STATE CONTROL OF ARCHAEOLOGICAL RESOURCES ON PRIVATE LAND

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INTRODUCTION

In Titusville, Florida, road builders in a new subdivision were digging out a swampy bog near a pond. They gave up when, after digging twenty feet down with a backhoe, they had not hit the bottom of the bog. In the process, however, they discovered two skeletons. After the police determined no foul play was involved, archaeologists from Florida State University were called in and determined the bog was an Indian burial site approximately 8000 years old. The greatest discovery was in the skeletons; the bog had preserved them so well that many still contained the brains of the deceased. They are the oldest examples of human cellular structure anywhere. Windover Farms, Inc., donated the site to the state, paid some of the excavating costs, and lent its name to the site. The dig was to be closed in January 1987 with half the area left for future digs.[1]

In Plymouth, Massachusetts, a bulldozer operator hired by a developer to work on a planned housing development graded an area adjacent to the development. In the process, he also destroyed a village, 800 years old, described as one of the last known Indian villages that existed before the arrival of the Pilgrims in 1620. Valerie Talmedge, director of the Massachusetts Historical Commission, said the site would have provided information on Indian life before European culture. The site had been left unmarked due to fear of looting of artifacts.[2]

These examples illustrate the contrasting treatment of America's archaeological resources. Public awareness of environmental problems is becoming more prevalent today, as evidenced by public involvement in pollution prevention, wildlife preservation, and the preservation of scenic wonders. Subsumed within this concern for our environment is an interest in the preservation of our cultural and historical past, the "human environment." One way of examining our cultural heritage is through the study of archaeology. This paper will survey the processes in which states and local governments have (and could) protect our archaeological resources, with an emphasis on the protection of archaeological sites on private land.

ARCHAEOLOGY IN GENERAL: THE PROBLEM

Archaeology is the science by which remains of ancient man can be methodically and systematically studied to obtain as complete a picture as possible of ancient culture

[1] Rensberger, *Florida Bog Reveals 8,000 Year-Old Secrets*, Washington Post, Oct. 26, 1986, at A1, col. C.

[2] *Indian Village Bulldozed*, Washington Post, Aug. 1, 1987, at A4, col. F.

and society, thereby allowing past ways of life to be reconstructed.[3] Ivor Noel-Hume and other historical archaeologists would also include the "recent past."[4] Archaeologists generally attempt to examine how man lived and adapted the environment to his own use.

Today an archaeologist at work on a site is looking for all remains, not just obvious evidence of human activity. Not only artifacts (like pottery, metals, and stone tools) and features (permanent objects situated in the soil such as floors, pits, walls, foundations, post holes) are gathered and recorded, but also nonartificial materials are gathered: seeds, animal bones, and soils.[5] These artifacts and features help identify the community that produced them both chronologically and culturally.

Archaeology is an important concern, according to noted archaeologist Jaquetta Hawkes, because it gives a people a "sense of having roots."[6] Archaeology also helps chronicle our cultural heritage, by filling in the blanks left by the written record of history. At some point, every nation looks into its past with pride, and how successfully archaeology can preserve things today "may have a very real influence on how this nation thinks of itself in the centuries ahead."[7] As the International Council on Archaeological Heritage Management proclaimed in its charter, "The protection of the archaeological heritage is the moral obligation of all human beings."[8]

Given a motive for preserving archaeological sites, there is an ever-growing urgency to preserve them. One estimate calculated that in California alone two archaeological sites per day were being destroyed by construction projects, natural erosion, incompetent excavation, or just plain vandalism.[9] Today, one can readily see the changing landscape through development just by driving through the country. This development may damage the ecological part of the environment, but destruction of archaeological sites is permanent. As Hester A. Davis of the Arkansas Archaeological Survey said, "You can't grow a new Indian site."[10] Once one perceives the need to preserve such sites for the information they contain, however, subsidiary problems of identifying sites and analyzing which sites to preserve crop up.

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[3] M. JOUKOWSKY, A COMPLETE MANUAL OF FIELD ARCHAEOLOGY 2 (1980).

[4] I. NOEL-HUME, HISTORICAL ARCHAEOLOGY 12 (1969).

[5] JOUKOWSKY, *supra* note 3, at 177.

[6] NOEL-HUME, *supra* note 4, at 8.

[7] *Id.*

[8] Klock, *The Friend's Forum*, 5 ALEXANDRIA ARCHAEOLOGY VOLUNTEER NEWS 4 (Nov. 1987).

[9] G. MCHARGUE & M. ROBERTS, A FIELD GUIDE TO CONSERVATION ARCHAEOLOGY IN NORTH AMERICA 22 (1977).

[10] *Is There a Future for the Past?*, Archaeology (Oct. 1971) (*quoted in* L. BRENNAN, BEGINNER'S GUIDE TO ARCHAEOLOGY 14 (1973)).

In the United States, there are potentially innumerable sites of archaeological significance. Indians have lived in North America since approximately 10,000 B.C.[11] and, given the nomadic tendencies of some tribes, the possibility for sites anywhere is incredible. Also, James Deetz considers the potential number of historical archaeological sites in the eastern United States alone "astronomical".[12] The number is astronomical because historical sites represent the period of maximum population in the U.S. The ultimate dilemma is in deciding which sites to save. In the past, homes of famous people were preserved, spawning "individual" archaeology.

However, archaeology studies cultures, not individuals; it would be dangerous to extrapolate generalizations about a society from a site used by an elite sector of that society.[13] Archaeologists would thus ideally like to save all sites, at least until excavation. The Office of Technical Assessment of the U.S. Congress even says excavation should be the last resort in archaeological research because new techniques in research are constantly being developed.[14] The key for state governments is to balance the common interest of mankind in the information contained in archaeological sites and society's interest in putting the land to an economically viable use.

STATE LANDS

In general, state governments control archaeological sites located on state owned or state controlled property. The state either explicitly reserves the right to investigate and excavate archaeological sites[15] or grants permits to qualified institutions and individuals to excavate the sites, while the state retains ownership of any artifacts found.[16] A state archaeologist or state historical commission usually has power to grant permits.

State governments usually provide for state agencies to "cooperate" with the state agency charged with protection of archaeological sites.[17] The degree of cooperation, though, varies from state to state. Alaska, for example, provides for one of the more strict state programs on public construction sites. The Department of Natural Resources may survey an affected area for historical or archaeological sites before "public construction or public improvement of any nature is undertaken by the state, or by a governmental agency of the state, or by a private person under contract with or licensed

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[11] G. MCHARGUE & M. ROBERTS, *supra* note 9, at 62.

[12] J. DEETZ, IN SMALL THINGS FORGOTTEN 32 (1977).

[13] *Id.* at 30-31.

[14] OFFICE OF TECHNICAL ASSESSMENT, CONGRESS OF THE UNITED STATES, TECHNOLOGIES FOR PREHISTORIC AND HISTORIC PRESERVATION 70 (1988).

[15] *See, e.g.*, VA. CODE ANN. Sec. 10.1-901 (Supp. 1988).

[16] *See, e.g.*, *id.* at Sec. 10.1-903.

[17] *See, e.g.*, ALASKA STAT. Sec. 41.35.070 (Supp. 1988).

by the state or governmental agency of the state."[18] The department has the power to stop construction and investigate and excavate the site if it determines that such sites will be adversely affected by the public construction or improvement. Of course, "[a]ll investigations, recording and salvage work shall be performed as expeditiously as possible so that no state construction project will be unduly impaired, impeded, or delayed."[19]

Some states provide for inspection of state land before state sale and the possibility of retention of historic sites or structures for preservation.[20] State governments overall do an admirable job in preserving state controlled archaeological sites. They recognize that they are preserving these sites and artifacts for the common welfare of the general public and consequently, they take their job seriously by mandating penalties for permit violations and vandalism. Unfortunately, the states do not extend their expansive protection to archaeological sites located on privately owned land.

PRIVATE LAND

IN GENERAL

State control of archaeological sites on private land can be described as limited; the states respect the sanctity of private property. State statutes provide for control of such archaeological sites (and artifacts found) by the landowner.[21] Occasionally, a state will declare its wishes that a property owner will excavate or preserve a site in conformity with proper archaeological standards and methods. Oklahoma provides an example:

> "[i]n order to protect and preserve historical, archaeological, and scientific information, matters and objects and other archaeological remains, which may from time to time be found on privately owned lands within Oklahoma, the Legislature declares as a statement of purpose that archaeological excavations on privately owned lands should be discouraged except in accordance with and pursuant to the spirit and authority of this statute."[22]

Most states thus merely encourage a property owner to be civic minded; there are few state controls over the use of privately owned archaeological sites. Owners may loot a site for artifacts if they so desire without regard for their informational value. The ultimate control still resides in the property owner. States possess the power to acquire land, through gift or purchase, for the purpose of preserving archaeological or historic

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[18] *Id.*

[19] *Id.*

[20] *See, e.g.*, IND. CODE ANN. Sec. 14-3-3.4-5 (Burns 1987).

[21] *See, e.g.*, VA. CODE ANN. Sec. 10.1-904 (Supp. 1988).

[22] OKLA. STAT. ANN. tit. 53, sec. 361 (1988).

sites.[23] Very few states, however, take the extra step by allowing property acquisition through the process of eminent domain.[24]

Another state tool is the conservation easement, a nonpossessory interest in real property for the purpose of preserving the archaeological aspects of the property, whereby the landowner maintains the site in accordance with the easement.[25] The designated state agency or historical commission may declare a site or structure a historic site or landmark, thus ensuring state protection through various regulations.[26] But if an individual owns the site, the state may only declare the site a landmark/historic site with owner consent. Easements must also be purchased from the owner. Consequently, the most common state mechanisms for protecting such sites are subject to owner consent, either through selling an interest or consenting to state control of the lands' archaeological resources.

PERMITS

Excavations on private lands could be controlled by the state through a permit system. Permits are generally required for excavations on state property and some states require a permit for excavating on private lands designated as state landmarks.[27] Only a few states, however, have taken the next logical step and provided for a permit requirement for excavating on any land in the state. Colorado provides one of the few such examples:

> "The society shall issue or deny permits for the investigation, excavation, gathering, or removal from the natural state of any historical, prehistorical, and archaeological resources within the state and determine whether or not the applicants for such permits are duly qualified to conduct investigations for which the permit is requested."[28]

Such a statute, depending on the permit qualifications, could ensure excavations that conform with proper archaeological standards, yet protect the owner's property rights in the artifacts and his development rights.

The idiosyncrasies of specific state statutes may nevertheless present interpretive problems. One such ambiguity is in the North Dakota Code,[29] which requires a permit for excavating on any land in the state. However, the Code also states that nothing in the chapter shall limit a private land owner from excavating on his own land or

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[23] *See, e.g.*, TENN. CODE ANN. Sec. 11-6-114 (1987).

[24] *See* ALA. CODE Sec. 41-9-242 (1982); ALASKA STAT. Sec. 41.35.060 (1988); HAW. REV. STAT. Sec. 6E-3 (1983); TEX. REV. CIV. STAT. ANN. art. 6081c (Vernon 1970).

[25] *See, e.g.*, VA. CODE ANN. Sec. 10.1-1009 (1988).

[26] *See, e.g., id.* at Sec. 10.1-905 (Supp. 1988).

[27] *See, e.g.*, FLA. STAT. ANN. Sec. 267.12 (West 1988).

[28] COLO. REV. STAT. Sec. 24-80-406(1)(a) (1982).

[29] N. DAKOTA CODE Sec. 55-03-02.

someone with the owner's written consent.[30] An attempted reconciliation of these provisions argues that the Superintendent (the permit issuer) cannot refuse to issue a permit where the applicant is the land owner or someone with the land owner's written consent.[31]

Beck's reasoning, however, is directly contradicted by the *Turley* decision in New Mexico.[32] Turley was hired by land owners to excavate an archaeological site on their land, using a front-end loader. The applicable New Mexico statute stated that no person could excavate an archaeological site with mechanical equipment on private land without a permit. However, nothing in the section was deemed "to require such owner to obtain a permit for personal excavation on his own land."[33] Turley did not have a permit, though he did have a contract with the owners. Turley argued, however, that the word "owner" in the statute also included the owner's agent.

The Court of Appeals of New Mexico took a common sense approach to this argument and ruled that this section did not include the word "agent," whereas other sections did.[34] By process of exclusion, therefore, the Legislature did not intend to include the owner's agent within the section.[35] The Court of Appeals fixed on the word "personal" in the statute and determined the word meant that the act is done in person without intervention of another.[36] "This statutory requirement of "personal" excavation cannot be reconciled with the contention that "owner" includes 'agent'", and concluded the common law rule of agency was not applicable to this statute.[37] The court also said that permitting a land owner to excavate while requiring his agent to acquire a permit was consistent with the legislative intent of the statute: to preserve and protect structures, sites, and objects of historical significance in New Mexico and to discourage archaeology on private lands except in accordance with the provisions and spirit of the Act.[38]

The Supreme Court of New Mexico then rejected this analysis and overruled the Court of Appeals, holding that Turley, as the land owner's employee, was not required to get a permit.[39] The court asserted it was construing Section 18-6-11 "according to its

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30 *Id.*

31 Note, *North Dakota's Historic Preservation Law*, 53 N.D.L. REV. 177, 199 (1976).

32 State v. Turley, 96 N.M. 592, 633 P.2d 700 (N.M. Ct. App. 1980).

33 N.M. STAT. ANN. Sec. 18-6-11 (1978).

34 *Id.* at Sec. 18-6-9(B) (1978).

35 *Turley*, 96 N.M. at 594, 633 P.2d at 703.

36 *Id.*

37 *Id.*

38 *Id.* at 594, 633 P.2d at 702-3.

39 *Id.*

plain meaning."[40] The court applied the law of agency, stating that a person may do an activity through an agent that he may do personally, "unless public policy or some agreement requires personal performance."[41] The statute must expressly or by implication prevent an agent of the owner from acting.

The Supreme Court of New Mexico's interpretation of the statute nullifies its policy. The New Mexico legislature stated that "the historical and cultural heritage of the state is one of the state's most valued and important assets" and laid out a program designed to preserve the state's cultural heritage.[42] The legislature expressly declared its intent to discourage private land owners from excavating archaeological sites except in accordance with the Act, including the permit system.[43] The permit system is designed to assure that archaeological remains are removed with adherence to proper archaeological procedures, yet to preserve some discretion with the land owner. By allowing a land owner to hire anyone to excavate without a permit, the information the state seeks to preserve may be lost.

A strong argument can be made that the Supreme Court of New Mexico chokes on its own words: a strong public policy of preserving the state's cultural heritage mandates personal performance. *Turley* reveals the problems of accommodating private land owners within a permit system. State legislatures should be careful to be explicit in their permit statutes, lest more Turleys and circumventions of state policy arise.

COMPREHENSIVE LAND USE ACTS

The protection of archaeological resources can be attained by including such protection in legislation designed to protect the environment in general from the effects of development. California has enacted an elaborate statutory framework designed to protect its environment. The California Environment Quality Act (CEQA) provides that public agencies should not approve projects[44] as proposed if there are feasible alternatives or mitigation measures which would lessen the significant environmental effects of such projects.[45] The Act is primarily designed to apply to "discretionary" projects proposed to be carried out or approved by public agencies, including

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[40] *Id.*

[41] *Id.*

[42] N.M. STAT. ANN. Sec. 18-6-2 (1978).

[43] *Id.* at Sec. 18-6-10.

[44] Including direct activity by a public agency, activities undertaken by a person supported by any form of assistance by a public agency, and activities involving issuance to a person of a lease, permit, license, certificate, or other entitlement for use by a public agency. CAL. PUB. RES. CODE Sec. 21065 (West 1986).

[45] *Id.* at Sec. 21002.

amendment of zoning ordinances, issuance of zoning variances, issuance of conditional use permits, and approval of tentative subdivision maps.[46]

One part of the process is the filing of an Environmental Impact Report, a document to be considered by every public agency prior to its approval or disapproval of a project. The report provides public agencies and the public detailed information about the effect a proposed project will likely have on the environment. Additionally, it lists ways in which the significant effects of a project may be minimized and indicates alternatives to such a project.[47] The public agency having principal responsibility for carrying out or approving a project has the responsibility for determining whether an environmental impact report or negative declaration shall be required for any project.[48]

The state has authority to require preservation of "unique" archaeological sites or mitigation of development effects on the site.[49] Examples of preservation include avoidance of such sites, conservation easements, and capping or paving the sites with a layer of soil before building. Mitigation involves excavation of the parts of the site that would be destroyed or damaged by construction. Such excavation should normally be completed within 90 days after final approval of a project.

The statute is instructive in establishing guidelines by defining a site as a "unique archaeological resource" if it has a particular quality, such as being the oldest or best example of its type, is directly associated with a prehistoric or historic event or person, or has information needed to answer important scientific research questions and there is demonstrable public interest in the information. The protection provided may be limited, however, because the statute expires January 1, 1994. One can expect another amendment to be forthcoming, though, because the statute was originally set to expire in 1986, but was amended.

Section 21083.2 may have been designed to address *Society for California Archaeology v. County of Butte*[50] in order to specifically protect archaeological sites. Prior to the decision, "environmental" was defined as "objects of historical or aesthetic significance." The court of appeals ruled the definition included archaeological sites.[51] In this case, the Court overturned approval of a subdivision because the board of supervisors did not comment specifically and respond to the archaeological information contained in the environmental impact report. The board must state why certain positions or objections were accepted or rejected.[52] Although objections based on the

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[46] *Id.* at Sec. 21080.

[47] *Id.* at Sec. 21061.

[48] *Id.*

[49] *Id.* at Sec. 21083.2.

[50] 65 Cal. App. 3d 832, 135 Cal. Rptr. 679 (1977).

[51] *Id.* at 837, 135 Cal. Rptr. at 682.

[52] *Id.* at 839, 135 Cal. Rptr. at 683.

adverse effects of the development on archaeological sites were presented, the board may not have felt an obligation to respond due to the lack of explicitness in the statute. Section 21083.2 removes this ambiguity by mandating consideration of the effects of a project on archaeological resources during the approval process.[53] Some jurisdictions provide protection for designated natural areas, such as coastal areas,[54] scenic rivers,[55] and "areas of critical state concern."[56] Subsumed within these environmental protection acts are protections for archaeological resources. Such comprehensive frameworks are useful in identifying archaeological sites and mitigating the effects of development projects. This type of legislation would serve the purpose of collection of information contained in archaeological sites by preserving a site outright or at least by excavating the site properly within recognized archaeological procedures.

The likelihood, however, that other states will follow the lead of California and enact environmental protection statutes for the entire state is unlikely. A state is much more likely to pass such legislation covering a discrete natural area whose uniqueness or importance to the state is widely recognized, such as Virginia's Chesapeake Bay. Restricted, rather than statewide, areas of monitoring will also solve administrative problems by making monitoring easier and thus save already inadequate state archaeological funding.

HISTORIC DISTRICTS

Whereas regional environmental/archaeological protection plans are more suited to rural or undeveloped areas, the regulation of archaeological resources located on private lands in more developed areas or in the urban context is best achieved through historic district legislation. Several states provide for local designation of such areas or specifically list the areas in the statute.[57] While the state has to obtain owner consent before a single site is named a landmark, if the site is within a homogeneous area of historical or cultural significance, the entire area may be designated as a historic district and be regulated through ordinances, subject to various methods of owner

[53] Other litigation discussing the effects of the proposed projects on archaeological sites and mitigation include *Atherton v. Board of Supervisors*, 146 Cal. App. 3d 346, 194 Cal. Rptr. 203 (1983), *Environmental Protection Information Center Inc. v. Johnson*, 170 Cal. App. 3d 604, 216 Cal. Rptr. 502 (1985) (requirements apply to Timber Harvesting Plans), and *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal. App. 3d 1167, 243 Cal. Rptr. 339 (1988).

[54] *See, e.g.*, CAL. PUB. RES. CODE Sec. 30244; HAW. REV. STAT. SEC. 205A-2 (1987).

[55] TENN. CODE ANN. Sec. 11-13-101 (1987).

[56] FLA. STAT. ANN. Sec. 380.05 (West 1988).

[57] *See, e.g.*, VA. CODE ANN. Sec. 15.1-503.2 (Supp. 1988).

approval. For example, Connecticut provides that two-thirds of the owners have to vote affirmatively for a proposed district in order for it to become a historic district.[58]

Currently, most historical district statutes use cultural, architectural, and historical significance as criteria.[59] One could possibly read archaeology into these criteria, but few states explicitly specify archaeological resources as criteria to be evaluated in the designation process.[60] Nevertheless, historic district statutes and ordinances can easily be amended to require review of archaeological resources in the designation process.

The basic procedure in designating a historic district remains generally the same throughout the states. The process begins with the "historic preservation committee" that investigates and recommends landmarks or districts to the appropriate zoning or planning agency for designation as historic districts. The governing body then may pass ordinances or statutes designating the area as a historic district. The preservation committee then usually controls the district; its members are primarily represented by experts in history, architecture, and possibly archaeology. Any new structures to be built or changes to the exteriors of buildings in the district have to be approved by the commission with what is called a certificate of appropriateness. Louisiana is unique in prohibiting excavations without a certificate of appropriateness if earthworks of historical or archaeological importance exist in the historic district.[61] When the commission denies a certificate of appropriateness for modification or construction, the property owner can then appeal the decision to the appropriate governing body over the commission, and then to a court of competent jurisdiction.[62] Under the historic district procedure, the property owner's interest in a viable economic use of his property is protected, while the public's interest in maintaining the historical identity of the area is preserved.

As of 1983, 800 to 1000 communities in the United States have created preservation committees at the local level, a jump from a mere 11 in 1957.[63] The phenomenal jump can be credited in some part to the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.[64] The facts in *Penn Central* involved the city

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[58] CONN. GEN. STAT. ANN. Sec. 7-147b (West 1988).

[59] New Hampshire uses "cultural, social, economic, political and architectural history". N.H. REV. STAT. ANN. Sec. 31:89a (1988).

[60] *See, e.g.*, IDAHO CODE Sec. 67-4607 (1980); ILL. ANN. STAT. ch. 34, sec. 6503 (Smith-Hurd 1988); MICH. COMP. LAWS ANN. Sec. 399.202 (West 1988); S.D. CODIFIED LAWS ANN. Sec. 1-19B-34 (1985).

[61] LA. REV. STAT. ANN. Sec. 25:737 (West 1988).

[62] *Id.*

[63] R. RODDEWIG, PREPARING A HISTORIC PRESERVATION ORDINANCE 1 (1983).

[64] 438 U.S. 104 (1978).

designation of Grand Central Terminal as a landmark, thus subjecting it to unique regulations, and whether such designation constituted a "taking" under the Fifth Amendment. The Court generally held that state landmark designation, and thus historic district designation, does not constitute a "taking" under the Fifth Amendment. The Court noted it had upheld land use regulations for the health, safety, morals, or general welfare that nevertheless destroyed or adversely affected recognized real property interests.[65] But, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose...or perhaps if it has an unduly harsh impact upon the owner's use of the property."[66]

In Penn Central's case, the Court held the landmark designation statute was not discriminatory zoning, since it was part of a comprehensive plan to preserve historic or aesthetic sites in the city, and the designation was not arbitrary since the owner had a right to judicial review.[67] The Court concluded the landmark designation was not a "taking" because the restrictions were substantially related to the promotion of the general welfare and still permitted reasonable beneficial use of the site.[68]

Historic districts are arguably in a better position than landmarks as a result of *Penn Central*. *Penn Central* did not dispute that a showing of property value diminution would not establish a "taking" if the restriction had been imposed as a result of historic district legislation.[69] The Court also noted that duties imposed by zoning and historic district legislation that apply throughout particular physical communities provide assurances against arbitrariness.[70]

One can infer from *Penn Central* that in order for historic district designations to be constitutional, they can not be arbitrary and must provide for reasonable beneficial use by the owner. The cure for arbitrariness is specific criteria.[71] The ordinance should also permit the owner to enjoy the beneficial use of the property, either economically or personally. Consequently, with ordinances covering

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[65] *Id.* at 125.

[66] *Id.* at 127.

[67] *Id.* at 132, 133.

[68] *Id.* at 138.

[69] *Id.* at 131. The Court cited Maher v. City of New Orleans, 516 F.2d 1051 (1975), which upheld the Vieux Carre ordinance, an architectural control ordinance applicable to New Orlean's French Quarter, as a permissive means to pursue the legitimate state goal of preserving the "tout ensemble" of the Quarter. The property owner did not show a "taking" because he did not prove the ordinance denied him a reasonable rate of return on his property.

[70] *Penn Central*, 438 U.S. at 135.

[71] Alaska provides that a historic district is a compact area of historical significance in which two or more structures important in state or national history are located. "Structures important in state or national history" is defined as property listed in the National Register of Historic Places, characteristic of the Russian-American period before 1867, early territorial period before 1930, or reflecting indigenous characteristics of Native culture in Alaska. ALASKA STAT. Sec. 29.55.020 (1986).

archaeological sites, preservation or excavation of the site should not be duly unreasonable so as to destroy the owner's business, for example. In any event, the right to judicial review of a historic district designation and of denial of a certificate of appropriateness mitigates any damage the regulation might entail. Judicial review can adequately reconcile a property owner's desire to utilize his property with the public's interest in preserving its cultural heritage.

THE ALEXANDRIA ARCHAEOLOGY PRESERVATION CODE

The city of Alexandria, Virginia, has proposed an ordinance system which would require archaeological survey work on any site slated for development. The Code was first proposed in 1984; subsequent research by the Alexandria Archaeology Commission revealed that only five jurisdictions in the U.S. require archaeological work prior to development (including Santa Fe, N.M. and Dade County, Fla.). A draft code, written by Assistant City Attorney Ignacio Pessoa, was then sent to the City Council in June 1987. A revised draft was completed in March 1988; the ordinance is now further being revised before public hearings and a vote by the City Council.[72]

The Archaeology Preservation Code requires an archaeological clearance before grading or excavation can be undertaken on a site, depending on the area in which the site is located.[73] On receipt of an archaeological clearance application, the city archaeologist conducts or accepts an independent archaeological assessment of the activity. The assessment may include a history, extent and location of ground disturbances, previous acts of ground disturbance, type and quantity of predicted archaeological resources on the site, and analysis of the public value of the site relating to its cultural heritage. The city archaeologist shall determine in the assessment the probability of adverse effects on archaeological resources by the activity, the benefit to be derived from preservation of the archaeological resources, and an archaeology management plan to be performed by the city or the applicant to secure the public benefits identified.[74] The Code provides criteria for determining the significance of archaeological resources on a site.[75]

If the city archaeologist determines the proposed activity would have no adverse effects on any archaeological resources on the site, he shall issue an excavation permit. But if the activity will have adverse effects on such resources, the city archaeologist and applicant are to decide on a management plan. Management plans may include monitoring of the excavation, surface reconnaissance, and full-scale excavations and in

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[72] P. Cressey, *The Director's Chair*, 6 ALEXANDRIA ARCHAEOLOGY VOLUNTEER NEWS 2 (April 1988).

[73] Old Town Alexandria, the designated historic district, entails the most protection, then parcels with buildings over one hundred years old on them, and so on. ARCH. PRES. CODE Sec. 7-6-344 to 346.

[74] *Id.* at Sec. 7-6-348.

[75] *Id.* at Sec. 7-6-350.

place preservation; all resources found on private land, however, remain property of the land owner.[76] Once a management plan is determined, a permit is issued, conditioned on fulfillment of the requirements of the management plan.[77] The applicant further has right of appeal to the Archaeology Preservation Code Committee, the City Council, and then to the Circuit Court of the City of Alexandria.[78] Alexandria has thus formulated an ordinance system designed to protect its archaeological resources, patterned on established historic district ordinances as applied to structures. Whether the Code can survive the influence of the real estate lobby and pass in its present form, only time will tell.

CONCLUSION

Archaeology has slowly been recognized as a part of our cultural heritage deemed worthy of protection in the public interest. States have wholeheartedly protected archaeological resources on state lands, but have been reticent about treading on the rights of private property. Whether states will expand the principle that a private land owner cannot use his property so as to harm the public interest (and thus protect archaeological sites on private land) depends on the public interest. Extensive protection of such sites on private land is premised on the assumption that the public actually cares.

Given the proliferation of historic district commissions, one can safely assume there is growing interest in the preservation of our cultural heritage. Comprehensive permit procedures, comprehensive land use statutes recognizing archaeological preservation, and archaeology ordinances in the historic district setting should be enacted to further the public welfare. The examples in the introduction are merely typical; the discovery of archaeological sites in construction sites happens every week. The preservation of man's cultural heritage requires more control over the actions of private property owners. To allow a land owner to destroy or excavate a site without any control or procedures is like taking words out of context - the essential meaning is lost forever.

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[76] *Id.* at Sec. 7-6-351.

[77] *Id.* at Sec. 7-6-352.

[78] *Id.* at Sec. 7-6-368 to 70.