

ALBERT S. BARD AND THE ORIGIN OF HISTORIC PRESERVATION IN NEW YORK STATE

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Advocates of New York State's enabling legislation specific to historic preservation, passed by the legislature and signed by Governor W. Averell Harriman in April 1956,¹ focused on neighborhood preservation and "planning for community appearance."² The criteria in the law is broadly worded, the deliberate result of the thorough grasp that the bill's principal drafter, attorney Albert S. Bard, had of the development of aesthetic regulation in American jurisprudence. It can be argued that although New York City adopted its heralded Landmarks Law in 1965,³ the reach of what the framers envisioned in the 1950s has never been realized to a significant degree. In fact, the unfinished business of those who formulated and promoted what came to be known as the Bard Law includes creating a more effective means to address the protection of neighborhood character in jurisdictions like New York City.

By the fall of 1954, a Joint Committee on Design Control of the American Institute of Architects New York Chapter and the local organization of the American Institute of Planning held regular meetings.⁴ Participants included architects, planners, and civic-minded individuals who were keenly aware of the pressing need for the establishment of tools to protect public and private property from unsympathetic change.⁵ The stated objective of the Committee was "[t]o collect, analyze and evaluate existing laws, ordinances and regulations . . . having to do with the appearance of individual buildings . . . and open

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1. N.Y. GEN. MUN. LAW. § 96-a (McKinney, Westlaw through L.2011, ch. 1-54 & 57-495). In 1968 the relevant provision of the original enabling legislation, New York Historic Preservation Enabling Act of 1956, Law of Apr. 2, 1956, ch. 216, 1956 N.Y. Laws 908, was repealed and reenacted at § 96-a without substantive changes. Mary Spearing, Note, *Landmark Preservation: The Problem of the Tax Exempt Owner*, 3 FORDHAM URB. L.J. 123, 123 n.2 (1974). The Governor had vetoed the same legislation a year before in 1955. It was reintroduced and passed in 1956, defeating the previous veto. Bard Act, N.Y. PRESERVATION ARCHIVE PROJECT, <http://www.nypap.org/content/bard-act> (last visited Jan. 28, 2012) [hereinafter Bard Act].

2. AIA-AIP N. Y. AREA JOINT COMM. ON DESIGN CONTROL PLANNING AND CMTY. APPEARANCE vii (Henry Fagin & Robert C. Weinberg eds., 1958).

3. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)).

4. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Dec. 7, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

5. Id.

spaces . . . and of any other aspects of the urban scene where design regulation might be desirable and practicable.”⁶

An additional objective was “[t]o suggest new and better regulations and other procedures, if practicable . . . and to investigate related questions of the advantages and disadvantages, aesthetically and politically, of such regulations . . . to the practicing architect, the property owner and the [private] citizen.”⁷ Committee members held expansive ideas about the scope of the topic at hand. The meeting minutes read: “[t]he city’s responsibility is to the design of the whole scene as taken in by the eye at any one point as well as to the design of any one individual building.”⁸

At the November 18, 1954 meeting of the Joint Committee on Design Control, members agreed that “[o]ur job is to formulate regulations applicable to our region which would stand the test of legal action.”⁹ Attorney Albert S. Bard explained to his fellow Committee members that unless wording was “added to the State Law relating to powers of cities, as a form of enabling legislation, the more specific regulation we might recommend for New York City itself, for other communities, would probably not hold water.”¹⁰ A remarkable one-page document is appended to these meeting minutes. It contains the earliest known version of the language adopted into New York State law a year and a half later, drafted by Mr. Bard. The wording is striking for its breadth:

To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, including appropriate control of the use or appearance of neighboring private property within public view, or both . . .¹¹

Bard’s prescience in crafting such far reaching criteria no doubt grew from his lifelong, careful study of “aesthetics as a basis for the exercise of the police power,” as he described it late in his career in correspondence with a Harvard Law School student.¹² New York City’s Landmarks Law, when it was enacted

6. Meeting Minutes (Dec. 7, 1954), *supra* note 4.

7. *Id.*

8. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Dec. 16, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

9. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Nov. 18, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

10. *Id.*

11. *Id.*

12. Letter from Albert S. Bard, Attorney, to Calhoun Dickinson, Harvard Law Student (Dec. 15, 1959) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review). Calhoun Dickinson was a third year law student taking a Land-Use Planning course at Harvard Law and was put in touch with Bard by Calhoun’s professor, Charles Haar. Letter from Calhoun Dickson, Harvard Law Student, to Albert S. Bard Attorney (Dec. 12, 1959) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives

in 1965, contained this same sweeping language.¹³ In 1954, however, the members of the Joint Committee thought that an amendment to the New York City Zoning Resolution, based on the principles to be established “[i]n the State Enabling Act by Mr. Bard’s proposed amendment would be the next step so far as New York City is concerned.”¹⁴ They were not alone in conceptualizing the implementation of historic preservation goals through the mechanism of zoning. As zoning reform became a municipal priority in the latter half of the 1950s, culminating in revisions to New York City’s Zoning Resolution in 1961, advocates of historic preservation focused repeatedly on zoning as an avenue for protection.¹⁵

When New York City’s major zoning changes were complete, they were conspicuously lacking any acknowledgement of historic preservation needs or goals. This was due to a shrewd calculation by James Felt, Chairman of the Planning Commission, who was in charge of the zoning reform. His concern was that adding the subject of historic preservation to an already politically charged proposed new zoning could keep him from achieving his primary goal.¹⁶ “Aesthetic zoning was only one of a number of reforms that would be left behind on the road to the resolutions approval.”¹⁷ As part of the compromise that Felt reached with leading preservationists, Mayor Robert F. Wagner, Sr. established a “Committee for the Preservation of Structures of Historic and Esthetic Importance.”¹⁸ At its third meeting on September 12, 1961, minutes reveal that a question was raised as to whether or not the master list of New York City landmarks “should be made part of the Zoning Resolution. It was felt that this could best be resolved in conference with the City Planning Commission.”¹⁹ It is unclear whether or not the Mayor’s

Division & the Widener Law Review). It is possible that Albert Bard may have influenced Dickinson, as Dickinson’s obituary recounts him as an advocate of aesthetic regulation law. See Sharon Pian Chan, Obituary: Calhoun Dickinson, 77, Attorney and Parks Advocate, SEATTLE TIMES (Oct. 13, 2008, 12:00 AM), http://seattletimes.nwsource.com/html/localnews/2008259783_dickinsonobit13m.html.

13. Law of Apr. 19, 1965, No. 46, 1965 N.Y. Local Laws 261 (codified as amended at N.Y.C ADMIN. CODE §§ 25-301 to 25-321 (West, Westlaw through Local Law 29 of 2011)). For a discussion of the specific amendments made to the Landmarks Law that changed the language originally drafted by Bard see Bard Act, *supra* note 1.

14. AIA-AIP JOINT COMM. ON DESIGN CONTROL, Meeting Minutes (Nov. 18, 1954), in Albert S. Bard Papers 1893-1962 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

15. See, e.g., Anthony C. Wood, An Interview with the First Chairman of the Landmarks Preservation Commission, The Late Geoffrey Platt, VILLAGE VIEWS, Winter 1987, at 7, 7-9, 17, 28, 38 [hereinafter An Interview with Geoffrey Platt]; Anthony C. Wood, An Interview with Harmon Goldstone, VILLAGE VIEWS, Summer 1987, at 17, 24-25, 35-36 [hereinafter An Interview with Harmon Goldstone].

16. ANTHONY C. WOOD, PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY’S LANDMARKS 244-46 (2008) [hereinafter PRESERVING NEW YORK].

17. PRESERVING NEW YORK, *supra* note 16, at 246.

18. An Interview with Geoffrey Platt, *supra* note 15, at 8-9; See also An Interview with Harmon Goldstone, *supra* note 15, at 38-39.

19. COMM. FOR THE PRES. OF STRUCTURES OF HISTORIC AND ESTHETIC IMPORTANCE, Meeting Minutes (Sept. 12, 1961), in Whitney North Seymour Papers, 1930-1983 (on file with

Committee conferred with urban planners and their Commissioners on this point. What did happen is that preservation advocates sought and achieved the adoption of New York City's local landmarks ordinance,²⁰ a distinctly different approach to realizing their goals. But that the powers associated with zoning were understood throughout much of the 1950s and into the early 1960s as being sufficient and valid in support of historic preservation objectives is noteworthy.²¹ It suggests that today's ongoing erosion of neighborhood character throughout New York City can be addressed with planning and zoning tools, and it offers valuable guidance on how this important contemporary challenge might be confronted.

In a notable 1955 article in *The American City*, Albert S. Bard wrote:

Not until Courts recognize community beauty as a ground for the exercise of police power by the state or community upon the same basis and as fully as they recognize health, safety, morality, and good order as grounds for such exercise, and as an equal partner with those factors in the term "community welfare," will planning and the law of planning come full circle.²²

Bard noted that while this had not yet taken place, "the law is on its way and the recent case of *Berman v. Parker* . . . decided by the United States Supreme Court on November 22, 1954, helps close that gap."²³ *Berman* was a seminal case in the development of urban renewal, involving a challenge to the District of Columbia's Redevelopment Act of 1945, which provided for the clearance of blighted areas and their redevelopment with the new construction fulfilling optimal planning standards.²⁴ The plaintiff, an owner of a thriving business in a redevelopment project area, sought an injunction against the application of the statute to him and against the condemnation of his property.²⁵ According to Bard, the Supreme Court held that "a project for the replanning and redevelopment of a large section of the city is entirely constitutional and that all property within the area is subject to condemnation in order to compel its participation in and contribution to the new development . . ."²⁶ Key to the decision was the Court's view that the redevelopment plan itself served a public purpose.

The Committee on City Development of the Fine Arts Federation issued a report for its annual meeting on April 28, 1955 that mirrored Bard's above referenced article in *The American City*. Commenting on *Berman v. Parker*, the authors noted:

The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

20. *PRESERVING NEW YORK*, supra note 16, at 137-38.

21. Ross D. Netherton, *The Due Process Issue in Zoning for Historic Preservation*, 19 URB. LAW. 77, 77-78 (1987).

22. Albert S. Bard, *Esthetics and the Police Power: U.S. Supreme Court Holds District of Columbia Redevelopment Act Constitutionally Valid*, 70 AM. CITY 179, 179 (1955).

23. Id. at 202 (internal citation omitted).

24. *Berman v. Parker*, 348 U.S. 26, 28-29 (1954).

25. Id. at 28, 31.

26. Bard, supra note 22, at 202.

The decision itself does not expressly state that esthetic considerations alone—the making of a pleasanter and more sightly city—will support such legislation, nor that esthetic considerations by themselves will support the regulation of land uses, but the language of the opinion by Mr. Justice Douglas may be claimed to go so far as to support such a case.²⁷

Bard and the architect, Geoffrey Platt, who later played a significant role as a leader in New York City's preservation community, were the two signatories on the report.²⁸ The report underscores the fact that the decision of Justice Douglas constitutes the 'opinion of the court,' and no dissent was filed.²⁹ The Report stated: "His language is broad enough to support legislation which replans a city area upon new standards of appearance and beauty."³⁰

The *Berman v. Parker* case was argued before the Supreme Court on October 19, 1954.³¹ A week later, Bard introduced a resolution that was passed by the Board of Directors of the Municipal Art Society of New York, a prominent civic organization.³² It deplored "the absence of adequate consideration of the factor of appearance in the planning and zoning of the city."³³ It is telling that many close observers of the preservation and planning professional scene in New York City today, over half a century later, believe that the same situation exists. What is also fascinating is that Bard had prepared the draft of enabling legislation prior to reading the *Berman v. Parker* decision.

Following the issuance of the decision, Bard corresponded with the key players who were involved in it. For example, in a December 27, 1954 letter to Simon E. Sobeloff, the U.S. Solicitor General who argued the case in support of the District of Columbia Redevelopment Act, Bard wrote:

For more than 40 years I have been interested in the legal question to what extent aesthetic considerations may constitutionally be made the basis of the regulation of private property. The development of planning in late years and the decisions on the subject indicate a marked trend in judicial decisions in support of aesthetics as the basis of the exercise of the police power.³⁴

In a reply written the following day, the Solicitor General responded: "I think that Justice Douglas' opinion, not only because of its authority, but because of its sweep, will be as great a landmark in the law as the old *Eudid v. Ambler*

27. THE FINE ARTS FED'N OF N.Y., REPORT OF THE COMMITTEE ON CITY DEVELOPMENT 8 (1955).

28. *Id.* at 10.

29. See *Berman*, 348 U.S. at 28.

30. THE FINE ARTS FED'N OF N.Y., *supra* note 27, at 8.

31. *Berman*, 348 U.S. at 26.

32. See *PRESERVING NEW YORK*, *supra* note 16, at 137-38.

33. *Id.* at 137.

34. Letter from Albert S. Bard, Attorney, to Simon E. Sobeloff, U.S. Solicitor Gen. (Dec. 27, 1954) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

Realty Company case."³⁵ There is no question that the Solicitor General's prediction was accurate; how astute of him to make the observation so close to the date of the decision.

This series of correspondence also includes a back and forth with an attorney representing the other side of the case. On January 17, 1955, in a reply to Joseph H. Schneider, Esq., who represented the adverse party in the dispute, Bard wrote:

For a long time planning has had to deal with aesthetics in order to be planning at all, and the inclusion of aesthetic factors among other factors supporting an exercise of the police power goes back a long time. It began in New York many years ago by a mild decision that the inclusion of aesthetic factors did no harm. Since then the law of planning has undergone great development, and the effect of aesthetic considerations upon values, both financial and social, has become generally recognized.³⁶

Without question, Bard was viewed by his peers as an expert on the subject. He was invited to be among "outstanding authorities" who contributed an essay to *The American Journal of Economics and Sociology* published in April 1956.³⁷ His article, *Aesthetics and the Police Power*, includes an instructive annotated list of court cases relative to the subject at hand.³⁸ The Journal granted permission the following year for the reprinting of the article by the Citizens Union Research Foundation.³⁹ Between the two publications, it is apparent that Bard's thinking would have been shared widely among those with similar interests in professional and civic circles of the day. Felix Frankfurter, a Justice of the Supreme Court of the United States, penned a handwritten note to "Dear Albert," complimenting Bard: "you did well collecting those aesthetical juristic utterances together."⁴⁰ Bard was an attorney of great distinction and he applied his lawyerly skills with the same persistence and brilliance as he approached his preservation advocacy efforts.

Henry Hope Reed, the venerable New Yorker who launched the architectural walking tour as a fundamental element in the preservationist's

35. Letter from Simon E. Sobeloff, U.S. Solicitor Gen., to Albert S. Bard, Attorney (Dec. 28, 1954) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

36. Letter from Albert S. Bard, Attorney, to Joseph H. Schneider, Attorney (Jan. 17, 1955) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

37. See Letter from Mabel Walker, Executive Director, Tax Inst., Inc., to Albert S. Bard, Attorney (undated) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

38. Albert S. Bard, *Aesthetics and the Police Power*, 15 AM. J. ECON. & SOC. 265, 268-70 (1956).

39. Letter from V.G. Peterson, Sec'y-Treasurer, Am. J. Econ. & Soc., to Albert S. Bard, Attorney. (Oct. 2, 1957) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

40. Letter from Felix Frankfurter, Justice of the U.S. Supreme Court, to Albert S. Bard, Attorney (undated) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

toolkit, recognized immediately the importance of Bard's advocacy. Writing enthusiastically to Bard in May 1956, he stated:

Your article, "Aesthetics and the Police Power," is one of the most encouraging statements for the future . . . [I]t is interesting that the concept of community beauty has expanded so fast within recent years. As you say, [it] is a "revolution that has taken place in fifty years with respect to the legal power of the community to deal with the individual landowner . . ."⁴¹

Bard wrote a summary of the provisions of the enabling law in June 1956; in it, he refers to the "fresh power" it contained.⁴² During that same spring season following the enactment of the enabling legislation, Bard drafted a different summary of the bill, this time entitled "New Planning Power to Deal with Landmarks and Unique Situations."⁴³ It was sent to J. Owen Grundy of the weekly newspaper *The Villager*, and on May 29th, the newspaperman responded to Bard's letter of May 28th inquiring about the piece. He assured Bard: "I think that the new law should receive the widest publication. This, so that local governing bodies and zoning officials throughout the State will know about its provisions and be in a position to apply them before it is too late."⁴⁴ Always ready to promulgate information that he deemed essential to practitioners and perhaps even to the uninitiated, Bard sent a letter to the editors of *The American City* in September 1956. Printed under the heading *Municipal Regulation of Esthetics Advanced*, he asserted: "The law, which might serve as a model mandate for esthetic regulations in cities and towns throughout the country, gives the New York cities the power" to enact and administer laws and regulations concerning historic properties.⁴⁵

The Joint Committee on Design Control met regularly from 1953 to 1957 to "review methods by which communities in various parts of this country and abroad are attempting to prevent ugliness and to achieve harmony and beauty in their appearance."⁴⁶ The Committee believed that "[t]he professional designers of buildings and of neighborhoods shared a common feeling. Certain current esthetic regulations might be effective, others might be doing more harm than good. A new, more positive approach to planning for

41. Letter from Henry H. Reed, Jr. to Albert S. Bard, Attorney (May 28, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

42. Albert S. Bard, *New Power to New York Cities to Deal with Particular Projects*, June 1956 (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

43. Letter from Albert S. Bard, Attorney, to J. Owen Grundy, Assoc. Editor, *The Villager* (April 23, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

44. Letter from J. Owen Grundy, Assoc. Editor, *The Villager*, to Albert S. Bard, Attorney (May 29, 1956) (on file with The New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division & the Widener Law Review).

45. Albert S. Bard, *Municipal Regulations of Esthetics Advanced*, AM. CITY, Sept. 1956.

46. Fagin & Weinberg, *supra* note 2, at vii.

community appearance is needed.”⁴⁷ Robert C. Weinberg, the architect and planner who served as co-chairman of the Committee and co-editor of its report, was a younger colleague of Bard who shared many of his affiliations and interests.⁴⁸ When the Committee embarked upon its work and began to grapple with questions concerning the constitutional underpinnings of the topic at hand, Bard counseled them to “[p]roceed on the assumption that esthetic control of private property in the interest of the community is a legal exercise of the police power.”⁴⁹ Bard was confident that the courts would catch up to public sentiment which he believed, increasingly, was moving to embrace aesthetic regulation. As a young lawyer, toiling on the battle to reign in the overwhelming number of billboards in New York City, Bard was steeped in the intricacies of how advertising could be regulated on the grounds of public beauty. Over the course of a long professional career, Bard battled the obstacles faced by those who sought control over the look of the public realm. He pressed consistently for a legislative or other legal solution, lobbying unsuccessfully in 1938 for a state constitutional amendment.⁵⁰ His combination of a rigorous intellect, unflagging determination, and prodigious scholarship finally yielded the sought after result with the adoption of the Bard Law in 1956. To shape the debate about the future integrity of the City’s neighborhoods, today’s concerned citizens and advocates need to borrow a page or two from Bard’s playbook. The lesson here is that the message must be clear, the pursuit resolute, and the energy unwavering. To change the current trends in neighborhood conservation, both the public and their elected representatives need to be engaged. The time has come to raise the volume on the discussion about the quality of places New Yorkers call home, and to produce a viable strategy that will ensure their preservation.

47. Fagin & Weinberg, *supra* note 2, at vii.

48. PRESERVING NEW YORK, *supra* note 16, at 135, 137.

49. Id. at 137 (quoting Fagin & Weinberg, *supra* note 2, at 8).

50. Id. at 31-32.