

Legal Aspects of Municipal Historic Preservation

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

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Introduction

A growing number of municipalities in New York, as well as the nation, are seeking to protect their heritage through the preservation of historic buildings, places and districts. The first municipal historic district preservation law in the State was enacted in 1962 by the City of Schenectady to protect the Stockade Historic District.¹ Since its enactment, the State of New York has seen over 175 municipalities enact local historic preservation laws or ordinances.²

A successful and legally defensible local preservation program begins with a detailed inventory and analysis of a municipality's historic resources. Often, a municipality will address historic resources in its comprehensive planning process. In some cases, local preservation groups may have already documented the historical resources, and a community may be able to rely on such work. In other cases, a community will need to obtain technical assistance from historic preservation experts. The inventory and analysis establishes a record of the historic character of a structure or an area and provides a rational basis to guide regulatory decisions.

This memorandum is a summary of the main legal aspects of municipal historic preservation efforts.

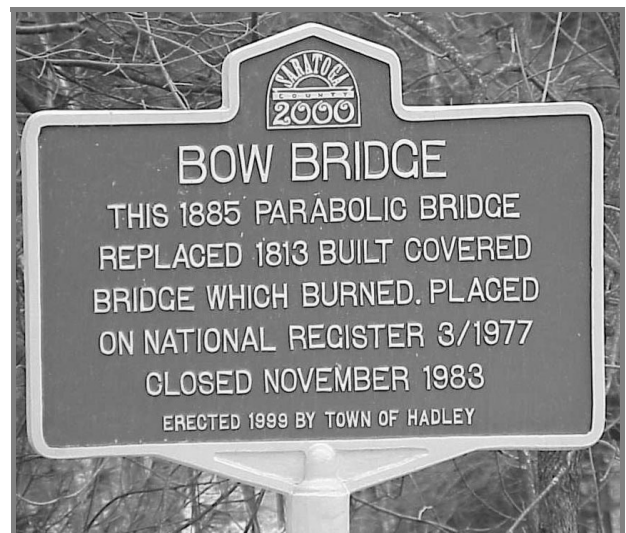
Overview of Municipal Regulatory Authority

The interrelated legal concepts of the “police power” and the “home rule power” provide New York State municipalities with the authority to regulate historic resources. The State Constitution defines police power as “that power government has to provide for public order, peace, health, safety, morals and general welfare.”³ The New York State Municipal Home Rule Law expressly authorizes a county, city, town or village to enact local laws relating to the “protection and enhancement of its physical and visual environment.”⁴ Historic resources are clearly part of a community’s physical and visual environment, and therefore the municipal home rule power includes the power to regulate historic resources.

In addition to these broad grants of power, the New York State Legislature has provided cities, towns, villages and counties with specific methods of regulating and preserving historic resources through the enactment of the State Historic Preservation Act, historic landmarks legislation, and the Certified Local Government Program. Furthermore, the courts have recognized that broad powers granted to municipalities to regulate land use (typically through zoning enabling statutes) also provide authority for municipal regulation and preservation of historic and aesthetic resources.⁵ Finally, Congress has also provided municipalities with the ability to nominate historic resources to the National Register of Historic Places. These historic protection tools will be discussed below.

National and State Registers of Historic Places

In 1980 the New York State Legislature passed the State Historic Preservation Act (L. 1980, c.354), which established the State Register of Historic Places. The guidelines established by the State Historic Preservation Act (“SHPA”) closely resemble those established by the National Historic Preservation Act of 1966⁶ which created the National Register of Historic Places. The State and National Registers list those buildings, structures, districts, objects and sites significant to the history, architecture, archaeology and culture of New York and the nation. The variety of properties included on the National Register is vast, ranging from Native American petroglyphs to fast food restaurants. Over 70,000 New York State properties are now included on the National Register.



The Town of Hadley has erected a sign directing the public to a historic bow bridge.

Listing of a property or area on the National and State Registers by itself does not limit the private uses of the property. Owners of property eligible to be listed are sometimes opposed to listing, because they think it automatically regulates what



The owner of this building in the Town of Lewiston converted it into a fast food restaurant.

they may do with their property. In fact, private owners of properties on the National and State Registers may alter or demolish their properties without any regulatory restraints, provided they have not accepted federal funds for repair or renovation of the property or there is no limiting local law. There are three benefits to property owners from being listed on the registers: (1) protection from the effects of federal and state agency actions through a notice, review and consultation process; (2) eligibility for 20 percent federal income tax credits for the costs of substantial rehabilitation; and (3) priority consideration when federal and state agencies are seeking rental space.

Whenever a State agency is proposing to undertake, fund or approve a project which may cause any change, whether beneficial or adverse, to a property listed on the National or State registers, or which is eligible for such listing, it must consult with the New York State Office of Parks, Recreation and Historic Preservation (OPRHP). The state agency must submit an impact statement detailing any changes that may occur to the historic or cultural resource.⁷ If the Commissioner of OPRHP determines that the proposed action may have an adverse impact on the listed or eligible property, the agency must, to “the fullest extent practicable”, avoid or mitigate the impacts.⁸ Note that the review and consultation process established by Section 14.09 of the Parks, Recreation and Historic Preservation Law (PRHPL) exclusively regulates properties under the control or jurisdiction of State agencies which are listed or eligible for listing on the National or State Registers.⁹ The state agencies must also comply with the State Environmental Quality Review Act.

The only way properties on the National and State Registers may receive direct municipal regulatory protection from incompatible alteration and demolition by a private owner is through enactment of a local historic preservation law. A local historic preservation law, which affords regulatory protection, may be a zoning law or a separate historic preservation law. Some communities have chosen to enact both types of laws, which are discussed below.

Local Historic Preservation Legislation

Municipalities have authority to enact their own historic preservation laws, which is unaffected by the listing or lack of listing of properties on the National and State Registers. Local historic preservation laws may cover properties of purely local historic interest, as well as those listed on the National and State Registers, or both. Local governments have several avenues to preserve historic resources within their community. The zoning enabling statutes for cities, towns and villages provide authority for the protection of historic resources through local zoning laws. Municipalities may also enact site plan review laws either in conjunction with zoning laws or as separate enactments. Lastly, local governments may regulate historic properties by enacting a landmark preservation law as authorized by §96-a or under Article 5-K of the General Municipal Law.

Zoning to Preserve Historic Resources

The division of a municipality's territory into districts, or zones, is a basic feature of land use regulation.¹⁰ Division into either residential, commercial, industrial, or any number of zoning districts, is common. Municipalities which contain neighborhoods, downtowns, or other contiguous tracts of historically significant resources may also establish Historic Preservation Districts to encompass those areas even if some property within the district lacks historic significance. While municipalities often use zoning to protect historic

districts, separate historic preservation laws authorized by General Municipal Law § 96-a and Article 5-K are typically used to protect individual



A view of Broadway in Saratoga Springs, New York.

structures. Another approach that differs from the creation of an historic district zone is adoption of "overlay zones." An overlay zone applies a common set of standards to a designated area that may cut across several different conventional or "underlying" zoning districts. The standards of the overlay zone apply in addition to those of the underlying zoning district. This provides an extra measure of protection for the historic resources within the district. For example, if only a portion of a downtown business district has historic resources that merit additional protection, an additional layer of regulations may be established to apply only to that area. In this way the historic protection regulations "overlay" the underlying zoning requirements. An action proposed in this overlay zone may be subject to review by the local historic preservation commission which will look at such factors as the loss or retention of significant architectural features, compatibility with historic construction methods and styles, and maintenance of district character.

The establishment of a zoning district is a legislative act of the city council, town board, or village board of trustees, as the case may be. Legislative acts which have a reasonable relationship to a legitimate governmental objective enjoy a presumption of constitutionality.¹¹ Since the preservation of historic resources has been determined by the courts to be a legitimate governmental objective¹², the only inquiry is whether a local law or ordinance adopted by a municipality is reasonable. Further, historic preservation controls (as with other local land use regulations) may not regulate an individual piece of property so much that “[I]t renders the property affected by it so unsuitable for any purpose for which it is reasonably adapted as effectively to destroy its economic value.”¹³ In other words, a regulation which leaves a property with no reasonable economic value can be considered a “taking”, and can be invalidated by a court.

Determining whether a local land use restriction or its application is reasonable usually depends upon the particular facts involved. Occasionally, requirements placed on an applicant are so onerous and patently unreasonable that they may be invalidated. In one example, a case was brought against a municipality which established a local historic zoning district for a single parcel, required that it remain in one ownership and pro-actively required the owner to restore the historic and architectural character of the property. The Court of Appeals invalidated the establishment of the district on the narrow basis that nothing in the pertinent enabling legislation authorized municipalities to impose such requirements, but it could just as well have found the requirements were unreasonable, in the constitutional sense.¹⁴

On the other hand, where the City of Schenectady Historic District Commission required several measures, including planting 38 *arborvitae* trees eight feet in height in order to screen a proposed large above-ground swimming pool in an historic zoning district, the requirements were upheld by the Appellate Division.¹⁵



Signage provided by the Village of Lewiston.

To protect the historic character of an area, a municipality may want to use zoning to limit the types of uses allowed. While zoning enabling statutes allow municipalities great discretion in establishing what uses are allowed or prohibited in a district, some limitations have been established by law or by the court. Educational uses in residential areas is one area where the courts have established limitations on municipal regulation. In New York, it is the rule that educational uses enjoy “special treatment with respect to residential zoning ordinances and have been permitted to expand into neighborhoods where nonconforming uses would otherwise not have been allowed.”¹⁶ In the Court of Appeals decision in Trustees of Union College v. Members of Schenectady City Council,¹⁷ the City of Schenectady zoning

ordinance prohibited educational uses from locating in its “Single Family Historic District,” which encompassed the “General Electric Realty Plot,” a distinctive nine-block area of 120 homes developed at the turn of the 20th Century and listed on the National Register of Historic Places. The Court held that because of the competing public policy interests in education, such uses should not be foreclosed from locating in a residential zoning district, even a historic one. The Court further held that there must be a case-by-case deliberative process in which “proposed educational uses must be weighed against the interest in historical



A former public school has been rehabilitated for use as a private school in the City of Saratoga Springs.

preservation,” as in a Special Use Permit process.¹⁸ Municipal zoning ordinances that purport to completely exclude educational uses from historic residential districts will be invalidated, and it would be wise to allow such uses, subject to special use permit authority granted to cities, towns and villages.¹⁹ However, if a reviewing body determines that a particular educational use would adversely affect the protected historic resources by not meeting applicable standards, the Court has

indicated that a reasoned denial to locate within such a district would be upheld.

Design Review Boards

Most municipalities which have enacted historic preservation laws or ordinances, whether through zoning or separate preservation legislation, establish a separate body to review proposed projects located in historic districts or affecting historic properties. The body is frequently named an Architectural Review Board, Design Review Commission or Historic Preservation Commission and is usually composed of persons with some interest or expertise in the subject. Members of the board typically have a more specialized knowledge or interest in the issue than municipal planning board members, and their decisions may be more legally defensible because of this specialized knowledge. A municipality may establish special qualifications for members of such boards by enactment of a local law.²⁰

In addition to being based on an inventory and analysis and establishing a reviewing body, historic preservation laws or ordinances should contain two other key components: a clear description of the actions which require municipal review, and the standards of review.²¹ For example, regulated projects may involve the demolition or exterior alteration of historic structures, as well as the construction of a new structure within an historic district. A change in use may also subject the designated property to review.

Standards for alterations and rehabilitation of historic structures are often borrowed from the United States Secretary of the Interior's Standards for Rehabilitation of Historic Properties.²² Other sources of information on standards for use by municipalities are the Preservation League of New York State, county and regional planning agencies,



Among the items which can be reviewed by a local board is the materials used in the alteration of an historic property.

the Department of State, and the New York State Office of Parks, Recreation and Historic Preservation (OPRHP). OPRHP administers the State Historic Preservation Act under the authority of Article 14 of the Parks, Recreation and Historic Preservation Law. OPRHP provides information and assistance to individuals, nonprofit historic preservation groups, as well as communities in matters of historic preservation. The Commissioner of OPRHP also serves as the State Historic Preservation Officer, who is responsible for reviewing and proposing nominations to the State and National registers, as well as consulting with

agencies whose actions may affect a listed historic resource.

Zoning ordinance standards for protection of historic resources which generally require any new construction or alteration to be compatible with existing structures of historic or architectural value have been upheld by the courts. They have been found to be “sufficiently precise and verifiable” and to “provide minimal guidelines to safeguard against arbitrary or discriminatory enforcement.”²³

Site Plan Review

Cities, towns and villages may enact site plan review laws and ordinances, as either a component of a zoning law or ordinance, or as a separate enactment.²⁴ The enabling statutes authorize local governments to enact legislation which specifies the uses which must obtain site plan approval, as well as the elements to be included on plans submitted for approval. The statutes provide that such site plan laws or ordinances may include those elements related to, “[A]rchitectural features, location and dimensions of buildings, adjacent land uses...as well as any additional elements specified...in such zoning ordinance or local law.”²⁵ A planning board or “other administrative body”, may be delegated authority to administer site plan review.²⁶

Local site plan review regulations should establish what actions are subject to site plan review. Site plan review can apply to a general class of uses, such as gas stations, or to a proposed action in a particular area, such as a historic district. Through site plan review, a municipality could also empower an historic review board to review

proposed projects in historic areas and require applicants to meet certain architectural requirements. Where an historic zoning district has not been established, a local site plan review law could require that any alterations to designated historic structures undergo site plan review. The standards for review should be established in the site plan review law or ordinance.



This one-story building in an historic business district is being remodeled to better match the scale and appearance of older structures.



The final results of the remodeling can be seen below. The credit union building is located in Saratoga Springs, New York.



Landmark Preservation Laws

An additional source of authority for local governments which would like to protect historic resources through local law or ordinance is General Municipal Law §96-a and Article 5-K.

While this important enabling legislation includes the authority to regulate districts, it supplements the zoning powers of local governments by

General Municipal Law § 96-a

Protection of historical places, buildings and works of art.

In addition to any power or authority of a municipal corporation to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing board or local legislative body of any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value. Such regulations, special conditions and restrictions may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes.

allowing historic landmark controls. It differs from zoning because its purpose is not the regulation of land uses, per se, but protection of a community's historic resources²⁷, even, in limited circumstances, the interior of buildings.²⁸ Where both zoning and landmark laws apply, the applicant must comply with both. Consequently, an applicant who seeks to establish a use which is permitted under a zoning law may be denied permission to alter an historic building where the reviewing body (typically a local Landmarks or Historic Preservation Commission) finds that the proposal would not comply with the requirements of the local landmark law.²⁹ Where approval is granted,



it is usually in the form of a "Certificate of Appropriateness."

As in other review processes, a landmark

preservation law or ordinance must specify the process for designating an historic building or site, and the criteria to be used in that designation. Prior to enactment of a landmark preservation regulation, a municipality should conduct a survey of potentially eligible buildings and sites. The survey will act as part of a comprehensive historic preservation program which the ordinance or local law seeks to implement, and will provide a sound (and less *ad hoc*) basis for decisions on designations as well as determinations on whether to allow alteration of a designated structure. The actual designation of a nominated structure or site is a legislative act, but the regulations should allow the preservation commission, planning board and other appropriate entities to nominate buildings and sites for designation by the local legislative body.

The local law or ordinance should provide written notice to the owner of a nominated property and provide the owner and the public with the opportunity to be heard in the matter of the designation, but the municipality need not receive the owner's consent for designation.³⁰

A landmark preservation law should also include designation of a review board, qualifications of board members, standards for review and description of regulated actions. Historic preservation boards focus on the details of alteration and rehabilitation of historic structures, as well as on the impacts of new construction on adjacent historic resources. They need not concern themselves with the complicating factors associated with deciding whether a given use is permissible under zoning.

When a community decides to enact separate historic preservation legislation in addition to its zoning controls, it is important that the overall approval processes be coordinated. This will ensure that applicants are not unduly burdened by having to obtain overlapping or contradictory approvals. In these cases, care should be taken to alert the applicant to the required procedures. For example, the historic City of Kingston, the first capital of New York State, has developed a useful guide to the Kingston Landmarks Ordinance, which includes such sections as "How It Works" and "Ways to Expedite the Process." The ordinance incorporates provisions for informal review processes, such as a pre-application conference. This type of meeting enables the applicant to better understand the review process, and it helps applicants to avoid unnecessary delays and costs.

Certified Local Governments Program

The Certified Local Governments (CLG) Program administered by OPRHP provides technical and financial assistance to communities enrolled in a partnership with NYS OPRHP and the National Park Service pursuant to the National Historic Preservation Act. CLG funding is used for a variety of local preservation needs, including historic preservation plans as part of main street redevelopment programs, community education programs, and in-depth surveys leading to designation of historic landmarks and districts. As of the date of this publication, over 40 Certified Local Governments have received over \$1.5 million in assistance.

Transfer of Development Rights

Article 5-K of the General Municipal Law, and the zoning enabling statutes for towns, villages and cities contain express authority for the use of the “Transfer of Development Rights” (TDR) land use tool, in conjunction with historic preservation. The basic concept of TDR is an exchange of development rights. An owner of a designated property may sell his or her quantitative development rights to the owner of a receiving property. The result is that the owner of the designated property would forfeit the ability to develop his property and the owner of the receiving property would be allowed to submit development plans for approval by the municipality. Development rights are usually conveyed to a private owner for whatever price the seller can

obtain. While the TDR concept is not in wide use in New York state, it has been used extensively in New York City, where conveyance of air rights has helped to preserve and redevelop such significant landmarks as Grand Central Station and South Street Seaport. Administering TDRs requires a somewhat sophisticated system of tracking development rights which are sold and purchased. It is necessary to establish, through a detailed comprehensive planning process, where development rights may “land” without causing unanticipated development problems. Municipalities are also authorized to use TDR for other purposes pursuant to the zoning enabling statutes. In those cases, municipalities must base use of TDR upon a comprehensive plan.

Acquisition of Easements

Article 5-K also explicitly authorizes local legislative bodies, after due notice and public hearing, to acquire fee or easement interests in historic properties by purchase, gift, or other means. In some cases, municipalities have purchased “facade easements” in Main Street areas resulting in the requirement of municipal approval for any facade alteration. Where a municipality is the holder of an easement, it stands in the same shoes as would the private owner of any interest in real property. It may decide whether to permit alteration of a structure simply based upon the terms of the easement, as opposed to having to make elaborate findings of fact and comply with other procedural requirements.

State Environmental Quality Review Act

The State Environmental Quality Review Act (“SEQRA”) must be complied with when a state or local agency has discretionary authority over an action, such as the issuance of a certificate of appropriateness. When historic resources could be affected by an action governed by SEQRA, the thresholds for classifying and examining the action may be stricter. An “unlisted action” which occurs within or substantially contiguous to a registered property or a property which has been nominated for the National or State Register, will be considered a “Type I” action under SEQRA.³¹ Type I actions are more likely to require the preparation of an environmental impact statement, as well as undergo coordinated review.³² For example, a local government that has site plan review authority over a property that is listed or “substantially contiguous” to a property listed on the State or National Register of Historic Places may also consider the environmental impact upon the listed property. This evaluation must be made whether or not a local government has enacted local historic preservation controls.³³

While the bulk of the responsibility for protecting historic resources falls upon municipalities, there are several sources of assistance available to help determine the extent of local resources and the appropriate means to protect them.

Information and Assistance

New York State Department of State
99 Washington Ave
Albany, NY 12231
(518) 473-3355
www.dos.ny.gov

New York State Office of Parks, Recreation and
Historic Preservation Office
Peebles Island Resource Center
PO Box 189
Waterford, NY 12188
(518) 237-8643
www.nysparks.state.ny.us/shpo/

Preservation League of New York State
44 Central Avenue
Albany, NY 12206
(518) 462-5658
www.preservenys.org

New York State Council on the Arts
Architecture, Planning, and Design
175 Varick Street
New York, NY 10014
(800) 510-0021
<http://www.nysca.org/public/home.cfm>

New York Landmarks Conservancy
One Whitehall Street
New York, NY 10004
(212) 995-5260
www.nylandmarks.org

End Notes

1. Preservation League of New York State, “Local Preservation Legislation: Questions and Answers”, Technical Series/No.8, 1982.
2. Preservation League of New York State, “Tools for Historic Preservation”, undated publication distributed at 1997 New York Planning Federation Annual Conference.
3. New York State Department of State, “Local Government Handbook”, 2000, 5th ed.
4. N.Y. Municipal Home Rule Law § 10(1)(ii)(a)(11)
5. *Shubert Organization, Inc. v. Landmarks Preservation Commission*, 166 A.D.2d 115, 570 N.Y.S.2d 504 (1st Dep’t 1991)
6. 16 U.S.C.A §470 *et seq*
7. §14.09 of the Parks, Recreation and Historic Preservation Law
8. A historic building listed in both the state and national register was demolished and replaced by a modern building on a college campus. The court found that “all feasible and prudent plans that would avoid or mitigate adverse impacts, as required by the Parks, Recreation and Historical Preservation Law Section 14.09(1)” were duly considered.. *Ebert v. New York State Office of Parks, Recreation and Historic Preservation*, 119 A.D. 2d 62, 505 N.Y.S.2d 470 (3d Dep’t 1986), appeal denied 68 N.Y. 2d 612, 510 N.Y.S.2d 1026.
9. *Id.*
10. N.Y. Gen. City Law §20 (24) (McKinney 2000); N.Y. Town Law §262 (McKinney 2000); N.Y. Village Law §7-702 (McKinney 2000).
11. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303 (1926); *Esselte Pendaflex Corp. v. Village of Garden City*, 216 A.D.2d 519, 629 N.Y.S.2d 59 (2d Dep’t 1995)
12. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L.Ed.2d 631 (1978).
13. *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492, 470 N.Y.S.2d 350 (1983).
14. *F.G.L. & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 495 N.Y.S.2d 321 (1985).
15. *Salvatore v. City of Schenectady*, 139 A.D.2d 87, 530 N.Y.S.2d 863 (3d Dep’t 1988).
16. *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 593, 510 N.Y.S.2d 861 (1986).
17. *Trustees of Union College v. Members of Schenectady City Council*, 91 N.Y.2d 161, 667 N.Y.S.2d 978 (1997).
18. *Id.* at 166.

19. N.Y. Gen. City Law §27-a (McKinney 2000); N.Y. Town Law §274-a (McKinney 2000); N.Y. Village Law §7-725-a (McKinney 2000).
20. Section 10(1)(ii)(a)(1) of the Municipal Home Rule Law provides that a county, city, town or village may, by local law, establish qualifications for its officers.
21. *State v. Rutkowski*, 58 A.D.2d 14, 395 N.Y.S.2d 729 (3d Dep’t 1988)
22. 36 CFR §67, www2.cr.nps.gov/pad/sec110.htm
23. *Salvatore v. City of Schenectady*, 139 A.D.2d 87, 530 N.Y.S.2d 863 (3d Dep’t 1988).
24. N.Y. Gen. City Law §27-b (McKinney 2000); N.Y. Town Law §274-a (McKinney 2000); N.Y. Village Law §7-725-b (McKinney 2000).
25. *Torsoe Brothers Construction Corp. v. Town of Orangetown*, 120 A.D.2d 738, 502 N.Y.S.2d 787 (2d Dep’t 1986).
26. Where a town enacted a local law to delegate site plan review to an “Architecture and Community Appearance Board of Review” rather than a planning board, such delegation was upheld by the Appellate Division. *Teachers Insurance Annuity Assoc. of America, Inc. v. City of New York*, 82 N.Y.2d 35, 603 N.Y.S.2d 399 (1993).
27. N.Y. Town Law §274-a (McKinney 2000).
28. *Zartman v. Reisem*, 59 A.D.2d 237, 399 N.Y.S.2d 506 (4th Dep’t 1977).
29. *Id.*
30. *Teachers Insurance Annuity Assoc. of America, Inc. v. City of New York*, 82 N.Y.2d 35, 603 N.Y.S.2d 399 (1993).
31. 6 N.Y. Comp. Codes R. & Regs. tit.6, §617.4(b)(9) (2000).
32. “Coordinated review” is mandatory for Type I actions (N.Y. Comp. Codes R. & Regs. tit.6, §617.6(b)(3) (2000)), which means that an agency receiving an application for approval, (for example, an application for a local demolition permit) must notify all other involved agencies and notify them that a lead agency must be agreed upon, after which the lead agency must determine whether to require an environmental impact statement, a decision which is binding on the other involved agencies.
33. The SEQRA regulations at N.Y. Comp. Codes R. & Regs. tit.6, §617.2(1) (2000) define “environment” to include resources of “historic or aesthetic significance”, so that a local agency must determine the impacts of any proposed action on such impacts, and, choose the alternatives which avoid or minimize adverse effects on such resources.