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First Amendment and Land Use, in Recent Developments in Land Use, Planning, and Zoning

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operate a business for buying, selling, and trading new and used farm equipment, *Darnall v. City of Monticello*,[94] where testimony relating to potential decrease in property values from an appraiser and neighbors was justification for denial of a conditional use permit to build a duplex on property zoned for single-family homes, and *Steen*, where neighborhood opposition to an application for a conditional use permit to use ten acres of property as a borrow pit was upheld.

There is only one lesson to be learned in this area: what is competent evidence in one state probably will not be competent evidence in the next state.

IV. First Amendment and Land Use[95]

Once again in the past year, the U.S. Supreme Court has entered an opinion involving the first amendment that has significant ramifications for local zoning and planning. This marks the third time since 1986 that the Court has handed down a decision in this field.[96] The most important development in this area of the law since last year's committee report is the Supreme Court's decision in *FW/PBS, Inc. v. City of Dallas*,[97] which addressed the validity of a comprehensive adult entertainment zoning and licensing ordinance enacted by Dallas in 1986. *FW/PBS* was followed with great interest because it marked the first time the Court had considered the validity of using a restrictive licensing scheme to regulate adult entertainment businesses.[98]

The first amendment is also increasingly important in the field of historic preservation law, where local preservation commissions are now frequently encountering resistance from religious groups when they designate historic churches, or deny permits to alter or demolish them. In two cases decided this past year in New York and Boston, churches claimed that landmark designation interfered with the free exercise of

94. 522 N.E.2d 837 (Ill. App. 4 Dist. 1988).

95. This section is taken from the report of the First Amendment and Land Use Law Subcommittee, co-chaired by Professors Alan Weinstein, Cleveland-Marshall College of Law, and Edward H. Ziegler, Jr., University of Denver School of Law. Professor Weinstein submitted this year's report. Bradford J. White, of Clarion Associates, Inc. in Chicago, and Co-Chair of the Historic Preservation and Architectural Controls Subcommittee, submitted the portions of this section dealing with the first amendment and historic preservation.

96. The other two cases were *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138 (1988).

97. _____ U.S. _____, 110 S. Ct. 596 (1990).

98. In previous cases, the Court upheld zoning restrictions that regulated the location of adult businesses in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

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religion, testing the traditionally zoning and land-use notions about regulation of the location, use, and occupancy of church structures.

A. *Restrictive Licensing of Adult Entertainment Businesses*

The Dallas ordinance in question in *FW/PBS, Inc. v. City of Dallas* comprehensively regulated "sexually oriented businesses."[99] In addition the ordinances required that adult businesses be licensed, with civil disability provisions prohibiting certain individuals from obtaining licenses. The ordinance imposed locational restrictions on adult businesses, required that viewing booths in adult theatres be configured to allow surveillance by management, and prohibited the rental of a motel room for less than ten hours at a time.[100]

The bulk of the ordinance was upheld in the district court,[101] but the Fifth Circuit panel, while affirming the lower court's decision, split on the most critical aspect of the Dallas scheme, whether its licensing provisions should be treated as a form of content-neutral "time, place and manner" regulation because they were aimed at controlling the "secondary effects" created by adult businesses rather than expressive activity itself.[102] Finding that the Dallas ordinance regulated the secondary effects of adult businesses, two members of the panel argued that it was unnecessary for Dallas to comply with the more stringent procedural safeguards that are applied to regulations aimed at content and held that the lower level of protection provided by the "time, place and manner" analysis in the Supreme Court's *Renton*[103] decision was adequate.[104] Af-

99. The ordinance defines a "sexually oriented business" as an "adult" arcade, bookstore, video stores, cabaret, motel, motion picture theatre, theatre, escort agency, nude model studio or sexual encounter center. 110 S. Ct. at 602.

100. *See* Dumas v. City of Dallas, 648 F. Supp. 1061 (N.D.Tex. 1986).

101. *See* 110 S. Ct. at 602. The district court for various reasons, struck several provisions of the ordinance. *See* Dumas v. City of Dallas, 648 F. Supp. 1061.

102. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

103. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court established that municipalities could single-out adult businesses for special regulatory treatment in the form of time, place, and manner regulations that restricted the locations where such businesses could operate, so long as the municipality could show it had a substantial governmental interest in regulating such businesses and the regulations still allowed for reasonable alternative avenues of communication.

104. *FW/PBS*, 837 F.2d at 1302–03. The Fifth Circuit majority did note that application of the *Renton* analysis does not inevitably exclude the use of greater procedural safeguards. They argued that theses procedures were not necessary in this case, however, because a business that was denied a license would presumably have enough at stake to warrant seeking judicial review of the licensing decision, and thus, while there might not be immediate review of a decision that could restrain free expression, there would be no permanent suppression of speech based solely on the discretion of a city official.

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ter acknowledging that it would be "awkward" to analyze some of the Dallas licensing provisions as "time, place and manner" restrictions within the *Renton* framework, the majority of the Fifth Circuit panel found the licensing scheme valid in all respects.[105]

The dissenting judge strongly disagreed with this position, arguing that licensing schemes could not be analyzed like zoning restrictions because the denial of a license effected a complete ban on speech and thus raised serious prior restraint problems that are not properly addressed in the *Renton* standards.[106] Further, because the Dallas ordinance's licensing provisions failed to provide adequate procedural safeguards before imposing a prior restraint on speech, as required by *Freedman v. Maryland*,[107] the ordinance was invalid.

Although the Supreme Court adopted this position by a 6-3 vote and struck down the licensing provisions of the Dallas ordinance,[108] safeguards stated in *Freedman* case should be required. Justice O'Connor, joined by Justices Stevens and Kennedy, argued that only two of the three *Freedman* safeguards were required: (1) that any restraint imposed prior to judicial review be only for a specified brief period during which the status quo must be maintained and (2) prompt judicial review of that restraint must be available.[109] Justice Brennan, joined by Justices Marshall and Blackmun, argued that the third standard, requiring the "censor" to bear the burden of going to court and the burden of proof in court in order to obtain a final restraint, was also necessary.[110]

Justice O'Connor gave two reasons why the third standard was not required in this case. First, as opposed to the *Freedman* case which involved censorship of individual motion pictures, the Dallas licensing scheme does not involve passing judgment on the content of particular films or books. Instead, the city makes a ministerial decision about each applicant based on a set of defined criteria and thus ". . . the city does not exercise discretion by passing judgment on the content of any pro-

105. *Id.* at 1304. The majority correctly recognized that the "awkwardness" was caused by the differing effects of denying someone an adult business license because of zoning (i.e., locational) factors, which could be cured by selecting a different location, and a denial based on such immutable personal characteristics as a record of convictions for certain crimes. In the former case, one's freedom of expression is merely regulated, while in the latter it is prohibited entirely.

106. 837 F.2d at 1306-12.

107. 380 U.S. 51 (1965).

108. The Court found that the Dallas licensing scheme did not place any time limits on the various inspections required before a license could be issued, thus allowing an indefinite postponement of the issuance of a license.

109. 110 S. Ct. at 603-07.

110. *Id.* at 611-13.

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tected speech."[111] Second, O'Connor argued that *Freedman* placed the burden of going to court, and the burden of proof in court, on the censor because where exhibition of a single film was at issue, it was unlikely that a motion picture distributor would have enough at stake to warrant challenging the censor's decision and thus the decision to suppress would itself guarantee complete suppression of the speech. In the Dallas case, however, involving business licensing, the license applicants would have enough at stake to pursue a license denial through the courts.[112]

The three dissenting Justices would have affirmed the Fifth Circuit and held the licensing scheme valid. Justice White, joined by Chief Justice Rehnquist, argued that the *Renton* standards were sufficient to safeguard the licensees' rights under the first amendment and that there was no evidence in the record of the licensing delays that Justice O'Connor cited as the reason for requiring application of *Freedman*'s procedural requirements.[113] Thus, Justice White could "see no basis for invalidating measures that will guard against highly speculative injuries."[114]

Justice Scalia would have upheld the ordinance on the novel theory that adult businesses which specialize in "hard-core" pornography or live nude performances deserve no first amendment protection because they are engaged in "the sordid business of pandering."[115] In Scalia's view, while individual works of pornography are always protected by the first amendment, businesses that specialize in pornography that is sexually explicit in more than a minor degree are engaged in an activity that is akin to obscenity and are not constitutionally protected.[116]

In generating four separate opinions on the critical issue of the validity of the licensing scheme,[117] the court follows its recent pattern of failing to reach a consensus the first time it considers a new issue involving municipal regulation of expressive activity. If the Court follows true to

111. *Id.* at 607.

112. *Id.* at 606–07. This was essentially the same reasoning used by the majority of the Fifth Circuit panel.

113. *Id.* at 614–17.

114. *Id.* at 616.

115. *Id.* at 617–25.

116. Justice Scalia cites *Ginzburg v. United States*, 383 U.S. 463 (1966), as authority for his position. Justice Stevens, in his opinion, took issue with this, contending that *Ginzburg*, which was decided before the Court extended first amendment protection to commercial speech, "cannot withstand our decision in Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)." *Id.* at 617.

117. Justices O'Connor, Stevens, and Kennedy would require the ordinance to provide the first two procedural safeguards in *Freedman*; Justices Brennan, Marshall and Blackmun would require all three; Justice White and the Chief Justice would let the ordinance stand based on a novel approach to adult business regulation by declaring that certain sexually explicitly adult businesses have no constitutional protection at all.

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form, it will take one or two more cases before a majority agrees on a single approach. Thus, for example the Court split 4-1-4 in its first "adult zoning" case, *Young v. American Mini-Theatres*,[118] but was able to form a six vote majority ten years later in *Renton*. Similarly, the Court's five separate opinions in its 1981 sign regulation decision, *Metromedia, Inc. v. City of San Diego*,[119] coalesced into a six member majority three years later in the next sign case, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*.[120]

The Court had far less difficulty with the nonlicensing portions of the Dallas ordinance. The entire Court agreed that Dallas could subject motels renting rooms for less than ten hours to regulation under the adult business ordinance and only Justice Stevens dissented from the Court's judgment that no petitioner could show standing to challenge the civil disability provisions of the ordinance.[121]

FW/PBS has made clear that a majority of the Court views adult business licensing provisions that have the potential to bar expressive activity differently from the locational restrictions approved in *Young* and *Renton*. In this, the majority echoes the Court's 1981 ruling in *Schad v. Borough of Mt. Ephraim*,[122] striking down an ordinance, purportedly aimed at adult businesses, that has the effect of banning all live entertainment in a municipality. Further, since there was no single majority, nor even a plurality, opinion on the issue of the procedural safeguards required to enable an adult business licensing scheme to pass constitutional muster, Dallas, or any other city, would be well-advised to provide all three of the *Freedman* safeguards in its licensing scheme it if wants to avoid further constitutional challenges. Finally, the Court deferred ruling on the civil disability provisions of the Dallas ordinance, and vacated the Fifth Circuit's ruling on the issue but has for the first time sanctioned regulating "adult motels."

118. 427 U.S. 50 (1976). The case involved the Detroit "anti-skid-row" ordinance that imposed a dispersion requirement on adult businesses. Justice Stevens' opinion upholding the ordinance was joined by Chief Justice Burger and Justices White, Powell, and Rehnquist, but lost Justice Powell, who wrote a separate concurring opinion, on the issue of whether the ordinance was content-neutral. Justice Blackmun, joined by Justices Brennan, Marshall, and Stewart dissented.

119. 453 U.S. 490 (1981). No more than four Justices could agree on any one view of the case. In addition to the plurality opinion upholding the ordinance by Justice White, joined by Justices Marshall, Powell, and Stewart, there was a concurring opinion by Justice Brennan, joined by Justice Blackmun, and separate dissenting opinions by Justices Stevens and Rehnquist and Chief Justice Burger.

120. 466 U.S. 789 (1984).

121. The Court thus affirmed the Fifth Circuit regarding the "adult motel" portion of the ordinance, reversed on the validity of the licensing scheme, and vacated that portion of the Fifth Circuit opinion that upheld the civil disability provision.

122. 452 U.S. 61 (1981).

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B. *The First Amendment, Churches and Historic Preservation*

The relationship between the first amendment and local land-use controls has also been one of the pre-eminent historic preservation issues in the past few years. The power of government to designate and regulate churches and synagogues was challenged in *The Society of Jesus in New England v. Boston Landmarks Comm'n*,[123] and *Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. City of New York*.[124] In the *St. Bartholomew's* case, a long-awaited decision, a federal district court in New York City ruled that the New York City Landmarks Preservation Commission action in denying a demolition permit for St. Bartholomew's community house located on Park Avenue was not unconstitutional under the first, fifth or fourteenth amendments. This seems to follow a recent line of cases indicating that government can carefully regulate religious institutions without violating the establishment clause and the free exercise clause of the first amendment. However, the contrary result was reached in a trial level decision in New England in the *Society of Jesus* case involving designation and protection of the interior of a Boston church.

In *The Society of Jesus* case, a Massachusetts Superior Court held that the interior landmark designation of the Church of the Immaculate Conception by the Boston Landmarks Commission acted as an impermissible burden on the Society of Jesus in New England's (the Jesuits) free exercise of religion. The court found that the state interest in historic preservation did not outweigh the significant restraints on the practice of religion that were imposed by the city's landmark statute.[125]

In October 1986, the Jesuits demolished several significant interior features of the church without obtaining a building permit. The Jesuits had planned a major renovation of the church to install office space and to construct condominium units on its adjacent property. In October 1986, the Boston Landmarks Commission approved temporary landmarks status for the building and ultimately designated a portion of the interior of the church as a landmark in May 1987.

The Jesuits alleged that the mere designation of the church as a landmark violated their constitutional guarantee of the free exercise of religion. The court held that the Boston Landmarks Ordinance did not, on its face, violate the first amendment; however, the court held that as

123. 728 F. Supp. 958 (D. Mass. 1989).
124. No. 86 Civ. 2848 (JES) (U.S. District Court for the Southern District of New York, decided December 13, 1989).
125. Slip op. at 7-8.

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applied in this case, the designation of the church as a landmark violated the Jesuits' free exercise of religion.[126] The court concluded that the designation itself placed constraints on the Jesuits' administration of their church and that designation must be removed.

The court contrasted this case with the New York Court of Appeals decision in *Church of St. Paul & St. Andrew v. Barwick*,[127] where the New York court held that the Church of St. Paul & St. Andrew's first amendment challenge of the New York City Landmarks Preservation Commission's designation as a taking of its property and infringement of its first amendment rights was not ripe for review because the church had not yet applied for a certificate of appropriateness or sought other administrative use from the Landmarks Preservation Commission. The Massachusetts court, distinguishing *St. Paul & St. Andrew*, focused on the fact that the Jesuits had actually filed an application. The Boston Landmark Ordinance, the court found, had much more of an impact on the Jesuits than mere designation because, from 1986 to the present, the Jesuits' efforts to run their church as they saw fit were repeatedly frustrated by the actions of the commission pursuant to the landmarks ordinance.[128] The court found that the "mere fact the Jesuits *honestly perceived* a restriction on this liturgically significant interior structure tends to show the impact of the Landmark Statute on their religious practices" (emphasis added).[129]

The court found that the right to the free exercise of religion is not absolute and given a compelling state interest the practice of religion may be regulated. However, the court recognized that usually courts uphold only regulations that "implicate public health or safety, since only the gravest abuses endangering paramount interests, give occasion for permissible limitation of free exercise rights."[130] Finding that historic preservation is a worthy goal, the court concluded that the state's interest did not outweigh the significant restraints on the practice of the Jesuits' religion.[131]

This holding fails to address Supreme Court precedent such as *Lyng v. Northwest Indian Protective Ass'n*,[132] a first amendment decision where the Court held that three Indian tribes did not have a constitutional right under the first amendment to block a federal road construc-

126. Slip op. at 8.
127. 67 N.Y.2d 510, 505 N.Y.S.2d 24 (1986).
128. *Society of Jesus* at 5-6.
129. Slip op. at 6-7.
130. Slip op. at 7.
131. Slip op. at 7-8.
132. 483 U.S. 439 (1988).

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tion project that would disrupt sacred religious grounds. The Court in *Lyng* stated that even if the proposed road would virtually destroy the Indians' ability to practice their religion, the Constitution does not provide a principle that could justify upholding respondents' legal claims.[133] The Court reasoned that the affected individuals would not be coerced by the Governments's action into violating their religious beliefs and the governmental action did not penalize religious activity.[134]

In contrast, the court in *Society of Jesus*, focused on the Jesuits' activities rather than on their religious beliefs. Moreover, the court's reasoning that an individual's perception of an infringement on his or her religion seems to open the door to a subjective test on the infringement of one's first amendment rights that could significantly inhibit local governments from enacting any kind of regulation involving religious properties.

The federal court decision in *St. Bartholomew's* addresses challenges by the church to the New York City Landmarks Ordinance based on violations of rights under the first, fifth, and fourteenth amendments of the Constitution.

In 1967, the church building, the exterior of the community house, and the surrounding property were designated as landmarks by the Landmarks Preservation Commission. Subsequently, the church filed three applications to demolish the community house and construct an office building on the site, the last one based on a claim of insufficient return.[135] Following public hearings where the commission heard testimony concerning the suitability of the community house to its charitable purpose, the extent and cost of necessary structural and mechanical repairs for both the church and community and the state of the church's finances, the commission voted to deny the church's application.

Thereafter, the church brought suit alleging that the landmark laws are facially unconstitutional to the extent they impact the property of any church because they (1) interfere with the free exercise of religion; (2) violate the equal protection clause because they treat charitable and commercial institutions differently; (3) are unconstitutional as applied to St. Bartholomew's as a consequence of the commission's denial of their applications for a certificate of appropriateness because that denial interfered with the free exercise of religion and acted as a taking without compensation; (4) violate the establishment clause by requiring an intrusive examination of the church's internal affairs in the hard-

133. *Id.* at 1327.
134. *Id.* at 1325.
135. Slip op. at 6.

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ship application process; (5) violate the doctrine of substantive due process by depriving the church of its property's reasonable income production without a compelling state interest; (6) violate the due process clause of the fourteenth amendment because the legal standards for designation of landmarks and for granting a certificate of appropriateness are impermissibly vague; and (7) constitute due process violations because of the lack of the opportunity to cross-examine witnesses in the certificate of appropriateness procedure.

The court rejected plaintiff's contention that the landmark laws unconstitutionally interfered with the free exercise of the religious beliefs of any church that is designated a landmark. The free exercise of religion is abridged when government action coerces the affected individuals into violating their religious beliefs or it penalizes religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.[136] The court added that a substantial interference with the free exercise of religion may also occur where church property is taken, even by condemnation, for state purposes.

The possibility that a church may at some future time seek to make a different use of its landmarked property creates no more than an incidental burden on the practice of religion and does not require the state to justify its actions with heightened scrutiny of a compelling state interest. In a footnote the court rejected the plaintiff's contention that whenever a law has any impact upon a religious institution it must be justified by a compelling state interest—a compelling state interest is only required when the law impermissibly burdens the free exercise of religion.[137] The court found that landmark designation does not in and of itself violate the free exercise clause, especially since such designation does not deprive the church of the right to seek a certificate of appropriateness to alter its property if the nature of the property is such that it no longer can be used to carry out its religious or charitable mission.[138]

The court did not accept the plaintiff's claim that the statutory and judicial tests for economic hardship required an intrusive examination into the finances and internal workings of the church resulting in an excessive entanglement between government and religion in violation of the establishment clause. The doctrine of excessive entanglement normally applies in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that the funds are being used solely for secular purposes.

136. Slip op. at 9.
137. Slip op. at 10.
138. *Id.*

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Here, according to the court, the doctrine is not applicable where the government must make an inquiry into church finances for the limited purpose of determining the validity the church's claim of economic hardship.[139]

The court held a trial on the plaintiff's claims that the landmarks law was unconstitutional as applied to the Church. Noting that these claims could be divided into takings arguments and first amendment arguments, the court found no merit in either. The plaintiff's claim of unconstitutionality as applied depends upon plaintiff's ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to spend the money necessary to make those facilities adequate.[140]

Although the concept of legitimate investment expectation is not directly transferable to a charitable or religious institution, the court found that the concepts of reasonable beneficial use and the owner's primary expectations are equally applicable to both. The district court, recognizing the constitutionally acceptable standard for determining when there has been a taking of charitable property developed by the New York courts, found that where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution it violates plaintiff's fifth amendment rights.[141] The court concluded that it should apply the same inquiry to the first amendment claim. Plaintiff had to prove that it can no longer carry out its charitable work, i.e., exercise of religion, in its existing facilities to sustain its free exercise claim.

The court examined the record before the commission in an effort to determine if the plaintiff proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities and found that it had failed to do so. The court summarized by finding that the church failed to show that it cannot afford to pay for the cost of necessary repairs to the church and the community house. Nor did the church show that its financial situation precluded it from restoring its property and carrying out its religious mission and charitable purpose. The court held that as a matter of fact, the church failed to prove that its community house is inadequate for the purposes to which it is devoted, that the church failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities

139. *Slip op.* at 11.
140. *Slip op.* at 16.
141. *Slip op.* at 18.

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do require some repair and rehabilitation, the church failed to show that it cannot afford to pay for those necessary repairs and rehabilitation.[142]

V. Historic Preservation and Architectural Control Law[143]

A. *Introduction*

There were some other significant developments in 1989—90 in the field of historic preservation and architectural control law in addition to the cases involving preservation of historic churches. Two tax court decisions concerning the valuation of preservation easements illustrate that the courts continue to accept the assertion that preservation easements are a significant additional encumbrance on property even when the property is already protected by existing local preservation controls.

As in the past year, most of the activity continues to be at the state and local level. A number of legislatures enacted new laws requiring consideration of the effect of state undertakings on historic resources. After about three years of negotiation, the city of Atlanta passed a new historic preservation ordinance that tailors the degree of protection to the importance of the historic resource. The Indiana Supreme Court upheld a state agency's prohibition of strip mining on a large portion of a site because of the presence of archaeologically significant resources. In Oregon, a state administrative board ruled that county provisions requiring owner consent to identification of historic resources was in contravention of the purposes of statewide planning goals and prevented the county from carrying out its balancing responsibility.

The most significant federal activity involves legislation aimed at the increasingly significant issue of repatriation of Indian remains.

B. *Developments in Federal Law*

1. TAX CREDITS, TAX LAW, AND PRESERVATION EASEMENTS

Rehabilitation projects taking advantage of the historic rehabilitation tax credit in fiscal year 1989 were down 8.97 percent from 1,092 in fiscal year 1988 to 994 projects. Approximately one-half of all projects were rehabilitated for housing. In fiscal year 1989 about 3,700 housing

142. *Slip op.* at 36–37.

143. This section is based on the annual report of the Historic Preservation and Architectural Controls Subcommittee, Bradford J. White, Clarion Associates, Inc., Chicago, and Lee Keatinge, Advisory Council on Historic Preservation, Golden, Colorado.

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