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Economic Hardship and Regulatory Takings in the DC Historic Landmark and Historic District Protection Act

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ECONOMIC HARDSHIP AND REGULATORY TAKINGS
IN THE DC HISTORIC LANDMARK AND HISTORIC DISTRICT PROTECTION ACT

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INTRODUCTION

Many local historic preservation statutes are characterized by economic hardship provisions in the permit review process that allow municipalities to avoid compensation liability under the Takings Clause.¹ New York City, for example, has provided that a certificate of appropriateness can be granted if the applicant demonstrates that she cannot earn a statutorily set "reasonable rate of return" on the property in its present state.² Some cities, including the District of Columbia, have drafted their preservation laws in a manner that specifically incorporates the federal constitutional standard for a taking, in order to fully understand the operation of the economic hardship provision of the DC Historic District and Historic Landmark Protection Act, it is necessary to have a working knowledge of constitutional takings jurisprudence.

Although many local historic preservation laws have economic hardship provisions, the District of Columbia is unique in providing a separate economic hardship standard for low-income property owners. This provision provides a heightened level of protection for property owned by low-income individuals. This paper will discuss the original purposes of the provision, the benefits of a separate standard for low-income individuals, and the potential for the provision's abuse by unscrupulous developers. Although the intentions underlying the creation of the provision were quite laudable, the

¹See, e.g., San Antonio Historic Preservation Ordinance, SAN ANTONIO MUN. § 35-7002 (2003) (defining unreasonable economic hardship as "an economic burden imposed upon the owner which is unduly excessive and prevents a realization of a reasonable rate of return on the value of his property as an investment, applying the test utilized by the Supreme Court of Texas in construing Article I, Section 17 of the Constitution of the State of Texas, 1876, in determining the existence of an unreasonable economic hardship."); Lake Forest [Illinois] Historic Residential Historic Preservation Ordinance, LAKE FOREST CITY CODE § 51-6 (2003) (providing for a certificate of economic hardship when denial of a permit results in "denial of all reasonable use of and return from the property.").
²NYC CODE § 25-309 (2002). The statute defines a reasonable rate of return as a "net annual return of six per centum of the valuation of an improvement parcel." Id. at § 25-302(v).
benefits of the low-income standard, as it is presently administered, are more than
outweighed by its potential costs. This paper will conclude by examining the safeguards
that are available to prevent such abuse.

REGULATORY TAKINGS AND UNREASONABLE ECONOMIC HARDSHIP IN THE DC LAW

The District of Columbia Historic District and Historic Landmark Protection Act

In 1978, the DC Council enacted the Historic District and Historic Landmark
Protection Act. In addition to establishing procedures for the designation of historic
districts and individual landmarks, the Act also provided a detailed statutory framework for
reviewing demolitions, alterations, subdivisions, and new construction within historic
districts and on landmark properties. Under the Act, any application to demolish a
landmark property or a contributing structure within an historic district is subject to review
by the DC Historic Preservation Review Board (HPRB). If it finds that the proposed
demolition or alteration is "compatible" with the purposes of the Act, the HPRB
recommends approval of the permit application to the Mayor's Agent. If, however, the
Board determines that the proposed work will be incompatible with the landmark or the
character of the historic district, it recommends denial of the permit.

Section 6-1104 of the DC Law provides that no demolition "permit shall be issued
unless the Mayor finds that issuance of the permit is necessary in the public interest, or that
failure to issue a permit will result in an unreasonable economic hardship to the

8 Id. at §§ 6-1104 (demolition), 6-1105 (alteration), 6-1106 (subdivision), and 6-1107 (new construction).
9 Id. at §6-1104.
10 Id. at § 6-1103. The Mayor's authority under the DC Law has been delegated to the Mayor's Agent, an
administrative law judge.
Section 6-1102 of the Act defines "necessary in the public interest" as either: 1) consistent with the purposes of the Act; or 2) necessary to construct a project of special merit. Section 6-1102 of the Act also provides that a property owner experiences unreasonable economic hardship when "failure to issue a permit would amount to a taking of the owner's property without just compensation." Additionally, "low-income owners" suffer unreasonable economic hardship if a permit denial imposes an "onerous and excessive financial burden" upon them.

This test was clearly designed to avoid compensation liability under the Takings Clause. Councilmember John Wilson introduced Bill 2-367 in the DC Council on June 28, 1978. As originally introduced, the bill provided that the Mayor could issue a demolition permit if a denial would impose an "undue economic hardship" upon the applicant. The bill defined undue economic hardship as a condition in which "the owner's return from and use of the property are unreasonably limited without the fault of the owner." Two days before the bill was introduced, the Supreme Court handed down its landmark decision in \textit{Penn Central Transportation Co. v. City of New York}, which upheld the New York City Landmarks Preservation Law against facial and as-applied takings challenges. When the amended bill emerged from the Committee on Housing and Urban Development in September, the provision had been modified to incorporate

\footnotesize{7 Id. at §6-1104.  
8 Id. at § 6-1102. "Special merit" is defined as "a plan or a building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." Id.  
9 Id.  
10 Id.  
11 COMMITTEE ON HOUSING & URBAN DEVELOPMENT, COUNCIL OF D.C., REPORT ON BILL 2-367, 1 (Oct. 5, 1978) [hereinafter COMMITTEE REPORT].  
12 D.C. Bill 2-367, §3(1978).  
13 Id.}
the constitutional takings standard established in *Penn Central*)\(^5\) By adopting the federal regulatory takings standard in designing the provision, the DC Council insured that the denial of a demolition permit would almost never result in a taking of private property requiring compensation. It is important to note, however, that this provision merely provided a *statutory* standard for permit review. Whether the denial of a demolition permit effects an unconstitutional regulatory taking, on the other hand, is determined by federal constitutional law. It is this federal standard that provides content to the economic hardship provision of the DC Law. The DC Council emphasized this point, noting that because the statutory definition “is designed to embody the constitutional standard as defined by the United States Supreme Court, the precise legal boundaries of this definition may change from time to time as the Court defines a taking for these purposes.”\(^16\) This distinction, as explained below, has a number of important practical implications for litigation purposes.

*Regulatory Takings and Historic Preservation*

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\(^{15}\) COMMITTEE REPORT, *supra* note 11 at 6. In addition to citing *Penn Central*, the Committee’s report also refers to the Fifth Circuit’s decision in *Maker v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975). The Committee noted that an applicant claiming economic hardship must demonstrate that:

(i) He cannot continue to use the property; and

(ii) He cannot sell the property for an amount which would give him a reasonable return based on his actual investment; and

(iii) He cannot sell the property for a price which would not be confiscatory based upon his actual investment; and

(iv) The property is not suitable for adaptive reuse; and

(v) His inability to use, rent, sell, or reuse the property is not the result of his own fault, for example, because through his own failure of maintenance the property has declined in value or become uninhabitable. *Id.* at 6-7.

Although these are useful criteria, the Fifth Circuit’s decision in *Maker* is not binding precedent in the District of Columbia.

\(^{16}\) *Id.* 7.
Determining the constitutional validity of a land use regulation under the Takings Clause involves what is essentially a two-tiered inquiry. First, a court must determine whether the operation of the regulation deprives an owner of "all economically viable use" of his or her property. If this question is answered in the affirmative, the regulation effects a per se taking under *Lucas v. South Carolina Coastal Council.*\(^1\) If, however, the property retains any value whatsoever, the court must evaluate the regulation under the three-part test articulated in *Penn Central Transportation Co. v. City of New York.*\(^18\) Under *Penn Central,* courts engage in "essentially ad hoc, factual inquiries" that examine: 1) the economic impact of the regulation; 2) the regulation's interference with distinct, investment-backed expectations; and 3) the nature of the governmental action.\(^19\) While courts occasionally engage in a full *Penn Central* analysis when hearing takings challenges to land use regulations, challenges to permit denials under historic preservation schemes are often subjected to a truncated version of test, which simply asks whether the regulation has denied the owner "all economically beneficial use" of the burdened property.\(^20\) Because most historic preservation laws allow owners to continue using protected properties in their current condition, the denial of a demolition permit will almost never fail under this standard. In fact, in the twenty-five years since *Penn Central* was decided, there have been only three reported cases in which restrictions

\(^2\) *Penn Central,* 438 U.S. at 124.
\(^19\) Id.
imposed under an historic preservation ordinance were held to violate the Takings Clause.\textsuperscript{21}

\textit{Regulatory Takings vs. Unreasonable Economic Hardship}

The distinction between a violation of the Takings Clause and an unreasonable economic hardship under the DC Act is significant for a number of reasons. First, a property owner who wants to challenge the denial of a demolition permit on grounds of unreasonable economic hardship must seek judicial review of the Mayor's Agent's decision in the DC Court of Appeals.\textsuperscript{22} The plaintiff can argue that the finding of no unreasonable economic hardship was arbitrary and capricious, not supported by substantial evidence in the record, or on any of the other grounds for reversal described in the DC Administrative Procedure Act.\textsuperscript{23} A regulatory takings challenge to a permit denial, on the other hand, is properly filed as an original action in the DC Superior Court or in the United States District Court for the District of Columbia. Such actions are most commonly filed under 42 U.S.C. §1983.


\textsuperscript{22} DC Administrative Procedure Act, D.C. CODE ANN. § 1-1510(a) (2003) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review.").

\textsuperscript{23} \textit{Id.} at § 1-1510(a)(3). The DC Court of Appeals may set aside any action or findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) Contrary to constitutional right, power, privilege, or immunity;
(C) In excess of statutory jurisdiction, authority, or limitations short of statutory jurisdiction, authority or limitations or short of statutory rights;
(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter, or
(E) Unsupported by substantial evidence in the record of the proceeding before the Court. \textit{Id.}
Second, the proper remedy for a successful appeal of a Mayor's Agent's decision on economic hardship grounds is reversal of the decision and issuance of the original permit. The DC Court of Appeals does not have the authority to award compensation as a remedy. The proper remedy for a successful takings challenge to a permit denial, on the other hand, is just compensation for the property "taken." The district court cannot direct the Mayor's Agent to issue a demolition permit that had previously been denied. Such relief is only available in the DC Court of Appeals. At first glance, this distinction seems to offer the plaintiff a choice between obtaining compensation for the property taken and forcing issuance of the demolition permit. If a plaintiff seeks compensation, she should file an original action in the district court; if she prefers the issuance of a permit, then a petition for review in the DC Court of Appeals is the appropriate procedural route. A close reading of the DC Act, however, reveals that such a choice is illusory. The Act provides that no "permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner." While this provision prohibits the issuance of a permit when both of these conditions are absent, it by no means requires issuance when they are present. The Mayor's Agent may refuse to issue a permit even after determining that doing so would result in an unreasonable economic hardship.


25 See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) ("This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.").

26 D.C. CODE ANN. §6-1104.
hardship. Although such a decision would require the government to pay compensation for the property taken, it demonstrates that no plaintiff can force the Mayor's Agent to issue a demolition permit when doing so would be inconsistent with the purposes of the Act.

Finally, a petition for review of a demolition permit denial must be filed in the DC Court of Appeals within thirty days of the Mayor's Agent's decision. The statute of limitations on a takings claim, on the other hand, is six years. One important issue for litigation purposes is whether a plaintiff is required to file a petition for review in the DC Court of Appeals before filing a §1983 action in federal district court. In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court held that a constitutional takings claim is not ripe for judicial review unless the plaintiff has: 1) received a final decision from the government entity charged with implementing the regulation; and 2) pursued compensation through state inverse condemnation proceedings. According to the U.S. District Court for the District of Columbia, a plaintiff's failure to file a petition for review in the DC Court of Appeals does not preclude a constitutional takings claim in federal court. The denial of a demolition permit is a "final decision" for purposes of satisfying *Williamson County*, and "District law does not provide a procedure to compensate plaintiffs for denial of their building permit applications." 

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27 See District Intown Properties Ltd. Partnership v. District of Columbia, 23 F. Supp. 2d 30 (D.C. 1998) (holding that "even if [a plaintiff] successfully demonstrated 'unreasonable economic hardship,' [the Act] would merely authorize, but not require, the Mayor's Agent to issue the permits over the objections of the Board.").


30 *District Intown*, 23 F. Supp. 2d at 35.

31 *Id.*
900 G Street Associates and District Intown Properties

A brief examination of two cases helps illustrate the difference between a regulatory takings claim and an action for judicial review of a finding of no unreasonable economic hardship. In *900 G Street Associates v. Department of Housing and Community Development*, a developer applied for a permit to demolish the Old Masonic Temple, an individually designated landmark, on grounds of unreasonable economic hardship.32 Although the plaintiff had initially attempted to argue that the demolition was consistent with the purposes of the Act, this claim was subsequently withdrawn.33 The Mayor's Agent denied the permit application, holding that the plaintiff had failed to demonstrate that the denial would preclude "any reasonable use of its property or return on its investment."34 The plaintiff appealed the decision to the DC Court of Appeals, arguing that the permit denial amounted to a taking of private property without compensation.35 The plaintiff did not, however, seek compensation for an unconstitutional taking; it merely sought judicial review of the Mayor's Agent's denial of a permit application.36 Although the Court acknowledged that the value of the property had been greatly diminished by the permit denial, it nevertheless held that the plaintiff had failed to establish unreasonable economic hardship.37 The Court observed that:

if there is a reasonable alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how

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33 Decision and Order of the Mayor's Agent, HPA No. 79-310 (December 21, 1979).
34 *Id.* at 11.
35 *900 G Street Associates*, 430 A.2d at 1389.
36 *Id.*
37 *Id.* 1390-92.
diminished the property may be in cash value and no matter if ‘higher’ or ‘more beneficial’ uses of the property have been proscribed.\textsuperscript{38}

The Court also noted that the applicant bears the burden of proving that there are no reasonable alternative economic uses for the property.\textsuperscript{39} The decision to deny the plaintiffs permit was based upon the Mayor’s Agent’s determination that the plaintiff had failed to satisfy that burden. The Court held that the record was “more than adequate to establish that the Mayor’s Agent could have reasonably concluded that an alternative economic use for the Building exists.”\textsuperscript{40}

\textit{District Intown Properties, Ltd. v. District of Columbia Department of Consumer and Regulatory Affairs} provides a good example of a constitutional challenge to a permit denial under the Takings Clause.\textsuperscript{41} District Intown Properties was the owner of Cathedral Mansions, a three-building Georgian revival-style apartment complex with a large lawn facing the National Zoo.\textsuperscript{42} Twenty-seven years after purchasing Cathedral Mansions, District Intown filed an application to subdivide the subject property into nine lots of record.\textsuperscript{43} The new property configuration consisted of one large lot underneath the existing structures and eight smaller lots carved out of the lawn.\textsuperscript{44} District Intown had subdivided the property with the intention of constructing a townhouse on each of the eight smaller lots and applied for building permits to construct these townhouses in December 1988.\textsuperscript{45} While the building permits were pending, an application was filed with the HPRB to designate the Cathedral Mansions property (including the lawn) as an

\textsuperscript{38} Id. at 1390.
\textsuperscript{39} Id. at 1391.
\textsuperscript{40} Id. at 1392.
\textsuperscript{42} Id. at 877.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
The HPRB approved designation of Cathedral Mansions as an historic landmark. In July 1989, the HPRB issued a recommendation to deny the building permit applications. According to the Board, the proposed construction would be incompatible with the property's historic landmark status. In January 1992, District Intown once again applied for permits to construct townhouses on the eight vacant lots, and the HPRB again recommended denial of the permits. The Mayor's Agent adopted the Board's recommendation and further observed that District Intown had failed to carry its burden on the issues of unreasonable economic hardship and special merit.

On April 21, 1993, District Intown filed a petition for review in the DC Court of Appeals. It argued that the Mayor's Agent had exceeded his jurisdiction in making findings of fact and entering conclusions of law with respect to unreasonable economic hardship. According to District Intown, the only proper consideration in reviewing permit applications for new construction—as opposed to alteration or demolition—is whether the proposed construction would be incompatible with the character of the landmark. District Intown did not request that the Court reverse the permit denial; it merely argued that those portions of the decision discussing economic hardship should be

\footnotesize{\textsuperscript{45} Id.\textsuperscript{,} 46 Id.\textsuperscript{,} 47 Id.\textsuperscript{,} 48 Id. at 878.\textsuperscript{,} 49 Id.\textsuperscript{.} 50 Decision and Order of the Mayor's Agent, HPA No. 92-213-220 (March 8, 1993). 51 District Intown Properties Ltd. v. DCRA, 680 A.2d 1373 (D.C. 1996). 52 Id. at 1377. 53 Id. at 1378. 54 Id. at 1378.}
Although it agreed that special merit and economic hardship were not permissible considerations in the Mayor's Agent's review of new construction permits, the Court dismissed the petition on justiciability grounds. District Intown had not, according to the Court, been "adversely affected or aggrieved," nor had it suffered a legal wrong. This decision, however, was still a victory for District Intown. It had filed the petition for review in the DC Court of Appeals because it had been concerned that the Mayor's Agent's findings on the issue of economic hardship could have precluded a takings claim in another forum. The DC Court of Appeals dismissed this concern, holding that "findings and conclusions of the Mayor's Agent can have preclusive effect only if the Mayor's Agent acted within his statutory authority in issuing them." Because the Mayor's Agent had exceeded his statutory authority in discussing the issue of economic hardship, District Intown would not be estopped from raising a takings claim in federal court.

On March 22, 1996, District Intown filed a §1983 action in the U.S. District Court for the District of Columbia, alleging that the denial of its building permits had effected an unconstitutional taking of private property without just compensation. It argued that the denial of the building permits had rendered the eight vacant lots economically valueless and thus worked a "total taking" under Lucas v. South Carolina Coastal Council. The district court first engaged in the task of defining the relevant parcel of

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55 Id. at 1375.
56 Id. at 1377-78.
57 Id. at 1377. This is a threshold requirement for judicial review of an agency decision under the DC Administrative Procedure Act. See B.C. CODE ANN. § l-1510(a).
58 Id. at 1378.
60 Id. at 35. Although the plaintiff conceded that the apartment building continued to produce rental income and had a positive market value, it argued that each of the eight vacant lots was rendered valueless by the
the property interest alleged to be taken. Because the apartment complex and lawn had been operated as a single economic and functional entity for the duration of District Intown's ownership, the Court held that the relevant parcel was the entire Cathedral Mansions property. The eight vacant lots were not distinct parcels for purposes of the takings analysis, and the denial of construction permits did not result in a *Lucas-style* total taking. The proper framework for analysis, according to the Court, was the tripartite test articulated in *Penn Central*. The Court proceeded to apply the *Penn Central* test and determined that the denial of District Intown's permits had not effected a taking requiring compensation. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court, noting that "District Intown could not have had any reasonable investment-backed expectations of development given the background regulatory structure at the time of subdivision."

These two cases illuminate some of the key differences between a constitutional takings claim and a petition for review of a demolition permit denial. The substantive standard applied by the courts will be the same in both cases, but the procedural and remedial differences discussed above can become very important in developing strategies for litigation. The analysis becomes a bit more complicated, however, when the plaintiff in an economic hardship case satisfies the criteria for low-income owner status under the DC Law.

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61 District Intown, 23 F. Supp. 2d at 35-37.
62 Id. at 36.
63 Id. at 37-39.
64 District Intown, 198 F.3d at 877.
THE LOW-INCOME OWNER PROVISION OF THE DC LAW

For most property owners, a court's analysis of constitutional takings claims and economic hardship claims under the DC Law will be identical (although the remedy will be different). For "low-income owners," however, an unreasonable economic hardship is defined as "an onerous and excessive financial burden."\textsuperscript{65} This raises two initial questions of statutory construction: who qualifies as a "low-income owner," and what is an "onerous and excessive financial burden"? Fortunately, the DC Municipal Code provides a clear definition of "low-income owner" in the historic preservation context. The DCMR defines a "low-income owner" as:

an owner who is an applicant when the application is for a building or site owned by him or her and used as his or her principal place of residence, and whose household income is eighty percent (80\%) or less of the median household income for the Washington Metropolitan Area as established from time to time by the U.S. Department of Housing and Urban Development.\textsuperscript{66}

This definition limits the reach of the low-income owner provision to owner-occupied residential buildings owned by individuals who earn less than $44,000 per year.\textsuperscript{67} A more difficult question is exactly which kinds of financial burdens should be considered "onerous and excessive." To answer this question, one must examine the underlying purposes of the provision.

It is clear that the low-income owner provision provides heightened statutory protection beyond that guaranteed under federal constitutional law. For most property owners, a permit can be issued only if the Mayor's Agent determines that denial will

\textsuperscript{65} D.C. Code Ann. § 6-1102(14).
\textsuperscript{66} 10 D.C.M.R. § 2599.1 (2003).
render the property economically valueless. The costs of restoring a protected building are
not given significant weight in this calculus if there is any economically viable use for the
property. The "onerous and excessive financial burden" language, on the other hand,
seems to imply that low-income individuals maybe entitled to a demolition permit if the
costs of restoring the property exceed the owner's financial means. Such an interpretation
would allow the Mayor's Agent to grant a demolition permit in cases in which the
restoration of a protected property would be economically feasible but for the owner's low-
income status.

The Original Purpose of the Low-Income Owner Provision

An interpretation of the low-income owner provision that allows the demolition of
buildings that are capable of earning a reasonable economic return goes far beyond what is
generally considered to be the primary purpose of the economic hardship clause. If the
economic hardship provision functions solely as an escape hatch to avoid takings liability,
then the low-income provision doesn't make much sense. This tension suggests that the
DC Council's inclusion of the low-income owner provision in the DC Act was motivated
by other concerns.

One likely objective of the low-income owner provision is the mitigation of the
potential effects of gentrification caused by historic designation. During consideration of
the bill that eventually became the DC Law, some Council members expressed concern that
historic designation "would accelerate the displacement of poor persons from inner

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⁶⁷ HUD's median family income for the Washington, DC metropolitan area is $55,000 for Fiscal Year 2004.
See Estimated Median Family Incomes for FY 2004, available at
The original version of the DC Law did not include a low-income owner provision. The provision was introduced in the Committee on Housing and Urban Development as an amendment in November 1978. The unanimous adoption of this amendment seemed to be informed by a belief that the very designation of an area as an historic district would result in gentrification and the displacement of low-income residents.

The charge that gentrification results in the displacement of poor residents is certainly a valid concern. Anecdotal evidence suggests that there is some relationship between increases in property values caused by gentrification and the subsequent displacement of low-income residents. It is also beyond dispute that the DC Council acted within its constitutional authority in creating a separate economic hardship standard for low-income individuals. However, empirical evidence gathered since the enactment of the DC Law suggests that there is no clear relationship between gentrification and the involuntary displacement of low-income residents. Even if one were to assume that gentrification does in fact cause displacement, it is not exactly clear how historic

69 See DC Bill 2-367 (1978).
70 Amendment No. 2 to Bill 2-367 (November 14, 1978).
71 The low-income owner provision almost certainly passes constitutional muster under the Equal Protection Clause of the Fourteenth Amendment. Under the Supreme Court's equal protection jurisprudence, legislative classifications that do not burden a suspect class or implicate a fundamental right will be upheld if they are rationally related to a legitimate governmental purpose. See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979). Wealth (or lack thereof) is not a suspect class. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Protecting the District's low-income residents against displacement is certainly a legitimate public purpose, and the low-income ownership provision is rationally related to that purpose.
72 See Lance Freeman & Frank Braconi, Gentrification and Displacement, 8 THE URBAN PROSPECT 1 (2002), available at http://www.chpcony.org (noting that poor households are less likely to move from gentrifying neighborhoods than from non-gentrifying neighborhoods); Jacob L. Vigdor, Does Gentrification Harm the Poor?, 2002 BROOKINGS-WHARTON PAPERS ON URB. AFF. 133, available at http://muse.jhu.edu/journals/urb/toe/urb2002.1.html (corroborating Freeman and Braconi's findings).
designation stimulates gentrification. Gentrification is a social phenomenon that has not been limited to historic districts. If there is a significant relationship between historic designation and gentrification, it is likely that the relationship is caused not by the permit review process, but by the substantial federal tax incentives that are available for rehabilitation of historic properties. Whether federal tax law or the permit review process causes gentrification is well beyond the scope of this paper. Suffice it to say that the benefits of the low-income owner provision are uncertain at best. The costs, however, are substantial.

*Manipulation of the Low-Income Owner Provision*

The low-income owner provision of the DC Law creates the potential for two distinct types of abuse. First, individuals may employ creative accounting techniques to satisfy the provision's maximum income requirement. The DC Act does not expressly require the provision of personal income tax returns or other proof of income in economic hardship claims. The Mayor's Agent may, however, "require that an applicant furnish...".

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74 The Rehabilitation Investment Tax Credit (RITC) Program provides tax credits for the costs of rehabilitating historic structures. See 36 C.F.R. § 67 (2004).

75 The DC Act provides that all economic hardship claimants must submit the following documentation to the Mayor's Agent:

(A) For all property:

(i) The amount paid for the property, the date of purchase, and the party from whom purchased, including a description of the relationship, if any, between the owner and the person from whom the property was purchased;

(ii) The assessed value of the land and improvements thereon according to the two most recent assessments;

(iii) Real estate taxes for the previous two years;

(iv) Annual debt service, if any, for the previous two years;

(v) All appraisals obtained within the previous two years by the owner or applicant in connection with his purchase, financing, or ownership of the property;

(vi) Any listing of the property for sale or rent, price asked, and offers received, if any; and

(vii) Any consideration by the owner as to profitable adaptive use of the property; and
such additional information as the Mayor believes is relevant to his determination of unreasonable economic hardship and may provide in appropriate instances that such additional information be furnished under seal. n75 District regulations further provide that individuals claiming low-income status must provide "a statement of present household income and the number of persons in the household." n76 The regulations do not discuss how household income should be calculated. Although wages would certainly be viewed as income, it is not clear if returns on investments or capital gains would count as well. The absence of a clear standard for determining household income creates a very real possibility of manipulation. For example, an affluent business owner could set her own income in a way that creates the appearance of low-income status, in addition, the narrow focus on household income would allow individuals with considerable assets but little nominal income to qualify for low-income owner status. It is doubtful that the DC Council had such individuals in mind when it drafted the low-income owner provision.

Second, developers and other parties might use genuinely low-income individuals as straw parties to obtain demolition permits for protected properties. This tactic would involve a developer selling a protected property to a low-income individual at a very low price. The low-income owner would then apply for a permit to demolish the building on economic hardship grounds. After razing the building, the straw party would then sell the property back to the developer at a premium. Although the developer will still have to comply with the permit review process, it will now be applying for a new construction

(B) For income-producing property:
   (i) Annual gross income from the property for the previous two years;
   (ii) Itemized operating and maintenance expenses for the previous two years;
   (iii) Annual cash flow, if any, for the previous two years.

D.C. CODE ANN. § 6-1104(g)(1).
permit rather than a demolition permit. As a result, the developer's proposed construction will enjoy a presumption of compatibility, and the burden of proving incompatibility will shift to the government. The developer will still have to demonstrate that the proposed construction is "not incompatible" with the character of the historic district. Nevertheless, this tactic would allow demolitions that would be clearly impermissible under the regular economic hardship provision. Section 6-1104 of the DC Act requires economic hardship applicants to provide "a description of the relationship, if any, between the owner and the person from whom the property was purchased." This provision suggests that the DC Council may have anticipated exactly this kind of manipulation. Unfortunately, few individuals acting as straw parties for developers are likely to disclose the true nature of their relationship with them. The effective prevention of the low-income owner provision's abuse will require safeguards other than those currently provided by the DC Act.

_Illustration: Fix It or Dump It?_

The only completely effective way of preventing the types of abuse described above would be to repeal the low-income owner provision. This proposal is not as radical as it sounds, in the twenty-five years that the Historic Landmark and Historic District Protection Act has been in place, the Mayor's Agent has never issued a demolition permit under the terms of the low-income owner provision. Those who would support keeping

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77 _Id._ at §6-1104(g)(2).
76 10 D.C.M.R. §2516.4(c).
77 The permit review process for new construction provides that a building permit "shall be issued unless the Mayor, after due consideration of the zoning laws and regulations of the District of Columbia, finds that the design of the building and the character of the historic district or historic landmark are incompatible," D.C. CODE ANN. § 6-1107(f). _Compare Id._ at § 6-1104(c) ("No [demolition] permit shall be issued unless the
the provision in place will argue that this fact suggests that any concern with its abuse is overblown. It is clear, however, that the low-income owner provision creates the potential for manipulation. The fact that developers haven't yet taken advantage of this opportunity is an unpersuasive justification for keeping the provision in place. The provision's benefits to low-income individuals are de minimis at best; the costs of its potential abuse are tremendous. Unfortunately, no member of the DC Council is likely to propose repealing a legislative provision that was designed to protect low-income individuals against displacement. Given this political reality, other approaches to this problem must be developed.

Preventing the first type of abuse—the use of misleading accounting techniques—would require, at a minimum, a more searching inquiry into the economic status of the applicant. First, the Mayor's Agent should consider—in addition to income received in the form of wages and investments—the value of an applicant's other assets. An individual who owns five cars and three houses shouldn't qualify for the low-income owner provision simply because he has a nominal annual income below $44,000. Second, the Mayor's Agent should not limit his inquiry to the applicant's "present household income." The Mayor's Agent should examine income streams over a period of at least three to five years.

The current Mayor's Agent took a step in the right direction in the recent case of Will and Gennet Purcell.\textsuperscript{78} Purcell involved an application for the installation of 48 vinyl replacement windows on a corner house within the Greater U Street Historic District.

\textsuperscript{78} Decision and Order of the Mayor's Agent, HPA Nos. 01-202; 01-515 (March 12, 2004).
The Purcells sought an alteration permit after they had already replaced the original wooden windows. Both the HPRB and the Mayor's Agent determined that the installation of vinyl windows on the house was inconsistent with the purposes of the Act and incompatible with the character of the historic district. During a hearing before the Mayor's Agent, the plaintiffs argued that the denial of the alteration permit would impose an unreasonable economic hardship upon them. Although both plaintiffs were attorneys, they claimed to have a combined household income of only $8,000, which was well below the maximum income limit of the low-income owner provision. Gennet Purcell had recently been laid off from her position as an associate at a large law firm, and Will Purcell was self-employed. The house, which had been purchased for $135,000 in April 2000, was assessed at a value of $640,000 in 2002. The Mayor's Agent also examined the Purcells' other assets and liabilities, which included two cars, rental income from a basement apartment, bank account balances, and child support payments.

The Mayor's Agent determined that the Purcells had failed to demonstrate unreasonable economic hardship. In so holding, he observed that "to the extent that Applicants are experiencing economic hardship, such circumstance is only temporary, due to Gennet Purcell's unemployment status, and Will Purcell's low cash flow as he seeks to build and expand his law practice." By setting up a distinction between "sustained" and "temporary" low-income owners, the Mayor's Agent has provided a useful check against the manipulation of the low-income owner provision. Because the

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79 Id. at 1. The Mayor's Agent entered a default judgment after the applicants failed to show up for the hearing on their permit application. The applicants later requested, and were granted, a rehearing on the issue of economic hardship. Id.
80 Id. at 5.
81 Id. at 3-4.
Purcells had failed to satisfy the low-income owner criteria, their ability to sell the house at a gain precluded a finding of unreasonable economic hardship. While some applicants might argue that this detailed scrutiny of financial records is unreasonably intrusive, it is clear that the Mayor's Agent is authorized under the DC Law to require such documentation.84

It will be considerably more difficult to erect effective safeguards against the second kind of manipulation. As mentioned above, all economic hardship claimants must disclose "the relationship, if any, between the owner and the person from whom the property was purchased." It is clear, however, that a low-income owner who is acting as a straw party will have a strong economic disincentive to disclosing the nature of his relationship with the developer. Unless the Mayor's Agent allows the government to use polygraph tests and trial lawyers to impeach the testimony of economic hardship applicants, there would appear to be no way of distinguishing bona fide claimants from straw parties.

One potential solution to this problem would be the use of conservation easements to ensure that any new construction on a property would be limited to the structure proposed by the low-income owner at the time the demolition permit application is filed. The term "conservation easement" is often used to describe restrictive covenants, negative easements, and equitable servitudes that are created for the purpose of protecting

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82 Id. at 5.
83 Id. at 10.
84 See B.C. CODE ANN. § 6-1104(g)(2) ("The Mayor may require that an applicant furnish such additional information as the Mayor believes is relevant to his determination of unreasonable economic hardship.").
and managing historic, environmental, and other property resources. Although there are a number of important legal differences between these distinct property interests, they are functionally similar in that they each allow a private individual or group to obtain a protective non-possessory interest in the property of another. Governments often obtain protective easements as well. For example, District zoning regulations currently condition permits for planned unit developments (PUDs) on the recodarion of a covenant between the property owner and its successors to use the property only in the manner specified. Until recently, the effectiveness of conservation easements in the historic preservation context has been quite limited due to the common law requirements imposed on such restrictions. For example, if a land use restriction imposed by a restrictive covenant did not "touch and concern the land," the covenant would not bind successive owners of the burdened property. The District of Columbia Uniform Conservation Easement Act (UCEA) eliminated much of the uncertainty that often accompanies the use of negative easements and servitudes for preservation purposes by removing the common law requirements that often rendered them ineffective. There are at least three problems, however, with the use of conservation easements for the protection of historic structures.

First, although the UCEA addresses some of the common law limitations placed upon conservation easements, the Act expressly states that it "does not affect the power of a court to modify or terminate a conservation easement in accordance with principles of

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86 10 D.C.M.R. 2407.3 (2003).
There are two common law doctrines that allow courts to terminate servitudes in certain situations. Under the "relative hardship" doctrine, the owner of property that is burdened by a servitude can raise an affirmative defense that the individualized burden of the restriction outweighs its benefits to the land. The doctrine of "changed conditions" allows courts to refuse equitable enforcement of a servitude if the property restriction has become obsolete. Under either of these doctrines, courts are given an enormous amount of discretion to decide whether the costs of a servitude outweigh its benefits, or if a land use restriction has become "obsolete." The continuing viability of these doctrines in state courts undermines the effectiveness of easements and other servitudes as preservation instruments.

Second, courts often construe servitudes very narrowly in order to avoid enforcement, hi Foundation for the Preservation of Historic Georgetown v. Arnold, the DC Court of Appeals narrowly construed a conservation easement to dismiss an enforcement action against a landowner. After observing that the terms of the easement were ambiguous, the Court held that an exterior alteration on the subject property did not violate the easement. In so holding, the Court opined that "restrictions on land use should be construed in favor of the free use of land and against the party seeking enforcement." It is unlikely that conservation easements will adequately protect historic resources when judges take this kind of an approach to their interpretation.

88 Id at § 42-203.
89 See Edward E. Chase, Servitudes, 1 AMERICAN LAW OF REAL PROPERTY § 605[a], at 6-123 (Arthur Gaudio ed. 1994).
92 Id. at 797.
Finally, there is a potential constitutional problem with conditioning the approval of a building permit on the applicant's agreement to dedicate a conservation easement, in *Nollan v. California Coastal Commission*, the Supreme Court held that a coastal management agency violated the Takings Clause when it conditioned the approval of a building permit on the plaintiffs agreement to dedicate a public easement across the dry-sand portion of its private beach. The Court observed that "unless the permit condition [the exaction] serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" Although the Court did not prohibit the use of all development exactions, it did note that there must be an "essential nexus" between the exaction and the public purpose that the development ban is designed to achieve. In *Dolan v. City of Tigard*, the Supreme Court tightened the requirements of the *Nollan* test. In addition to demonstrating the existence of an "essential nexus," governments are now required to prove that the exaction is "roughly proportional" to the public purpose it is designed to achieve. The Court held that the governmental body must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Although *Nollan* and *Dolan* generally limit the ability of governments to use exactions as land use planning devices, most conservation easements would have no trouble satisfying the tests articulated in those cases. There is certainly an "essential

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94 *Id.* at 837.
95 *Id.*
97 *Id.* at 391.
nexus" between the dedication of a conservation easement and the public purpose of protecting the historic building to which the easement is attached. Most easements will also be "roughly proportional" to the impact of the applicant's proposed construction. Indeed, it would be difficult to design an exaction that is more narrowly tailored to achieving the purpose of preservation than a conservation easement. Unless a conservation easement bore almost no relationship to the maintenance of the character of an historic district or landmark, the decisions in Nollan and Dolan do not appear to place any significant limitations on the use of conservation easements in the historic preservation context.

Although conservation easements can be a useful adjunct to a robust preservation ordinance, the precarious nature of the protection that they provide makes them undesirable as a standalone system for protecting historic resources. However, the fact that conservation easements are not completely effective in preventing the demolition of historic buildings is no reason to entirely dismiss their usefulness. Such easements can be very effective in making the kinds of abuse described above much more difficult.

CONCLUSION

The low-income owner provision of the DC Law was designed to mitigate one of the perceived effects of historic designation: gentrification and the concomitant displacement of low-income residents. Unfortunately, the potential costs of the provision far exceed its likely benefits. Although the relationship between historic designation and the displacement of low-income residents is questionable, the repeal of the low-income owner provision is highly unlikely. Increased scrutiny of the financial status of low-

98 Id.
income applicants and the use of conservation easements can help minimize the potential for abuse.