SUPREME COURT STUNS PRESERVATION

In a ruling that has sent the preservation community reeling, the Pennsylvania Supreme Court declared the Philadelphia Historic Preservation Ordinance unconstitutional.

On July 10, the Supreme Court announced its decision in the United Artists Theater Circuit, Inc. versus City of Philadelphia, Philadelphia Historical Commission (PHC). The Court held that the Philadelphia historic preservation law was invalid because the regulation of designated historic properties without the consent of the owner amounted to a "taking" of private property without just compensation.

The controversy centers on the Philadelphia Historical Commission designation of both the interior and exterior of the Boyd Theater in April 1987. The 1928 art deco movie palace is the last surviving theater of its type in the city.

The owner, The Sameric Corporation, filed suit challenging the PHC authority to designate the interior of the theater. A trial court dismissed the appeal and the Commonwealth Court upheld that decision. The Pennsylvania Supreme Court subsequently granted the property owner's petition for appeal. While the matter was pending before the court, Sameric Corp. sold the theater to United Artists, who continued the appeal.

The broad decision, written by Justice Rolf Larsen, also cited the following issues: use of police power for aesthetic purposes (ignoring the cultural and historic aspects of preservation ordinances), designation's restriction of the uses to which an owner can put a property, and designation's requirement that the owner seek government approval for any change to the structure.

In reasoning the 4-3 decision, the court also relied heavily on the dissenting (i.e., losing) opinion of the U.S. Supreme Court's landmark 1978 preservation case, Penn Central Transportation Co. versus City of New York. The 1978 Penn Central decision ruled that the New York City historic preservation law did not violate the 5th amendment to the United States Constitution that prohibits the taking of private property without just compensation. The dissenting opinion stated that the designation of individual landmarks was unconstitutional because there is no "reciprocity of advantage". The dissenting opinion goes further by comparing landmark designations with zoning restrictions in that all property owners in a designated area are placed under the same restrictions not only for the benefit of the municipality as a whole but also for the benefit of one another. The Penn Central dissenting opinion called landmark designation "spot zoning" while the majority ruled that it did not.

The Boyd decision also suggested that the PHC landmarking authority is not a legitimate use of police power authority. This appears to conflict with Article I, Section 27 of the Pennsylvania Constitution that guarantees the right of the people "to the preservation of the natural, scenic, historic and aesthetic values of the environment."

It is unlikely that this case will ever be heard before the U.S. Supreme Court because the Pennsylvania Supreme Court did not base its opinion on the United States

continued on page 4
THE BOYD THEATER CASE: IN COURT AFTER THE DECISION

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Seven briefs have now been filed with the Supreme Court of Pennsylvania either urging reargument in the Boyd Theater case or opposing further argument. The City of Philadelphia and four supporting amicus parties had filed briefs by July 24th. The theater owners filed an Answer on August 5th, and the City of Philadelphia filed a Reply on August 12th.

The City of Philadelphia suggested that the court’s Boyd Theater decision had “virtually nullified” Article I, Section 27 of the Pennsylvania Constitution, the Environmental Amendment which contains a reference to historic preservation.

Philadelphia argued that it had “implemented the constitutional imperative” of Article I, Section 27 in its preservation ordinance and that the ordinance “achieves and appropriate balance between the competing right of a private property owner to freedom from uncompensated takings ... and the powers granted to state and local governments for the protection and preservation of historic and aesthetic resources.”

The Pennsylvania Attorney General urged reargument on the question of how Article I, Section 27 of the Pennsylvania Constitution should be interpreted. The Attorney General urged the Supreme Court of Pennsylvania to issue a new decision avoiding the constitutional issues incorrectly decided in a case not requiring “a decision of constitutional dimension.”

The Pennsylvania Historical and Museum Commission’s brief pointed out that the Boyd Theater decision ignored a prior Commonwealth Court decision which “established a standard by which the denial of a demolition permit could be evaluated to determine if a taking had occurred.”

Further, the court “did not consider a number of safeguards fashioned by the Philadelphia ordinance to protect property owners from undue hardship.”

A notable brief from the Congressional Arts Caucus, “a sanctioned organization of the U.S. Congress dedicated to furthering the arts in America, including historic preservation,” pointed out that the “broad holding” in the Boyd Theater decision “runs counter to national precedent on this issue and has devastating implications for historic preservation in historic Philadelphia as well as throughout Pennsylvania and the nation.” Seven Pennsylvania congressmen (Foglietta, Borski, Gray, Kostmayer, Murphy, Weldon, and Ridge) participated in this brief.

Additionally, the brief argued that the Boyd Theater decision “may still historic preservation efforts statewide and nationwide.” The brief pessimistically concluded, “It is hard to imagine a new historic preservation ordinance for the City [of Philadelphia] which would not offend this holding, given its broad sweep.” Because “the reasons for historic preservation are not frivolous or fanciful,” the brief stated that the “implications of failure to be able to regulate historic structures should not be minimized.” The brief pointed out the importance of tourism to the economy of Philadelphia.

Finally, the brief argued that the case could have been resolved “on narrow statutory grounds” and urged that “if the Court insists on reaching constitutional issues, it should consider all constitutional issues” and interpret Article I, Section 27 of the Pennsylvania Constitution in an appropriately effective manner.

A brief from the National Trust for Historic Preservation, the National Center for Preservation Law, and American Institute of Architects, the American Planning Association, the United States Conference of Mayors, the National League of Cities, and six Philadelphia and Pennsylvania entities (including the Pittsburgh History and Landmarks Foundation, the Preservation Coalition of Greater Philadelphia and the Philadelphia Historic Preservation Corporation) argued authoritatively that the Boyd Theater decision simply ignored a vast body of precedents holding that historic preservation in an entirely suitable use of the police power.

The National Trust brief also argued that the court’s “departure from its long-standing ‘taking’ analysis is accomplished without distinguishing or qualifying past precedent” and therefore “casts serious doubt upon settled law in Pennsylvania upholding numerous exercises of land-use regulation.”

Because the theater owners had not used the administrative procedures available to them to challenge the

continued on page 3
IMPACT FELT STATEWIDE

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Within days of the Supreme Court decision, historic preservation initiatives across the state have begun to unravel. The City of Scranton postponed consideration of a newly revised ordinance that was under development over a two year period. The borough of Washington in Washington County, based on threats of a lawsuit by Washington and Jefferson College has retreated from their resolution to establish a local historic district. The City of Pittsburgh, facing a number of controversial landmark proposals including the Syria Mosque, has been advised by their solicitor not to designate individual properties because of the potential liability. In addition to the above communities, Morgantown, Muncy, Media, New Bloomfield and Spangsville, all communities who were planning local historic districts, have shelved these plans until the issues raised by the Court’s decision become more settled.

The decision has also been used as the basis for a lawsuit filed in Commonwealth Court against the Pennsylvania Historical and Museum Commission. Miller and Son Paving, Inc., a quarrying operation in Bucks County, has brought suit objecting to its property’s inclusion in the Gardenville-North Branch Rural Historic District. Although the company is the only property appealing the nomination out of fifty property owners, it is claiming an unconstitutional taking based upon the Supreme Court’s analysis in United Artists. A briefing schedule should be established in the fall. At the same time, the nomination is under review at the National Park Service in Washington and it is expected they will make a decision shortly.

Boyd Theater (continued from page 2)
regulation of their property on “hardship” grounds, the Trust brief argued that the court’s “taking” ruling had been premature.

The Answer for the theater owners argued that “this Court must be presumed to have fully and completely explored, considered and determined the relevant issues and law bearing on the matter under consideration.” The Answer suggested that none of the reasons advanced by the amici “are so compelling as to warrant reargument.” The Answer cited the Pennsylvania Historical Preservation Act of 1988 but ignored the Pennsylvania enabling legislation for local HARBs and stated, “The Court’s ruling … will have little or no effect on the present state of historic designation outside of Philadelphia to the extent that a community’s historic preservation ordinance is patterned after the national or state preservation acts.”

The City of Philadelphia filed a short Reply to the Answer of the theater owners on August 12th, and argued with great specificity that a “taking” issue under Article I, Section 10 of the Pennsylvania Constitution was never raised on appeal by the theater owners as the case advanced through the Pennsylvania courts. The Reply correctly pointed out that most local preservation ordinances in Pennsylvania rest on Act 167, “which does not provide for owner consent.” The Reply pointed to the immediate “threat of litigation and … absolute chill on historic preservation” stemming from the Boyd Theater decision, including a lawsuit against the Pennsylvania Historical and Museum Commission over a pending National Register district nomination.

Informed Pennsylvania court watchers estimate that the state Supreme Court may take several months to act on the pending Applications.

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Brenda Barrett

In the wake of the Pennsylvania Supreme Court decision, communities across Pennsylvania are facing uncertainty about the legal sufficiency of their existing historic preservation ordinances and their effort to adopt new ordinances to protect historic buildings. In Philadelphia, of course, the Court specifically found that the city's ordinance, which in the past has primarily designated landmarks, to be unconstitutional. In response, the city's Historical Commission has stopped designating individual properties unless specifically requested by the property owner, reduced reviews of listing properties to a minimum and cancelled plans for public hearings on four historic districts that have been under development for over two years. The Historical Commission has stated that it will re-examine its position after the Supreme Court makes a decision on the Reargument. Other Pennsylvania communities have taken less drastic steps (see the related article "Impact Felt Statewide"), but almost all have adopted a wait-and-see attitude.

The Pennsylvania Historical and Museum Commission is advising communities with local historic districts established under the state's enabling legislation—Act 167—that it should be "business as usual." However, historic and architectural review boards and their local governments should be meticulous in following procedures for notification, public hearings and record keeping. Communities that are in the process of establishing new historic districts may want to await the result of the City of Philadelphia's Request for Reargument as a decision in this case may provide more clarification on this issue. Communities should continue to plan for local historic district designations, including undertaking historic surveys and preparing local historic district ordinances.

To assist local governments, Historic and Architectural Review Boards and historical commissions across the Commonwealth, the Pennsylvania Historical and Museum Commission and Preservation Pennsylvania are putting together a legal assistance program. The project will include an analysis and recommendations on how to proceed under the current decision, updates on future actions of the Court, advice on future defensible strategies for protecting historic resources, assistance on specific problems and issues facing communities and workshops and seminars. This will be critical as challenges to local historic preservation ordinances have already been launched in a number of communities. The project is targeted to reach municipal solicitors as well as land use and real estate attorneys. For specific information on this project, write Legal Assistance Bureau for Historic Preservation, P.O. Box 1026, Harrisburg, PA 17108.

Supreme Court (continued from page 1)
Constitution but, instead, made its finding under a similar provision of the Pennsylvania Constitution.

Pennsylvania Historical and Museum Commission Executive Director, Brent Glass, believes the effects of this ruling could be far-reaching. "While this case only directly affects the Philadelphia ordinance, it is likely that suits will be filed in many other Pennsylvania communities after this decision. Thousands of historic buildings and hundreds of communities could be affected," states Glass.

Already, across Pennsylvania, historical commissions have put landmark designation applications on hold until the full implications of the ruling become clear.

As this issue of Preserving Pennsylvania went to press, the Pennsylvania Supreme Court announced its decision to rehear the Boyd Theater case in October. Preservation Pennsylvania will keep you informed.