should address the property “as is” and if rehabilitated (which may mean just bringing it up to code). Some other factors to consider include: purchase price, assessed value and taxes, revenue, vacancy rates, operating expenses, financing, current level of return, efforts to find an alternative use of the property, recent efforts to rent or sell the property, availability of economic incentives or special financing (such as tax benefits, low-interest loans, grants, or transferable development rights).
- Additional consideration may be appropriate in assessing the impact on non-profit organizations such as the ability to carry out their charitable or religious purposes (although a non-profit is not entitled to relief simply because it could otherwise earn more money).
- Determine who caused the hardship. If the owner has neglected the building, paid too much for the property, or is just gambling on getting a permit in spite of knowing the ordinance provisions, he may have created his own hardship. Government isn’t required to bail an owner out of a bad business decision or speculative investment.
- Commissions should consider bringing in their own expert witnesses where necessary. If the matter goes to court, the decision will be based on evidence in the record. Local government housing, engineering, and building inspection staff may provide useful testimony.