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David: Good morning everybody we're just going to take another minute we've got some people still registering. Please help yourself to coffee and various pastries in the back of the room, glass of water. Brave the cold morning and we're going to get started in just a minute. Good morning. It's amazing how quiet it gets right after you do that.

Okay good morning preservationists, good morning friends of preservation, good morning everybody who made it out. We're really glad you're here. My name is David Schnakenberg. Many of you have received emails from me under the guise of 2011FitchForum@Gmail.com. Most of those emails were sent between the hours of one in the morning and three in the morning so, sorry for that. Really excited about today's program, going to very quickly get the ball rolling and then pass it off. What we're here to do today is essentially to take stock of where preservation law is, both at the national and at the hyper local level with our own landmarks ordinance here in New York City. So we're going to open with our keynote who's going to discuss what the state of preservation law and preservation policy is throughout the nation then we're going to take a look at what's going on, on the ground in three cities that we're dealing with specific preservation issues in Chicago, Seattle and Los Angeles. Then you guys get a break and we're going to come back and to focus on the hyper local, we're going to talk about New York City's landmark law and talk about whether it's living up to its expectations, what we might want to do to tweak that law and we're going to finish the day by exploring some of the challenges and the opportunities that should inform preservation law and preservation policy going forward. Hopefully we'll have some fun. We've got some really excellent speakers. We're all very lucky. many of them have braved ice storms, blizzards, late trips, late plans, I'm sure someone took an automobile, so I can say that and so everyone's here which is really great for a February conference. One quick housekeeping announcement; if you're here for CLE credits, please make sure that you sign in, as you probably have and also that you sign out when you leave so you can get your CLE credits. When you sign out please fill out a course evaluation form. You won't get your CLE credit certificate if you don't, so there. So please take care of that. If anybody would like the CLE materials, if we run out of printed materials, please just go to our website, email the 2011 Fitch Forum address and we will send you a PDF of our CLE materials. And with that, I'm going to introduce, or sort of invite, Andrew Dolkart to come here and get started. Andrew is our host, he's the director of the historic preservation program here at the graduate school of architecture and preservation. He's also the James Marston Fitch associate professor of historic preservation, so very appropriate to get the day started at the Fitch Forum. So Andrew if you will come up I will sit down and you won't hear from me for quite awhile. Thanks everybody.

Andrew: So I want to welcome everybody. I came this morning, I've been a hermit on sabbatical but I had to come off it for this event. This is the most perfect kind of conference for me because I did absolutely nothing. About a year and a half ago Tony Wood and Carol Clark came to me with this idea and I said, 'great, run with it' and they did. They really deserve an incredible amount of credit for organizing this and putting this together and getting all these people to come. It's a really appropriate conference I think for us to be having here on the 45th anniversary of the landmarks law which coincides just about with when the historic preservation program here was established. From the very beginning Jim was very strong on trying to get students to understand the legal issues involved with historic preservation, both the foundations

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for preservation from a legal point of view and the problems. And when Carol and I were here together as students, one of the classes that we took was one of the first classes on preservation law and interestingly, it was taught by Paul Byard and at the same time that he was in architecture school. So he was both a lawyer and an architect and then later Paul came to direct this program and brought in Dorothy Miner and we continued to have a really strong feel for legal issues and we've continued that. We miss Paul and Dorothy but we continue to kind of build on this idea that preservationists need to understand where we are and where we're going and what the pluses and minuses are from a legal point of view otherwise it will all just fall apart. So I think it's a really great that we're here to assess where we've been and where we are. So I just want to welcome everybody. We're really thrilled that everybody is here. It's just so great to see so many familiar faces in the audience and I'm going to turn it over to Tony Wood.

Tony: Thank you Andrew and thank all of you for being here. There are those who accuse preservationists of being lost in the past. Ironically, the reality is preservationists are lost in the present. We are so intensely focused in the present that we don't spend a lot of time reflecting on how we got where we are today or where we might want to be going. We just do, do, do. Other wiser folks have suggested the value of a little bit of introspection. As Churchill reminds us, the further backward you can look the further forward you're likely to see. So thank you for taking a day out of your very intense present, to explore with us our past, where we've come in the last 45 years and the future and where we might want to be going. And what better place to do that and step back and reflect and project, than an academic setting? Far from hearing rooms, court rooms and back rooms, up in the hallowed halls or in our case, the hallowed basement of academia, we have a safe place where we can think out loud, ask important questions and openly and honestly explore extremely important matters. So on behalf of the historic preservation program of the graduate school here, and myself and Carol, we want to add our welcome for your being here this morning. now it takes a village to put on a forum like this and I want to give particular thanks to our co-sponsoring organizations, the law department of the National Trust for Historic Preservation, the James Marston Fitch Charitable Foundation, Preservation Alumni, and the Widener Law Review and thanks also go to our partner organizations. This is the first event I've been involved with that was totally promoted digitally and it seems to have worked thanks to our partners and their wonderful digital network. We also owe a great debt of gratitude to the generous financial supporters of this event who have kept us out of debt. The list of wonderful supports is in our program and do commit their names to memory and thank them when you see them. I do need to particularly thank two of the lead funders, the Columbia University Graduate School of Architecture, Planning and Preservation who put real money on the table in addition to space and the Elizabeth and Robert Jeffe Preservation Fund for New York City of the National Trust for Historic Preservation. Beyond essential financial capital, a forum like today's is only possible with vast infusions of intellectual capital. So a particular thank goes out to all the experts participating in today's forum. Several people have literally traveled across the country to be here. An event like this also requires the skills and talents of many of the folks who've been co-organizing endless details behind the scenes and particularly need to thank our coordinator David for all his good work. So today finds us well into the 45th anniversary year, the passing of New York's landmarks law. Even Hallmark has failed to figure out a way to make a big deal out of a 45th anniversary but for our purposes

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however, it's an important anniversary because it sets the stage for the golden anniversary of our law. So leave it to two preservation planners to determine that the best way to celebrate the 45th anniversary of the law is to use it as an occasion to do a checkup on preservation law and then more specifically, New York's law. Now, with the 50th anniversary in our site is the time to look nationally at the state of preservation law and particularly at the state of New York's preservation law. How far have we come? What challenges and opportunities does preservation law face ahead, both nationally and locally? What are the actions we should be contemplating to make sure that when the golden anniversary arrives with the big cake and candles that the law glitters and shines as brightly as we need it to do. Preservation happens in a historical context. Much has changed since Mayor Wagner signed New York's landmark law in 1965 and President Johnson signed The National Historic Preservation Act in 1966. These laws reflect what was legally and politically achievable over four decades ago. What has changed since then? What changes are looming over us now? How has preservation law responded to those changes? How might it respond to the local and national level? These are the many questions that will be addressed today. So by 5:30 tonight, we may conclude that all is well in the world of preservation law, or we may decide the challenges and opportunities of our time call for action. Whatever you and all of us conclude, unlike ostriches ignoring everything or *****[00:12:20]** suffering from unwarranted optimism, whatever we conclude will be the result of seriously and thoughtfully assessing the current state of preservation law and we can all only be better for having done so. So to launch today's efforts, let me turn the podium over to Adele Chatfield-Taylor. because everyone's more extensive bio was posted on our website and we know you all go to those sites, we're not devoting too much of our time to reciting all that needs to be said about our speakers but all that I want to say about Adele, is that in her seven years at the landmarks preservation commission, several months of which I had the pleasure of sharing an office with Adele, learned a lot then- her four years as a founder and first director of the New York Landmarks Preservation Foundation, her tenure at the National Endowment for the Arts, her presidency at The American Academy of Rome, her being a trustee *****[00:13:15]** of the National Trust for Historic Preservation, all on top of her degree from this program and previously teaching in this have made her one of the most thoughtful preservation thinkers of our time. She will both set an appropriate Fitchian tone for today's forum as well as introduce our keynote speaker. Join me in welcoming Adele.

Adele: Thank you Tony. Good morning everyone. How wonderful it is to be here for the 45th anniversary and for the Fitch Forum 44 years after I enrolled in what was then known simply as the Fitch program or the 'Fitch thing'. Let me thank the organizations for this marvelous gathering and for the honor of being involved and salute particularly Martica Sawin for her incredible support of the Fitch legacy in all that she does. My job this morning is to introduce our keynote speaker and it's a great pleasure to have a chance to say a few words in that pursuit about Jerold Kayden. A lawyer as well as a city planner, Professor Kayden would've been a man after Fitch's heart. I just determined that Jerold did meet Fitch but didn't really know him, because he was too young, but when he founded the program Fitch actively sought to enroll the very diverse cross section of professionals and individuals who have always worked at historic preservation and the curatorial management of the built world, as he later came to call it. Although he was unique in his eagerness to include what were then known as housewives and

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amateurs never as a vague commitment to continuing it but specifically because he recognized that these were often the most skilled and effective preservationists to be found anywhere, not only in the United States but all over the world and they had a great deal to share and teach. Fitch nevertheless would have been delighted with Professor Kayden's impressive background. He is the Frank Backus Williams Professor of Urban Planning and Design at the Harvard University Graduate School of Design. His research and teaching focus on law and the built environment. As urban planner and lawyer, Professor Kayden has served governments and non government organizations and private developers around the world. For the past 15 years he's been the principal constitutional counsel to the National Trust for Historic Preservation in Washington. Internationally, Professor Kayden has been a consultant to The World Bank, The International Finance Corporation, the United States Agency for International Development and the United Nations Development program working in China, Nepal, Armenia, the Ukraine and Russia. Professor Kayden has received honors too numerous to recount but I do want to note the recognition he received at the Graduate School of Design as the Teacher of The Year. He earned his undergraduate law and city and regional planning degrees all from Harvard and subsequently, served as law clerk to the US Court of Appeals for the second circuit judge James L. Oakes and for US Supreme Court Justice William J. Brennan, Jr. Professor Kayden's dazzling profile is perfect to set the stage for our discussions today. In ancient Rome, the punishment for a person destroying a historic building was having one's hand chopped off. Although our laws and policies date back not to ancient Rome but to at least 100 years to the Antiquity Act of 1906, these beautifully worded starting points, somewhat reminiscent of our Declaration of Independence were the beginnings of our Constitution were really the establishment of the big ideas. the drawing the line in the sand and the penalties were not as clear cut as they were in ancient Rome but what has happened to the law in the last century, particularly in the last 45 years is an indication of how important this subject and this fight, if I may call it that, has become. The varieties of issues we will cover today, beginning with Professor Kayden's presentation also indicates how much work there is still to be done and frankly, that we have barely begun. My own focus in the last 20 plus years has been in expanding the American perspective on preservation to incorporate a more global understanding of preservation solutions. The problems are usually all the same around the world but the ways to solve them are ingeniously varied and worth understanding, particularly what goes on outside the United States. In its interest, the American Academy of Rome now gives two fellowships and a residency named for James Marston Fitch aimed at those of you who want to think about this outside of the United States and I hope you will apply and win. We hope someday to soon have a visit from our keynote speaker Jerold Kayden.

Jerold: Thank you Adele. I wasn't sure if you were suggesting that I too had to apply in order to win. Today's birthday conference is entitled, as we can see, '45 Years of Preservation Law; New York City and the Nation, the Past and the Future.' What does that tell us? Historic preservation is middle aged, mature, experienced, time tested, realistic. No mid life crisis looming here, although, I can't help but remark on the fact that the actual birth date of New York City's landmark preservation law, April 19th 1965, is actually almost 46 years ago, telling us that historic preservation law handlers are willing to shave almost a full year from its true age. Middle age also means that it's time to hit the gym, taking better care about what to eat and

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start thinking about the next generation. Middle age does also lead to some stock taking and that is what I'd like to do here this morning. Necessarily selective and discriminating, I suppose a keynote presentation is looking at keynotes and the keynotes are chosen by the keynoter. So that's what I've done. I'm not covering everything but I am covering I think the high points of the past 45 years and I'm doing it in four parts. First, addressing the generic local ordinance that is after all, the backbone of historic preservation law. Next, I'll be talking about the surround of constitutional law and especially where we stand together with the Penn Central framework, first articulated by Justice Brennan and his colleagues on the Supreme Court in 1978. Third, I'd like to talk a bit about the legal treatment of religious institutions, which after all own a few historic buildings. Primarily their treatment under the federal and now, almost all encompassing Religious Land use & Institutionalized Persons Act and finally, I'd like to discuss how historic preservation may be repositioned by its components, legally, to address the challenges of the next 45 years. And I will do all of this in five minutes. So although constitutional law itself has received much of the attention, the local historic preservationist is actually the foremost hero of our legal story. Through much of the 20th century, local regulations of the built environment were handled almost exclusively by the zoning and related instruments and standard zoning never concerned itself whatsoever with historic preservation. Zoning's trio, the violin, viola and cello of use ***[00:22:54] and bulk restrictions affected what could be built, where it could be built and how it could be built. Zoning was principally interested in controlling new development and not saying anything on its face about existing development. Zoning was never meant in fact, to preserve anything specific and never expressed a preference for old versus the new. Indeed, the zeitgeist of zoning- certainly the zeitgeist of zoning through much of the 20th century was about simply regulating the shape of new development if not stopping development at least earlier on. And even as it's known principally as a regulatory instrument the deeper darker reality of zoning is its creation of property right entitlements, expectations among landowners that they owned something that could be understood speculatively as a real estate assets and not just land and something that could be used in its existing state and existing use. And indeed, if you go back and read the most famous, perhaps, land use decision rivaled only I think by Penn Central, the Euclid versus Ambler decision of 1926 from the US Supreme Court. it actually reads very, very much as a pro property rights opinion, much more than a pro regulation opinion and that makes a lot of sense given that it was authored by Justice Sutherland and joined by justices who at the time were not interested in holding up regulation but were interested in striking down, particularly national regulation to the extent that it interfered with what were considered to be fundamental rights dealing with things like property and contract. Justice Sutherland and his colleagues in Euclid wanted to make sure that the single family home owners being protected in the village of Euclid by that town's zoning ordinance did not suffer grievances losses to property values occasioned not only be the intrusion of an industry coming up from Cleveland, but perhaps worse by the parasitic multifamily housing. Zoning then and through much of the 20th century was about the prevention of nuisance like uses. The classic pig in the parlor, that's a pig in your living room. Surely, out of place. The notion of preventing harm to property owners from new development. What I've just described is not a historic preservation law regime. And indeed, historic preservation has benefitted greatly in the establishment and subsequent maintenance of its separate and distinct legal regulatory regime at the local level and especially from its separateness from its zoning as I just described.

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Historic preservation laws with New York City's 1965 law being the most prominent, although not the first rejected many of zoning's foundational ideas. To begin with, obviously, the local historical preservation ordinance plugged a large hole left unaddressed in the existing rezoning regime which is how do we think about existing great buildings and their contribution to the community before we get to historic districts. Historic preservation law at the local level doesn't take in to account all of the interest served by the built environment. It's not a balancing ordinance as is zoning. It's not necessarily in accordance with a comprehensive plan even though when you read New York's local law it does refer to the other interests and the institutional mechanisms of review, do take into account other interest but in the main, at its base, it is historic preservation of buildings and districts that are privileged above all other purposes. Historic preservation law authorizes the regulation of specific named buildings. That is revolutionary in terms of land use regulation. It actually cuts against the foundational notion of zoning, which is after all, zones. Zones of generic categories of development all subject to the same rule leading to and the responding to the uniform treatment of property owners within the zone. The basic idea that I will be treated the same as my neighbor, guaranteeing fairness and equity justice. A notion of equal protection, Justice Holmes in the Pennsylvania Coal versus Mahon case from 1922 with the Supreme Court talked about the idea of an average reciprocity of advantage. Yes, I may be restricted by this regulation but so are all my neighbors. I get benefits from the restriction on their property just as they get benefits from the restriction on my property. That is not the model of historic preservation at all. Historic preservation indeed, is legal spot zoning and indeed spot zoning as a phrase, is not illegal. It's only illegal when we add the adjective illegal spot zoning in front of it. Historic preservation law relies fundamentally on discretionary case by case decision making rather than on zoning's rule based approach. That was truer decades ago, zoning itself has become much less rule based with its approach, much less based on the notion of zones with rules and has become much more of a discretionary case by case instrument of regulation. Just as historic preservation has really taken advantage of its legal ability to regulate districts as well as individual buildings, becoming, some would say far more like and others would say, too much like zoning and I'll address that a little later. In fact, in terms of challenges going forward with the regime I spelled out at the local level, this first part, the backbone of historic preservation law, one of the big challenges is this notion of historic preservation administrators under existing law, expanding the reach of what they are doing to in some ways take over the planning function and indeed in cities around the country, one often finds people interested in planning solutions involving all the sorts of balancing of preserving community character and scale, things that are relevant indeed to historic preservation but that are in many ways transcendent. While many people dissatisfied with the planning, legal regime, the zoning legal regime, have turned to the historic preservation legal regime, to achieve purposes that may not be at the fundamental core of what historic preservation is all about. In a new book that's just coming out right now, one of my Harvard colleagues, Ed Glaeser, in the book "Triumph of the City" which otherwise celebrates the city, takes a somewhat critical look at how historic preservation laws have now been applied by Broadway within cities, in particular New York City is in his sites in which the historic preservation regime begins to control what can happen throughout great swaths of the city. I think there is some danger in this enormous expansion. This is not a call not to do historic districts by the way, but it is a call to recognize that there are statutory limits and legal concepts of ultra ***[00:31:07] of the statute, meaning

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beyond the authority of the statues and we have to keep in mind the core ideas of historic preservation. Another challenge going forward for the local ordinance, is to deal with things like modernism and modern buildings and what's interesting is that law doesn't exist independent of the support to be provided by the people at which the level of the law operates, in this case, local but the further that historic preservation veers away for popular understandings of what historic preservation is all about, the more it becomes vulnerable. Again, this is not a call to veer away from preserving modernist buildings, far from it. It is a call to situate all the activities conducted under the local preservation law, within the sort of popular understanding because law does operate within that protective armature and becomes vulnerable for the future when it begins to veer away from certain kinds of shared or popular understandings without the adequate education one would need. Now with that being said, as I've called for some boundaries or confines of what the local law may be, that doesn't mean that we shouldn't look at other laws that have an important impact at the local level on landmark preservation outcomes and indeed, I do recommend the reconsideration of zoning to take account of things that are indeed affected by demolition, alteration, modification of buildings. Community character is the proper quarry of zoning laws, even as it may be more narrowly the quarry of historic preservation laws and certainly zonings propensity to create expectations among property owners of being able to develop. Thus, bringing out the need for historic preservation laws to destroy that idea, is a conflict and if we could indeed consider zoning and squeeze out some of the expectations that zoning has created, some of the property rights that zoning has created, we begin to create fewer problems then for historic preservation as it indeed requires property owners to maintain the building in its current form. Another challenge for the local ordinance relates to what I call the tyranny of context, law's obsession with design conformity. That's actually the title of a book that I'm finishing right now. As one looks across the country, it's clear that in many cases, in most cases, administrators of historic preservation instances, interpreting words like harmony and conformity and context and consistency and compatibility have a constrained view of what those words may mean. It too often results in what I call the tyranny of context in which there is an oversimplified reliance on the physical appearance of the surrounding environment to inform what can happen with new development within the historic district. Paul Byard's ^{***[00:34:35]} book, "The Architecture of Additions", addresses this idea of having a certain degree of flexibility on what the new can be without destroying the ultimate context but that ultimate context is not strictly physically based but can be defined, temporally, culturally, in a broader geography than just the immediate surrounding area. Now, administrators are not simply responding to some conservative notion of what to approve and disapprove as they interpret these words. They're responding to a review of judges who indeed are disdainful or at least certainly nervous about un-tethered discretion in arbitrary and capricious decision making, about vague and ambiguous laws and these judges indeed prefer the brick-brick outcome. If ^{***[00:35:33]} is brick, the new buildings need to be brick, just because the form is the same and glass and seal is the same, doesn't mean it's contextual. If the surrounding neighborhood is Victorian or colonial, then I can't understand says the average person judge, why an administrator under the local landmarks preservation law would allow anything else. That's the sort of education that is required for judge but judges in some reviewing end up promoting for administrators a sense that they better not veer too far and just in case anybody those this was a chimerical fear, all they have to read is Hanna versus the City

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of Chicago from 2009, an Illinois intermediate ***[00:36:17] case in which the plaintiffs there alleged that Chicago's landmark historic ordinance was unconstitutionally vague and ambiguous in violation of the state's constitutional due process clause, and the court agreed, saying that we believe that the terms 'value', 'important', 'significant', and 'unique' are vague, ambiguous and overly broad, we are un-persuaded by the city's arguments that the commission members can be well guided by these terms and if you read the ordinance it would not strike any of us as outlandish because we know even if there is flexibility there we've got a commission of qualified members except that the Illinois ***[00:37:06] court said that the qualifications articulated for the commission members are vague. And finally, the court concluded that no criteria by which a person of common intelligence may determine from the face of the ordinance, there is no criteria of whether a building or district will be deemed to have value or importance. So that decision sits there. Alright, that's part one, review of local ordinances and their importance and some of the challenges that they face. The second perhaps more celebrated part, of the past 45 years is the constitutional surround and that surround has been defined most particularly by that most famous of cases, the Penn Central Transportation Company versus New York City case but it sits within a debate about private property rights more generally and government regulation. Can enough be said about the Penn Central case? More important, will more be said about it by Supreme justices in the future? Do we need perhaps to designate the Penn Central opinion a landmark, thereby requiring the US Supreme Court to file for a certificate of appropriateness in order to alter or modify, let alone overrule it? After all, Penn both validated and disseminated New York City's local landmarks law. Indeed, much of its currency throughout the country is not owing simply to the fact that New York City is famous and important and when the city sneezes, the rest of the country catches a cold. Oh, that was about General Motors I guess. But indeed, that Penn Central opinion described what a lot of local landmarks preservation law would look like and lawyers read that opinion and now had a model for doing land marking in their own home city. So let's remind ourselves what the case looked like back in 1978 when the opinion was actually written. So, New York City had enacted our birthday boy or girl, the landmarks preservation law, through which it attempted to preserve historic landmarks and districts. It established the landmarks perseveration commission with its 11 members, designating landmarks on a particular landmark site or historic districts. A landmark was a building 30 years old or older with special character and aesthetic historical interest. A historic district would be an area of landmarks and one or more styles of architecture and after the commission designation something called the Board of Estimate, which existed when I had more hair, would look at the relationships between the narrow view of historic preservation and the relationship to those decisions to the city's master plan, something that has never existed. projected public improvements and other plans ***[00:40:06] approve or disapprove the designations and once designated a landmark, or located within a historic district, the commission had the authority as we know, to approve all the changes to the exterior at that time, alterations, improvements, and the owner had to keep the building exterior in good repair, and there were three procedures for the owner to apply to change things; a certificate of no effect on protected architectural features, a general certificate of appropriateness, and finally a certificate of appropriateness for insufficient return. I can't make enough money so that's why it's appropriate for me to be able to change the building even potentially demolish the building. The law authorize that the US Supreme Court transfer

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development rights in general in New York to contiguous sites, which would be across the street and across the intersection, allowing other sites, to buy effectively the unused development rights and expand their development potential by up to 20% although their amendment expanded the reach of transfers and I remember there were discussion at times of being able to transfer to Yonkers, New York because you could follow and there was a Grand Central Terminal little twist because of course, Yonkers isn't in the city. At the time of the cases, over 400 landmarks in 31 historic districts have been designated so this was a robust kind of law and then we got to the facts of the case. Penn Central owned Grand Central Terminal. That great, still great 1913 Beaux-Arts masterpiece, the remaining one, Penn Station happened to be demolished of course and it also owned a TDR - transfer development rights - eligible sites. In 1967 the commission designated the terminal a landmark. one year later, Penn Central, which owns Grand Central Terminal entered into a 50 year renewable lease with a developer to construct an office tower above the terminal or taking off some of the terminal that would pay a million dollars during the construction and then three million a year there after with bump ups and Central would lose a little bit of money on what would be taken away. Two plans were submitted, both done by Marcel Breuer, and both plans the 55 and the 53 story buildings were rejected on the basis that they destroyed the landmark and indeed its urban design. I mean, imagine a tower above the Grand Central Terminal. Oh, that's the Pan Am building, that's right or the Met life building or whatever but this was literally right above it. so that's the case that was brought to the US Supreme Court and it's hard to imagine just how seminal it was and how new it was to be able to do this, just as I've argued that the whole preservation law really cut against a revolutionary or radical way, the legal approach to regulation of land by dealing with specific buildings, treating them especially. Here you would have the substantial property rights, admittedly by millions and millions of dollars annually which capitalize and turns into a lot of money for you to take it away from the owner who owned it before the designation strictly for landmark designation. Well, the Supreme Court six to three sided with the City of New York. It reviewed the case under the Fifth Amendment to the United States Constitution just compensation or takings clause which states nor shall private property be taken for public use without just compensation. First, the court stated in unambiguous terms that landmarks preservation laws-this one in particular, but in general-substantially advance a city's legitimate interest in historic preservation. This would be squarely within the ambit of police power of a city to enact laws. By the way, that wasn't always true and indeed if you look at the evolution of what local governments and states could enact laws to advance the purposes, back at the turn of the century, aesthetics, historic preservation, purposes of those sorts would've been deemed outside the ambit or local government to regulate and indeed laws were struck down if they just promoted aesthetics which would be also viewed as part of historic preservation as it were. Then, legal decision evolved and aesthetics coupled with traditional health, safety, morals, general welfare purpose- the police power quartet of announcing health safety and general welfare would suffice but you couldn't have the aesthetics alone and it wasn't until the mid part of the 20th century that aesthetics standing alone would serve as a basis for regulation of the built environment. Well, in 1978 we have a clear unambiguous statement the historic preservation could understand. The enactment of laws that would designate private property rights. Then we get to the meat of the case and what its known for which is this diminution of value for the owner of private property and the US Supreme Court said not a taking. It

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enumerated what has come to be known as the three factor inquiry or test in which judges in reviewing historic preservation laws as applied, are directed to look at the economic impact of the action on the claimant, on the owner, its effect upon the owners distinct investment backed expectations and to look also at the character of the action which has been a taking and this underscores the purpose of the just compensation clause which is to assure that government is not forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole. and again, that's one of the quandaries for us in historic preservation that the landowner is being treated specially and the question is how special can he or she be treated and in the Penn Central case, applying these three factors, the Supreme Court began to at least suggest how far government could go as Justice Homes had put it in the Pennsylvania Coal versus Mahon case. If regulation goes too far it will be recognized as a taking. Well, was this too far and the court in applying these three factors to the facts here said it wasn't too far. Why not? First, Penn Central had admitted, in what in hindsight was a strategic blunder, that it had earned a reasonable return on its primary expectation to what the terminal would use. So Penn Central was earning a reasonable return and the court said the fact that it can't earn this speculative return is of no consequence, finally constitutional to our decision. The courts sided the laws authorization, the landmark laws authorization of transfer development rights that allowed the transfer to at least eight surrounding parcels and said that this sort of transfer ability should be taken into account and is, by us considering the impact of the regulation. Justice Brennan and his colleagues said that landmark designation was pursuant to a plan had the *** of uniformed comprehensiveness that has always provided solace and comfort to lawyers and judges reviewing laws to ensure that they are not picky choosy. Now, Justice Rehnquist[00:48:08] then subsequently Chief Justice, and finally the late Chief Justice Rehnquist had a strong disagreement with this point. He said that landmarks preservation laws designating a landmark were the anticipants of zoning. And you know what? He had a point there that one could easily argue but so be it. This notion of framing more comprehensively has become part of what we do. Finally Penn Central argued that you look to the parcel as a whole rather than to simply that portion is being regulated by the law and in this case, Penn Central had argued the taking was of our right to develop property as opposed to the terminal so there was a 100% taking of everything and Justice Brennan and his colleague said no, we don't look just at the regulated portion, we don't look just at the 10 foot set back from the front lot line, that occurs at all suburban development and say that has 100% been taking, thus compensation must be paid. We look at the parcel as a whole. And again, sitting on this parcel was Grand Central Terminal which Penn Central had admitted that it earned a reasonable return. And finally the court said, come back and reapply in the future, if there's a problem. Now, no one in this room, not me at the podium, not you in the audience, no one in the halls of the academy, across the street at Columbia law school and law firms in developers' offices, in city planning departments, the judicial chambers can tell any of us categorically what is too much economic impact, what is too much interference with distinctive investment backed expectations, in short, when do we know a taking has occurred and that's a problem. It's been very disturbing to legal academics and legal technicians because they really cannot say with any degree of authority definitively what the Penn Central case means for any given case. Now, people react and respond and adapt and I think there's been great adaptability to this uncertainty and I think in the work a day world in which we live, historic preservation operates just fine. So I think the

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***[00:50:42] the concern about the Penn Station case really resides in a much smaller place than our overall world. We can say to be sure that property owners are not entitled to the highest use of their property and government regulation, including historic preservation laws can deprive them of significant amounts of value. Alright, future challenges, property rights movement is certainly still an issue. The reaction in the ***[00:51:11] Kelo case in the City of New London is dealing with the related issue of eminent domain, reveals that. We need to continue to be very sensitive to the notions of hardship, listening carefully for calls of reasonable return. We need to review some of the local ordinances to make sure that they are in correspondence with the requirements, allowing for a reasonable return and perhaps revisit that intellectually interesting but little applied notion of transfer of development rights. Third, religious landmarks, we recently celebrated another birthday on September 22nd 2010 which was the 10th anniversary of the Religious Land Use & Institutionalized Persons Act. This was a law enacted after some constitutional developments in the US Supreme Court which basically left religious institutions owning religious facilities relatively under protected in their view and through the evolution of a political system in which religious institutions may be able to claim, in some ways, some would argue more protection rather than less protection for what they do. Religious exercise, after all, being protected by the first amendment even as there may be some conflict with the so called establishment laws which says the government may not establish religion either or help religion too much. There's an inherent tension there. The statutory enactment of the Religious Land Use & Institutionalized persons act some people say ***[00:52:54] law created this statutory regime at the national level guaranteeing that historic preservation laws could not substantially burden the religious exercise of religious institutions and that included facilities and buildings so churches and mosques and temples and all that we associate and are blessed by the stewardship that we have of religious institutions and their facilities. This led to the notion, would a landmark designation or more significantly, would denial of a certificate of appropriateness to alter, modify or demolish, considered to be a substantial burden on the religious exercise of certain facilities. The answer has been, looking at the record in the judicial record, no. The courts have been actually quite accommodating to the ability of local governments through landmarks preservation laws to treat religious institutions fairly similarity to the way other institutions are treated. A typical case has been the Trinity Evangelical Lutheran church versus the City of Peoria case in which a church bought an adjacent building, operated it as an apartment building for years, about 1 years after the purchase the church wanted to convert it to an additional assembly building for religious practice and indeed, after the landmarking, the church objected the landmarking, it ended up in court and that court held that there was no substantial burden, it only effects one building, one location, doesn't stop the ministry from operating even though yes, it limits its possibilities for expansion, adds a little bit to cost but that's the price of doing business here. You're still in the business of religion and so it's not a substantial burden. That's been the judicial approach that we see, now lots happens outside of courts and we have to recognize- and its true- that dialogues between historical preservation or landmarks preservation commissions and churches as is for change, there is a little more negotiating leverage for churches by citing the Religious Land Use & Institutionalized Persons Act and its harder to track that sort of special advantage that they have but certainly in the courts and in any sort of argument one would finally make, its take a look at the courts, substantial burden, not something to be troubled with and to the extent of course that St. Bart's

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would want to be a 50 or 75 story building taking down its community facility that's not even religious exercise. Even if the money is going to be used for a good cause such as feeding the homeless, housing the homeless. Okay, I'd like to conclude with a notion of re-positioning historic preservation law in the next 45 years. We will be meeting here in the year 2056 and I've already actually agreed to give the keynote for the same honorarium I am receiving today, of course inflated to future value. Tony, where are you? I think I'd like to make three key points very briefly. First, I think we need to strengthen historic preservation laws. We'll look at that I think a little bit later today. We can tinker with them to make them better. I think we can do better on insufficient returns or reasonable returns but I would resist the temptation to broaden historic preservation laws as such. I think they operate well within their confine if they are clearly understood. They are not substitutes for planning in the city and I think we are strongest when we operate squarely in what historic preservation laws are understood to be. In the New York City neighbors coalition case, interestingly, where the question was whether the Landmarks Preservation Commission decisions here in New York state would be subject to the State Environmental Quality Review Act, SEQRA. The court understood just how narrow landmarks preservation designations and decision making would be by calling the decisions of the Landmarks Preservation Commission ministerial because they are so circumscribed in their decision making and they really have nothing to do with the environment at large. One can contrast this by the way with the Chicago Hanna decision. Alright, so that's historic preservation laws. I would broaden, secondly, the rhetorical positioning of the value of historic preservation with another legal regime. Sustainability comes to mind but also, the broader function of historic preservation after all is to maintain the connection between people and place. John Costonis writes about this in his superb book "Icons and Aliens" talking about how the purpose of historic preservation is actually to guarantee an emotional stability. Cherished features of our environment are preserved not because they are beautiful but because they reassure us by preserving in turn, our emotional stability and world pace by frightening change. Now, that can be done within the broader array of laws. It's inherently done through historic preservation. I'm not suggesting that we rewrite those laws. we can talk about this, although I don't have time, in terms of even promoting the preservation of a skyline and of course the New York City situation now with the Empire State building and Vornado's proposal raises that very kind of thing and there have been cases in the United States and plans in London dealing with its view management views of St. Peter's St. Paul's Cathedral and other facilities that guarantee that even a skyline should be protected even if we don't do it necessarily under historic preservation laws themselves. I'd like to conclude then with the following thought; historic preservation of the environment could even most broadly be understood as a universal human right. certainly we have the UNESCO World Convention, adopted back in 1972 and its collection of cultural heritage and we're not going to amend the 1948 universal declaration of human rights but one could easily imagine it saying everyone is entitled to enjoy the benefits of cultural heritage and that after all, is what the legal regime of historical preservation at its broadest is all about. Thank you very much.

David: Thanks Jerold so much. That was terrific, really that was great. The next sort of item on our presentation, as you can see, more people are still arriving, so we can get settled while I sort of stall for 30 seconds. We're now going to have sort of a keynoter discussion where we're

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going to invite some people, also very talented and experienced lawyers to come and respond to Jerold's comments. So in order to do that, we wanted to sort of moderate this conversation. The question as who could we have to be moderate our response to Jerold's comments. who's going to take the broadest possible view of preservation who sort of knows everything that's going on and can focus that into a short response to a keynote that was so extensive and you know, the solution was actually very easy Tony immediately said well there's only one person we can ask to do that and that's Ann Van Ingen who's going to join us as moderator of this discussion and she'll introduce her panelist to you. Ann is the former Director of Architecture, Planning and Design and Capital Projects in New York State Council of the Arts, she's run preservation consulting- wow, I can't read my writing, a number of preservation consulting businesses. She works for a number of nonprofit agencies, or she has. She's currently the president of the St. Regis Foundation which is the land trust in the Adirondacks and serves as secretary of the James Marston Fitch Charitable Trust in addition to the other things she's done and is also an Adjunct Professor at the School of Architecture at RPI in Troy, New York so what we'd like to do now is welcome Ann and her panel to come up as well. Ann will introduce her panel to you. That's ***[01:02:23] would join us as well and of course, Jerold we'd like to bring you back to respond to your own keynote address, if you would.

***[01:02:33]

David: We do expect a positive response but first is to welcome Ann Van Ingen to the podium, so thank you Ann.

Ann: Good morning. Thank you all very much. I am, as you heard, between opportunities at the moment. I am a preservationist at large. I think that's how I'm describing myself at this moment in my life. I'm enjoying very much the opportunity to focus on particular projects. this one specifically, this one and Tony and Carol, thank you very much for creating such an extraordinary day and giving what has been for many years the Fitch Forum but forgive me it's some real serious substance and I'm very happy of be a part of it and my role is on the board of the James Marston Fitch Charitable Trust is what brought me here today and we're very happy to be co-sponsors and supports of today and just as a quick side bar to all of you who are students here at Columbia, just as I was ***[01;03:35] these many decades ago, I well remember conferences just like this held in this room. This was Fitch's idea of how to bring preservation to people and this was very much his idea of what this program should be, bring the smartest people from around the country to this room for your benefit and I remember well for several conferences that were held here then and what an important impact it had on my own career. So I urge you all, I'm sure you're not shy. Don't be shy. Introduce yourselves to the people here today. This is an extraordinary line up of people with some really remarkable intellectual firepower and I hope you'll take advantage of it. Don't be shy. So I'm glad to be here to orchestrate this response to Jerold. Thank you very much for your particularly thoughtful comments and I think what we're trying to do at this moment is operate, if you will, at the 50,000 foot level. We'll get down to the specifics of places and issues and cases in later session but what we're trying to do now is set the content for those conversations and as we work through the day we'll focus back in on New York City but I think setting this national context is very important. so let me introduce our very distinguished respondents today and I will do them simply in the order in which they're sitting and the first one being Paul Edmonson who is and has been for many years, the Vice President and General Counsel of the National Trust for Historic Preservation in Washington. He serves as the organizations chief legal officer and in

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that role he oversees all legal services for the organization, including an active program of ***[01:05:10] advocacy and litigation for historic preservation and he also oversees the organizations in-house corporate legal services in support of its broad preservation programs and activities, its regional offices, its historic sites etcetera. He also supervises the Trust's preservation easement program and legal education and outreach activities, all of which are, I'm sure you know, are extensive. He's worked over the years with the Trust with a wide variety of legal issues pertaining to the protection of historic resources in the United States including constitutional issues, federal and preservation law matters, issues pertaining to local landmarks law, tax incentives for preservation and preservation easements. Certainly a broad and deep knowledge of national preservation issues and I also know that Paul is very helpful. He always picks up the phone when people from around the country call for advice and counsel. He's received his undergraduate degree from Cornell in anthropology and archeology, bravo, and then received his law degree from the American University in 1981 and sitting next to Paul at the end is Tersh Boasberg who is a lawyer in Washington DC, specializing in historic preservation. He was the chair for the last 10 years of their DC historic reservation review board and has also been chair of the DC zoning commission and he is also an adjunct professor of law at Georgetown university of law center and teaches as well at ***[01:06:32] colleges master ***[01:06:36] historic perseveration program. He's been active in the DC neighborhood and downtown preservation and zoning battles as well as regional growth issues and Civil War battle field protection. He was lead attorney, importantly, for protecting the Virginia battlefields of Manassas, Randy Station and Kernstown and that grew his current presidency of the alliance to preserve civil war defenses of Washington and he is a founder of PreservationAction, a national grassroots organization of lobbying organization where I first met Tersh, many years ago. and he is a graduate of Harvard university and Yale law school and I've been told they don't care in which order they respond so Paul let's hear your response to Jerold's very thoughtful comments and then when the two of you have spoken I will toss in a couple of general questions for your consideration and then importantly open it up to all of you. So if you all have questions, there will be an opportunity in a little bit to speak with any or all of our speakers. Thank you.

Paul: Well Ann as always I agree with everything that Jerold had to say.

Ann: Of course

Paul: Tersh?

Tersh: I agree with you Paul.

Paul: Let me just go through a couple of the points that Jerold made and comment on them and then I'm going to bring up a couple of things that Jerold touched upon a little but didn't go into much detail on. Just in order of the kind of outline of the framework that he laid out. First off all the value of having a separate legal regime for the regulation of preservation of historic properties. The value I think has been demonstrated. Jerold made a strong case for over the last 45 years and would get down to the legal precedence of Penn Central, the effect of that across the country has really been just tremendous and we have a regime of landmark preservation in many cities and communities that is effective and important. There is also a flipside of this I think there's also been a significant level of influence because of the attention on the topic of historic preservation in this other more long standing regulatory stick scheme of zoning and planning and that is I would just say in the last 45 years, another tremendous benefit and advance in the field of preservation law. In many cases, the law when the Trust or statewide organizations are fighting, we're not fighting demolition of properties or inappropriate

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development effecting historic properties. We're not doing so under the rubric of the landmarks laws that were really the principal topic of Jerold's discussion and one of the reasons that we're here but because of the influence of recognition of landmarks in the broader framework, it's the planning laws, it's the zoning laws, that have some type of component for recognition of historic preservation. Many, many cases, we just actually completed one, in Virginia with the situation of Wal-Mart superstore on the ***[01:10:09] battlefield. It had nothing to do with local landmark regulation and everything to do with state and local planning laws and ignoring the preservations of the state scheme that require consideration of impacts on historic property. So I just want to point that flipside out. There's also, I would say over the last 45 years and Jerold alluded to this more in his closing statement in a recognition of the broader values in historic preservation, the contextual value and that's reflected both in zoning and planning but also in preservation laws themselves so that it's not simply whether something directly effects a particular building but the setting of that building and the broader contextual values that make that property important. It's also I think a recognition that there are a variety of criteria and factors that lead to us in recognizing this has historical landmark value, a recognition that we're not simply trying to preserve necessarily the best and brightest or the particular landmark where George Washington slept but individual properties have meaning from a neighborhood value standpoint and this expands well beyond the typical landmarks framework into cultural values for native American and other types of cultural resources that are important for native Americans across the country so I think that's one of the evolutions in historic preservation law over the last 45 years and that kind of broadening of recognition of the values of culture and character. Jerold's comments on Penn Central, I think clearly whenever Jerold and I get together we're always talking about Penn Central because that's one of our favorite topics because it really has stood the test of time. It is a critically important; I call it a movement validator. When Penn Central was decided I think Justice Brennan references 500 ordinances around the country and that's just in the years between 1965 and 1978 because many of those 500 ordinances were copied as DC's was- were copycats of the New York City landmarks ordinance. Today that number stands closer to 2600 across the country and I think that's largely due to the Penn Central decision, the kind of stamp of approval by the US Supreme Court. That doesn't mean- and Jerold was clear that the issues of property rights are behind us. Certainly we have a strong framework in the courts leading with the Penn Central decision for validation of the rights of communities who protect these properties but there are still tremendous property rights challenges that go on, I would say as much in terms of rhetoric as in terms of legal action and we see it all the time and any time that any -Tersh can probably speak to this in terms of Washington DC, I experienced it in my own neighborhood in Washington DC with the attempt to designate parts of Chevy Chase with this surge of rhetoric in the framework of property rights and it's been effective. It's blocked designations, even in cities which have sophisticated preservation regulatory schemes. It also has impacted and continues to impact existing valid preservation laws in different places. Last year there were attempts in both Utah at a statewide level and a number of communities, particularly Houston to dismantle the framework of preservation laws to one degree or another. There are also, I think every year, we continue to deal with the issue of owner consent. and the attempt, if it's not in a local preservation ordinance, its often sought to be added to the preservation ordinance so that the property cannot be designated without the consent of the property owner, these are all kind of framed in terms of property rights but there's this other kind of more recent evolution of the concept of property rights, getting away from the takings clause and getting deep into the due process clause and Jerold's reference to the Hannah decision in Chicago, there was also the Conner decision in Seattle. Luckily the Conner decision was a very strong rejection. it was a similar claim where a vagueness challenge to Seattle's preservation law, was mounted under the theory of violations of both ***[01:15:49] and procedural due process and we're seeing that kind of framework more commonly sighted and so I think that we still have to be very conscious of

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the fact that preservation, even though it stands on firm judicial grounds, it's still very susceptible to these types of rhetorical challenges and sometimes creeping into the ***[01:16:18] itself. RLUIPA, Jerold talked about the fact that judicially, we have some strong decisions that really suggest that the cases that the statute is not really the threat, at least, again, from a legal action standpoint that many of us feared when the law was being passed. actually, I have to tell you, when the law was being passed, the Trust and our preservation partners were up on Capitol Hill trying to ensure that the standards that were included in the law were in fact tied to the constitutional standards because we knew if that were the case, from a judicial standpoint the impact would be fairly minimal because we have some strong cases at the judicial level but again, as the same in terms of the taking clause, we see the impact more in the rhetorical framework and I have to tell you there are many communities around the country where religious property owners are simply able to get local commissions to ignore or to find a way to really not apply the laws or in some cases where the authority devolves to the city council it's really a political decision, in many cases we're seeing that there is a substantial impact because this federal law, again, not in the courts but in the realm of rhetorical framing. Let me just mention a couple other things that Jerold mentioned this was also the 45th anniversary of the National Historic Preservation Act, it's also the 45th anniversary of Section 4F of the Department of Transportation Act, probably one of the strongest federal preservation law on the books and I guess I would use his analogy to a middle aged person. I think the same kind of analogy can be applied both to the National Preservation Act, probably less so to section 4F. There was a time, probably about 10 years after its enactment in the 70s where there was a real invigoration and we had actually the expansion of the scope of the National Historic Preservation Act for the properties that are eligible for the national register. There was a strengthening of the interpretation of Section 4F to be applied to constructive use of historic resource in parks. Since that time though, looking back at that 45 year framework, there has been some – probably the- it's hard to describe other than some comfort on the part of maybe too much comfort on the part of federal agencies with process and not so much with substance and the trust has actually done a study on this subject. I'm speaking particularly Section 106 of the National Preservation Act which is really the part that has procedural control and we're finding that agencies in many cases have become very adept at essentially complying with the act in terms of process but without really taking a lot of effort to find substantive solution to preservation issues which was really the intent of the statute. So we issued a report a couple of months ago called "Back to Basics" where we're urging federal agencies to relook at their responsibilities under the national historic preservation act. It's interesting because these two legal frameworks really grew up side by side, which is another point, that the federal preservation law and speaking more broadly about the national preservation act, sets out a partnership between the federal government, the state and local governments and private entities of the private sector to advance historic preservation. This has become the core of the team of development of the national register which is often brought in at the local level as the basis for local designation. And again, kind of looking back at that 45 years and looking forward to the 50th anniversary coming up, I think it may be time for us to hit the reset button and say where we are in this framework. there are some real challenges and there has been a recent survey done by a task force by preservation action, it hasn't been fully realized but there is clearly there is a lot of the satisfaction among the preservation community with the administration of the federal preservation program and I think there is a real need to examine the structure and the way they interact with the state and local programs as well. One final point and I'll turn it over to Tersh. The time that we live in is particularly challenging at all of these levels that we're talking about and we're seeing the impacts at the federal, state and local level, with the cutbacks in funding at all of these levels. The strength of preservation laws, whether we're talking about local preservation laws or federal preservation laws are only as strong as the administrative structure that's there to administer them. That's just an obvious truth and that

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administrative structure is really in danger right now and a lot of it is in danger simply because the effect of the economy, the cut backs at the federal level in terms of ***[01:22:45] with federal funding and there is a trickle-down effect to this at the local level as well. Many localities have been understaffed for years and now they're actually at a point where they're actually having to cut back, they may have one person, that one person is now gone and their responsibilities have been passed along to someone in the planning office to someone without the level of specialty. So there really is kind of a crisis in the administrative structure that I think we need to really pay close attention to. It really can affect the way this whole movement is directing in the next five to ten years.

Tersh: I agree with almost everything that you said Paul, but I do want to say oh, to be middle-aged again. Working toward that, I want to thank all of you for being here. It's nice to see so many friends, so many people who I worked with in Chicago, Seattle, New York and Los Angeles and other places it's a really great tribute to the leadership that New York has shown and a special thanks to Adele who starts off everything. I did happen to hear her as a keynote speaker in Washington when she received the award for the national ***[01:24:16] award it was well deserved. I also want to nod toward Dorothy Miner and Paul Byrd in a very personal connection, Dorothy was in my wife's class at Smith and was actually at our wedding 50 years ago and Paul Byrd's older sister was one of two bridesmaids. So I feel very, very connected to all of you and more than that, as Paul said, the Washington DC law which was not enacted until 1978 because it didn't get self-rule until 1973, which is a sore subject in Washington and we're still trying to get a vote which we haven't received yet but not only are we modeled after New York City law, but we look to New York City as so many other cities around the country do for the interpretation. How you work out your problems, the problems come to New York City much larger than they do in any other city. They also seem to come first. You have a very active preservation constituency. I happen to think you have a very fine landmarks commission, you have a lot of intelligent people around the edges, you have new groups like the Historic Districts Council. We model ourselves on you and what you do here is so important to us, I cannot tell you. We're very grateful that the Penn Central case arose in New York, that the St. Bart's case arose in New York, Sailor Snug Harbor, all of the other cases *** [01:25:57] these are cases which we rely on all the time. Briefly, let me just say, Jerald your first point in terms of keeping separate the zoning and the historic preservation, certainly the statutory scheme I think is worth a great advantage. The only people that hate it are the developers because they hate it because they have to go both before historic preservation commission and a zoning here issue and they don't know where to start and we don't really know either where to start. We have a commissioner that says it doesn't matter where you start. To us it does matter because so much of what you do in one case can influence the others. When we make a decision on a case that's pending before a commission *** [01:26:44] we always say, nothing herein shall influence in any way the decision of the body making announcements on zoning. So I think that's very important. The other thing is after having been 10 years as chair in Washington and a couple years of chair in the zoning commission, I'm very scared about historic preservation, an actual truth, there are not a lot of people in our city, probably say here, that really understand, historic preservation is a very esoteric feel. You have to have some kind of background, you have to have some kind of field, you have to have traveled. It takes a lot to understand the nuances of historic preservation and if it were broader applied it ***[01:27:35] the universal right to historic preservation, nothing that scares me more than that is to sort of put it up by the first amendment or the fourth amendment. I like operating under the radar. I like being somewhat difficult. In a class we teach at Georgetown one of the questions always is well why don't you have all of the District of Columbia be a historic preservation district? why doesn't-and I hope I'm not quoted, and in truth it all probably qualifies because it's all more than 50 years old, we don't even have a 50 year rule in the district but most of the buildings are

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older. But if we propose to have the whole district of Columbia become a historic district it would not only kill that but they would probably start reversing all the historic districts that are already there. So we've begun very, very gradually in individual cities by taking the most obvious historic districts, in Washington's case, Georgetown, Capitol Hill and then slowly move in to add others as there is local interest in the neighborhood. Our staff, unlike New York City's staff, which of course has a much larger staff, we get a lot done with a small amount of people, they do the research. We don't have the money or the staff to do research on historical districts we leave it up to the community and that generally works very well and we have a very long process to become a historic district. Paul's comment about owner consent, this is a genuine worry. our staff does not have ***[01:29:10] and one thing that worries me about – a number of things worry me about owners consent in historic landmarks, if once they get a statute that says you have to have owners consent in historic districts there's going to be an order of consent in landmarks and then you will not have another landmark in the city of Washington or in any city of the United States so this is very scary stuff as Jerald rightfully pointed out, Rehnquist descent, is still very alive and I am scared to death if Penn Central got to the Supreme Court out of an ***[01:29:45] I'm not sure it would've passed at all. It may have been alright for historic districts, I'm not sure. it would've passed at all and so I am very worried about that and I am also very worried about the religious, the RLUIPA, as Paul says, a lot of it is in the rhetoric and it's true that the court cases so far although there are a couple of one's which are a little bit scary but the threat that and now there is a religious institution foundation which will seek out any case that it can't find and take it to higher court and let me tell you the ***[01:30:27] which happened in teleports in the last 15 years is such that it has extremely worsened. We had a test case in a way in Washington on the Third Church of Christ Scientist which was a perfect storm for anti preservation cases. It was a 1971 building that everyone called ugly. it was not only ***[01:30:53] but a brutalist even though it was built by the Pei firm, it was built one year before the national gallery but it was unfinished concrete or brute as the French would say, the congregation had fallen from, well we don't know how many families. It was built to house 400 people. It was now 40 people in the *** 1:31:20 and they basically couldn't afford to keep it up. So, we had to landmark the building because it was extremely prominent as a modernist building. But Jerald, you're absolutely right, people don't understand modernism. Even the mayor came out, luckily our mayor doesn't have anything to do with designation. In fact, we have in many ways another under the radar scheme. Only the historic preservation commission can decide whether to designate landmarks or historic districts and there is no appeal to city council or to the mayor and any appeal to the court is based on traditional law of administrative appeals. You have to be arbitrary and capricious and believe me we are not arbitrary and capricious, we may be slow and we may be labored but we are not arbitrary and capricious which means it's virtually impossible to upset anything we do. So we have to be extremely careful about that. We had, in the testimony, we had 40 experts talking about why this building was important and it was in the Washington DC ***[01:32:29] most important buildings built in 1971 not that that might've been the greatest year for buildings and for religious architecture, a subcategory, it was herald- it even had the dean of the Catholic University of architecture school say that this was the one building he really like more than any in DC. Now, I'll leave that to your judgment as to what other things the dean would've liked in Washington but this was the best one. Anyway, he had nobody to testify against it so we had to designate. We had a lot of political pressure not to designate. There was a law suit filed by the church and I won't go into detail, the developer claiming not only first amendment but RLUIPA and we were worried about RLUIPA because it was picked up by the ***[01:33:21] when it got into court, the federal judge, hearing on a motion, the first thing he said out of his mouth was you mean to tell me there's no restriction at all on a church that you're going to landmark and there's no cost involved? Who's paying you? Don't you have to hire a lawyer? And threw us all back because this was designation. It wasn't even denial of a certificate of appropriateness and all we did was deny a

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demolition from it. We didn't even deny something else that they could've done. To the church. Anyway, to make a long story short the case was settled but it went off on an interesting ground which I think is a reason that RLUIPA may be less worrisome and that is it went off on the ground of hardship. It went off on the Fifth Amendment ground that they didn't have enough money, which is in our statute as you know. We have a built in hardship amendment clause, at least most of you do. So therefore rather than decide whether fixing up the cost to fixing up the church would have been a substantial burden on the ***[01:34:36] religion, it was much easier to decide that yes indeed, it would've been a substantial hardship burden. So it went off on Fifth Amendment ground, not that it ever got decided in court but that was the basis of the settlement and I'm glad it was settled. Had that gone up to the Court of Appeal and maybe the Supreme Court I don't think we would've had a landmark church in the country. I'm very worried about that going up to the Supreme Court ***[01:34:58] let me just say a couple of things constructively and then I'll shut up. One of the things I would like to see one of the most constructive things I think in terms of local law and I agree with Jerold, a lot of the historic preservation act, a lot of the national, a lot of the federal stuff is leadership national but the tires really hit the road at the local level. You've got to have local laws protect your building there's no other answer to demolition provisions and we at the local level are pretty ignorant of what one another is doing. We don't have the preservation law reporter anymore. It's very hard to find out what other local communities do and you have to pay \$1500 for the Trust conference so that's a serious problem. Of course you can get an advisor that's a speaker but if you can't, so I hope ***[01:35:54] would take the leadership and maybe have a conference on local laws, maybe have a once a year meeting someplace and get the people –I see Mark Silberman in the audience, Philadelphia last year, what they're doing in Boston, Chicago, there are a lot of- by the way, I don't think Chicago does landmark churches. I think it's excluded from the ordinance and that is a bill also in Washington but we haven't appointed it to self. Anyway, to get together that's the first thing, the second thing is we also have a kind of perfect storm case at 227 Pennsylvania Avenue which is a block right north of congress where we had a 122 year old row of buildings there was one two story building in a row of three story, four story, two story was the smallest one. Course somebody comes in and wants to put a third floor. Why? To get a view of the Capitol for the office executives. That's Washington, sure fine but you talk about tyranny of context and this was a terrible problem because Capitol Hill, the houses are small and very fragile and most of them are two stories and if you allow a third story on every house in Capitol Hill, it would completely change the nature of Capitol Hill. Here was this building where its two neighbors were slightly taller, what to do? Anyway, we approve the building, it was later turned down by ***[01:37:30] I'm pretty sure he's talking about the Hanna case which brings up the vagueness of statutes and the value of precedent in administrative cases and this is the problem, I am always arguing for more and more rules so that we don't have arbitrariness, so we don't have capriciousness and basically so you take the political equation out of permanent. because if you have raw discretion which doesn't have some kind of basic growth then you get right back into the old days, if you know ***[01:38:02] table, so that is the problem and I think that will go on. So anyway, I will shut up. Thank you.

Ann: Well thank you both very much. I marched in here with a list of questions thinking if they don't touch on these things I ***[01:38:20] these questions well you've touched on virtually everything, we certainly appreciate it. Thank you. Again, keeping this at the general and you talk about there are 2600 global audiences across the country that's a lot of legal matter a lot of issues that come up across the country but looking ahead, do you see what's next? Any of the three of you, Jerold you sort of had your shot at this but Paul and Tersh, do you see what's next, what are we missing in some of these laws, do you see new developments in the law anything exciting coming out from these 2600 ordinances around the country that we can look to? Perhaps some positive new development.

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Tersh: Let me just speak very quickly, our law is working, we have a terrific law. We have lots of statutory interpretation, we have a kind of website which records all these cases and we don't have any problems with the law. We have problems with educating people and we have age old problems with building and political consensus but the law itself I think has been pretty good.

Paul: I would agree with that. There have been a number of phases in terms of development of historic preservation local landmarks there were quite a few cookie cutter laws based on New York's. in the 70s there was another kind of phase, in the late 80s, I ***[01:39:56] probably here ***[01:39:57] has done a number of updated versions that got adopted probably towards the late 80s and adding things for example like stronger economic hardship provisions which require much more detail on what actually is the economic hardship that faces the property owner. That's the kind of detail that makes it easier to understand and administer the laws. There have been a number of additional provisions that have come up over the years such as demolition by neglect which is a big issue in many communities. now we're seeing many have good landmark laws with good provisions in them but there are administrative issues in terms of how whether there is political will to take the steps to enforce the types of situations where there needs to be actual litigation brought against property owners or taking the step of actually fencing and fixing and leaning properties that are in need of repair. So there are those phases but I think I agree with Tersh that it's really more in- well there are two things; one is the actual administration of the laws and the education of the commissioners in many cases, make sure that they understand their responsibility and they actually follow a fairly sophisticated process in applying their responsibilities. Another Penn Station, Bob Stipe another person who has really led this movement over the years said now the Supreme Court's come out with that, we need to turn our attention to what is the other area of vulnerability and that is procedures. Procedures, due process, and failure to comply with procedural requirements of law. It's still an issue and that leads the kind of decisions that commissions make every day, in some cases vulnerable. We're seeing that I think in terms of some of the more recent challenges. So there are plenty of those types of challenges ahead.

Anne: Jerold, do you want to add anything?

Jerold: No.

Ann: Alright. I do have one other quick question and the temptation of course to valve back to New York City is strong and I will vouch for that. You touch briefly on the skyline protection issue, and certainly with the recent issue of the empire state building who are not a really and just wondering if any of you know or understand, we touched a bit about that topic being discussed in London, do you know other situations or do any of you- can you reflect on other communities that have dealt with that particular issue because I suspect this is one that's going to be lingering for a bit in New York City.

Jerold: It's a totally standard kind of thing we've been doing through legislation, view shed protection. It's normally been a natural phenomenon, natural elements that have been protected in terms of buildings that mars the view but it's very, very standard and it's been done for decade, nothing revolutionary in the United States what's so ever. and we have of course had concerns about skylines and indeed in New York City itself, just months earlier, the Jean Nouvel Tower design proposed to be about the Museum of Modern Art which wanted to be 200 feet higher than what was otherwise allowed was turned down by the city planning commission on the basis that it was in part going to interfere with the empire state building. So it's not as if we don't make decisions in New York City and elsewhere that deal with the potential impact of a

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building on a skyline. Now it's true that within existing historic preservation laws it's hard to see how they can be administered in a way to address this at all and I don't suggest that it necessarily be handled within existing historic preservation laws. I do want to keep them fundamentally cabined to deal with the sort of traditional popularly understood issues but I do point out that yes, there are these laws that exist as separate and distinct laws. I don't know exactly where would they go. I can imagine them being in the zoning regime. Its dealing with new development just as the Nouvel design was dealing with city commission. There have been by the way, other efforts. there's a case called United States versus Arlington county and Arling towers which was a United States District Court case dealing with a proposal by a developer to build four offices towers and a hotel in Rosland and the United States government brought a public nuisance suit claiming that the construction of those four offices towers plus the hotel would indeed be a public nuisance. Why? Because they would be a visual intrusion on the core of our Capitol City, the District of Columbia and the ***[01:45:37] plan, which emphasized, among other things, horizontality and seeing in the background these towers across the Potomac would interfere with that. That was an actual case that went before a judge, he heard expert witnesses, he looked at photographs, he did an onsite visit and he finally concluded that for the average person these four office towers and the hotel would not mar the experience of visiting the Washington and the Lincoln Memorial and other parts of the core of the capital but it was discussed and one can imagine experts coming forth with all the tools we have now that suggest that it would indeed mar things. the most up to date sort of treatment of this is indeed was done by the mayor of London, Red Livingston- formerly known as Red Ken, who did his London management view protection plan and laid out a series of protective carters dealing with river view sheds, townscape view sheds and there are lots of view sheds that are protected by this London plan which is a planning law effectively of London, including a view from Richmond, going to St. Peter's and it's a powerful instrument, totally uncontroversial. We simply do not want this skyline provides us with a sense of who we are, where we are, a mnemonic device as Kevin Lynch would put it or as Mumford would've put it, some stability or Costonis in icons, we protect it. So it's certainly something that's on the table. I'm not saying one way or the other what should happen with Bornato's whatever it is 1500 foot tower.

Ann: Should we open it up to questions from the audience? So, there must be questions. Yes?

Audience member: I'm wondering if Mr. Kayden knew the particulars of the ***[01:47:33] Kelo case?

Jerold: Sure, Kelo versus city of New London, 2005 case, five to four decision, very close at the Supreme Court, upholding a broad notion of public purpose of what would justify governments exercise of its so called eminent domain. Penn Station was about regulations and can regulations go too far and be similar to the more classic, eminent domain taking where government actually takes your property from you, government now owns it, pays you as some property owners would say just compensation and now you don't have it and turns it over to a private developer. This has been a controversial thing for them, by the way, historic preservation movement because a lot of historic buildings were in fact taken and destroyed and further into urban renewal. So we have a sort of conflicted attitude towards this though there are other cases where it enhances historic preservation. The court legally releases what to many of us was an uncontroversial decision which said that if government is doing something with its planning which suggests that the taking of existing, non- blighted single family houses- that was what was so controversial there. Kelo was just a sort of average person, not a poor person, oh there we can take automatically, but this was just an average person someone that actually

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looked like everybody. This was on Parade magazine yet the government took her house and gave it over to a big, bad, nasty Boston developer. By the way, none of this is even happening anymore. The house haven't been moved at all, not true, no development has occurred, in order to create jobs and additional tax revenues and the court said five to four, from a constitutional point of view with all of our legal precedence starting with Vermin versus Parker and going through Hawaii Housing Authority versus Midkiff and it's no problem, five to four. The outcry, politically was what was shocking to people and Justice Stevens now off the court but who wrote the Kelo opinion a month or so two months later in Las Vegas said something that what was said and done in Las Vegas doesn't stay in Las Vegas, he said had I been a legislator I would've not done what I did as a judge. I was forced as a judge to do this but I wouldn't have done it. it's a politically controversial issue and it has led to roughly 40 or so states amending their eminent domain statutes to make it harder for government to exercise the power of eminent domain especially when it's being taken –the object that's being taken is not blighted or otherwise dntrodden and of course when its being given to one private owner to another.

Paul: Let me just tag onto that, one aspect of the shift to the legislatures to address the Kelo issue, has been as Jerold said, these 40 or so laws around the country to restrict the ability of government to exercise the power of eminent domain but often attached to these laws are provisions that are also intended to restrict the rigatory takings authority and so buried in some of these laws is language that's often essentially designed to undo do some of the provisions or some of the principals that were seeing in the Penn Central case so you have to be real careful in reading and parsing through or reading some of the legislative proposals that have come out in the name of fixing the Kelo problem because they often go much beyond the issue of eminent domain.

Ann: Yes?

Audience member: ***[01:51:27] I just wanted to make a correction about what you said about the empire state building having something to do with getting rid of those 200 feet on the top of the Nouvel building. I was on the team that defeated that building, hopefully, they're not building it, regardless of how many feet it is because I believe the ***[01;51:56] bank building is over 200 feet. It had something to do with light and air, although it's a silly decision because 200 feet isn't going to do anything for us but it did not have anything- they may have mentioned it, they did mention it but that was not the major reason.

Jerold: Right. No, as I said it as among other things. I referenced that because of course, Vornado presents a similar situation.

Ann: Thank you. Yes, in the back right there with the glasses?

Audience member: Thank you references made to the descent in Penn Central, what's the best shot that the dissent took at Penn Central that preservationists need to be on guard about in case of this kind for resurrection that we're talking about. What was the best argument?

Jerold: It's unfair, that's it. I just can't emphasize how important that is, this notion that one person- it's not everybody, the three of us here. Paul, he has the landmark building, just Paul and he turns to Tersh and me and Anne and says 'why me?' and we can say well you have a great beard and more hair, well not than Ann of course , and you're historic and you're special and 'well, but I didn't know at the time when I bought it and now it's coming.' It's just unfair, it's not comprehensive and that attitude still prevails. That's what the whole private property

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movement is about, picky choosy kind of regulations. It's one thing that applies across the board that's why zoning was done in zones to be across the board. All of us in this room are in the same zone, so fine. Misery loves company, fine we're all restricted. The restrictions on Paul and Tersh and me benefits Ann just as the restrictions benefits them.

Audience member: ***[01:53:44]

Jerold: The best argument I've got is read the Penn Station case, six to three, 1963 it's many, many years later and justice will keep arguing that way. It's a political battle I don't know what would happen. I am nervous about the Penn Central case. I think it's the one shoe I'm still waiting to drop. I think the reaction to Kelo was astonishing. I think it all depends on who on the court, it really does. I mean let's face it, these appointments are outcome determinative on the opinions and what they say.

Paul: I think life and law are not fair is the bottom line.

Ann: I think as a comment, I think a lot of a thread through what we heard today is the underpinning of much of what we do, this field historic preservation field needs to be better with its messaging, we need to master the mass communication systems. We need to go viral, we need to be reaching out way beyond those that are sitting in the room today. I know that's an obvious statement but we have to keep thinking about that. The world is changing, our ability to message has changed and we really need to be in control of that and get out to a much broader audience so there is an understanding of what we're trying to do here so these nuances are not just these little esoteric conversations we have. I need to give us time for one more question, right there.

Audience Member: Actually it relates to what you just said and when Mr. Kayden says popularly understood, there's no popular understanding. there might be popular understating amongst historic preservationists but amongst people broadly it is obscure as Tersh said and not only that, its obscure to people in the field you know, to commissioners on historic preservation commissions and from an Olympian point of view I just wonder why can't the law be easier? Why is it -to explain to even someone who's interested in this it takes like five lectures, you know, where the federal role is, where the state role is, where the local role is, where there's landmarks and there's districts and where there's design guide, it's just so complicated and it would be wonderful if it could be simpler. I think one could message better if it wasn't so complicated. That's it.

Jerold: See, I think[crosstalk][01:56:19] right but you see, I mean, maybe I wasn't as clear in the time I had and I think you're absolutely right but I would say two things; I think it's crucial that it be very, very technical. It's just what Tersh actually said and what I suggested as well, this is a technical area and it's fine that we've got historic preservation, it has a traditional definition. I do suggest that we stick with traditional ideas of what historic preservation is so people don't begin to say well, that's not historic preservation you're really sort of going well beyond what it is. So within our area I don't mind because that's what ends up being legally challenged. The notion that it has a technical aspect to it which requires expertise, I think that's great for the sort of ongoing protections. I think the point you're making though, which is a powerful one, and what I've suggested is there is a rhetorical positioning that could be detached from the technical aspects of the law itself and that rhetorical position- and that's the point I was trying to make Tersh- is not that I want there to be a universal human right that's actually enforced in law, it's not going to happen anyway but I do think that's people should understand that historic

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preservation is much more than George Washington slept here or particular architectural style. It's really something about human psychology, emotional stability of giving us sort of a tether, an anchor, something that's physical so we know who we are and where we are at a time when we're looking more at brain and MRI scans. This is I think a very powerful, important part. I think we all know it intuitively, we may not have loved the world trade center towers but boy, did we miss them when they were finally gone, this notion of the built environment as being part of who we are as human beings, I think has a rhetorical positioning , a powerful place to put historic preservation is part of without changing the technical nature of what the legal regime is such that when we go to court we are dealing with expertise.

Tersh: This would be an appropriate point to remember the wonderful, New Yorker cartoon out in front of a complex with says 'The Andersons: A Complex Relationship'

Ann: And on that note, thank you very much.

David: Thank you Ann and Jerald and Paul and Tersh we're going to take a short break, we're trying to stay on our schedule so this is just about a 12 minute break for whatever you need and we'll see you back here soon, 15 is a little generous.

[End of transcription]