

Debating Historic Preservation in Israel: The Case of Tel Aviv

by Nir Mualam

This essay sheds light on the practice and understanding of historic preservation in Tel Aviv by following several town planning schemes that designate buildings for preservation. Particular emphasis is placed on the question whether policy-makers sufficiently understand the aim of preservation to ensure the sustainability and legality of historic preservation pursuant to Israel's principles of law and the American experience in this field.

A. Foreword – Tel Aviv and Historic Preservation in a Nutshell

The centennial celebrates the city of Tel Aviv as a success story in many respects. Tel Aviv is the cultural and financial capital of the state of Israel. It is growing in size and numbers. This growth and its centrality symbolize the vision of Israel's forefathers to create a new, modern and vibrant city.

Since its foundation in 1909, Tel Aviv has had to undertake urban struggles and initiatives, some of which related to the design-oriented aspects of its built environment. One of the major efforts has been to preserve the heritage embedded in Tel Aviv's architectural remnants of the past: the late 19th-century legacy of the Templars, who erected the historic village of Sarona (nowadays situated in central Tel Aviv); the heritage of the Jewish residents who went outside the city walls of Jaffa to create the "Red City" of Ahuzat Bayit; the garden city (or humanist) legacy of Patrick Geddes, who designed the Geddesian plan of central Tel Aviv; and the early 20th-century heritage of the modernists who originated from the *Bauhaus* school in Germany.

As a relatively new city in an even newer state, Tel Aviv faced various difficulties in its beginning. The city struggled with its heritage¹, unable at first to establish a tradition of preservation. The importance of preserving cultural artifacts was not emphasized because of the challenges that confronted the city². These challenges did not permit a focus on the preservation of the built environment. Nevertheless,

1 Bigger Gideon & Shavit Yacov, *The History of Tel Aviv vol. 4 – Metropolitan City (1974-1993)*, Tel Aviv (2002) p. 114.

2 The city still faces many design, refurbishment and preservation challenges. It suffers under the weight of traffic, increasing population and commuters – all of which have adverse effects on the maintenance of buildings, historic areas, infrastructure and public open spaces: Payton Neal "Patrick Geddes (1854-1932) and the Plan of Tel Aviv". In *The New City – Modern Cities*. Ed. Jean Francoise Lejeune Miami 1996 p. 20.

the destruction of the “Gymnasia Herzliya” high school and its subsequent replacement with a skyscraper is commonly considered a communal catastrophe³ and turning point that led to an increased awareness of the importance of preservation efforts⁴. From the 1980s on, the municipal planning teams started to introduce a new design and planning vision that included the rehabilitation of the urban fabric, using, among other tools, historic preservation⁵.

The international seal of quality for Tel Aviv's efforts, which also benchmarks future preservation initiatives, was granted in July 2003, when UNESCO declared central Tel Aviv (the “White City of Tel Aviv”) a World Heritage site, thus recognizing its special ensemble of modernistic structures embedded in a unique urban fabric. Yet it is important to note that Tel Aviv's efforts to protect certain buildings had already commenced beforehand, and had included a wider array of architectural styles (such as Eclectic and Ottoman).

Tel Aviv's contribution to Israel's preservation movement is multifaceted: the city trains public architects within its preservation team, thus building expertise and capacity. It allocates resources to cover new town planning schemes that attempt to be economically viable, and it raises awareness through conferences and public events that celebrate the city's heritage. Tel Aviv's planning arena further brings together public and private architects who deliberate complex issues, such as additions and modifications to historic buildings, their universal as well as local value and the possibility of altering the permitted use of such buildings.

As a result of this development of Tel Aviv's planning scene, the validity of historic preservation has become a central issue: does it curtail the landowner's right to enjoy his asset? And if so, why is heritage preservation practiced nevertheless? Is the reason for its practice self-explanatory? Or is it vague and hidden behind a veil of artificial transparency?

B. Possible Impacts of Historic Preservation

When a building is listed for preservation, certain hardships and limitations may be imposed on the proprietor: the modification of its exterior or interior, the extension or the demolition and subsequent reconstruction of the building – all of these may be forbidden. Further, the owner may have to maintain and refurbish the building in a specific manner, which can be costly. The result could be a diminution in property value.

3 Azaryahou Maoz, *The Real City of Tel Aviv*, Be'er Sheva (2005) p. 113-115.

4 Ben Tzur Yarden, *Building and Crying*. In *Yedi'ot Tel Aviv* 13.3.2009 p. 65-66.

5 Bigger Gideon & Shavit Yacov, *supra* note 1, p. 100.

It is obvious that irate property owners will ultimately seek compensation, but first and foremost they will try to remedy the situation by having their property's listing revoked. In other words, owners may attempt to challenge existing legislation, declaring it an unreasonable, disproportionate, unconstitutional and unlawful "taking" of their property⁶. They may be able to demonstrate this especially where preservation policy and legislation (including town planning schemes) do not provide sufficiently clear justifications for the aforementioned limitations on property use.

C. Debating Historic Preservation

When debates on preservation arise, they focus on several key issues: why is preservation practiced? Why do decision makers designate buildings for preservation? What is the proper aim of preservation? In addition, which unique qualities does a building hold? How should preservation be realized? What should be preserved and what should be left outside the boundaries of a local blueprint? What kind of compensation, if any, should be granted to a landowner whose building has been designated for preservation?

D. Questions to Be Addressed, Main Argument and Structure

Questions

This essay attempts to shed light on several questions mentioned above:

- Why is preservation practiced in Tel Aviv (with an emphasis on the debate on concepts of "beauty" on the one hand and considerations of social identity-stability on the other)?
- Why do decision makers designate buildings for preservation?
- What is the proper aim of preservation, or how should the debate be legally framed⁷?

The first two (descriptive) questions will be explored using several Tel Aviv town planning schemes and through the prism of "beauty" versus identity-stability

6 Generally speaking, "taking" means a governmental action that deprives a landowner of the use and enjoyment of his or her property. A "taking" may not occur without just compensation. See also part 1.5.2 for a discussion of American concepts of "taking".

7 Many other considerations may motivate historic preservation. For a non-exhaustive list, see Irit Amit-Cohen "Cultural Heritage in Conflict: The Case of Jaffa and Tel Aviv". In "Tel Aviv-Yaffo: From a Garden Suburb to a World City – The First 100 Years". Ed. Baruch A. Kipnis Tel Aviv 2009. p. 129.

rationales. The answers to these questions have legal implications for the validity of preservation itself.

That is why the third question is posed: how should the historic preservation debate be structured (in general, and in Tel Aviv in particular)? This question is important because the reasons decision makers give in favor of preservation are crucial: an improper goal or a blurry objective might be deemed unconstitutional (or otherwise legally void) and hence undermine the policy of preservation as enacted by local town planning schemes.

Argument and Structure

We argue that preservation policy and the debate surrounding it should be framed in a way that makes them more resilient to legal challenges.

Our argument will be elaborated in two parts: *Part 1* adopts the work of J. J. Costonis as a platform for debate. Costonis' main contention is that public officials – including municipal legislators – should refrain from the vague goal of achieving "beauty" when shaping preservation policy. Instead, social objectives can be found to justify the preservation of the built environment. They better explain the aim of historic preservation and include achieving *social stability* and protecting *social identity*.

Part 2 draws upon Costonis' recommendations as guidelines for reinforcing the practice of historic preservation. It looks into contemporary legal reasoning in Tel Aviv's town planning schemes and examines whether local legislators have fallen into the naïve, though somewhat appealing idea of "beauty" as a rationale for justifying historic preservation. Further, we seek alternative, clearer and more intelligible rationales for historic preservation measures, such as securing community stability and identity, as developed by Costonis.

The aforementioned examination is particularly interesting considering the relevance of Costonis' message to Israeli town planning, especially to planning efforts of preservation as carried out by Tel Aviv's local authority.

Part 1

Professor Costonis' View on Rationales of "Beauty" in American Land Use Planning and the Lessons for Tel Aviv

As a leading local planning authority and an established locality in the area of historic preservation, Tel Aviv can draw useful lessons from shifting its viewpoint outwards. The fruitful American experience in preservation is a great source in

that respect. The United States has had its legal debates and has also suffered public scrutiny aimed at historic preservation.

Consequently, this essay explores a lesson given by an American jurist. It explains the argument (in its American setting); explores its relevance to several decision makers in both the U.S. and other countries; investigates its relevance in other legal systems that regulate historic preservation; and, finally, attempts to draw a parallel between the American and Israeli legal systems with the aim of using the identified similarities to apply the American findings to the case of Tel Aviv.

1.1 Costonis' Idea

In his paramount essay on "Law and Aesthetics" (1981)⁸, professor John J. Costonis analyzed the rationales that underpin the debate about aesthetic regulation in the U.S. Costonis maintained that the trend was to justify aesthetic policy in a simplistic, naïve and subjective manner⁹. In his view, policy-makers as well as the judiciary had the tendency to rely on "beauty" while justifying an aesthetic course of action¹⁰. Criticizing it as an abuse of the aesthetic idea¹¹, Costonis dismissed the notion of "beauty". He suggested that regulators and other important actors de-emphasized subjective trends when justifying aesthetic policy¹².

Contrary to this, Costonis pointed to an opportunity for the judiciary, regulators and administrators to base their decisions on rationales that are legally defensible. Costonis acknowledged that heritage planning is a social construct¹³. Accordingly, rather than being hypnotized by the futile idea of "beauty", he advised to rely on *social stability* and *social identity* as key considerations when justifying aesthetic-based policies, including the policy of historic preservation. Such considerations, he stressed, were better suited for preventing an abuse of aesthetic policy making.

1.2 Identity-Stability Rationales

Identity-stability considerations highlight the idea that historic preservation is a practice that monitors environmental and social change. In other words, societies

8 John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 Mich. L. Rev. 355 (1981).

9 *Ibid.*, p. 357.

10 *Ibid.*, pp. 371-372.

11 *Ibid.*, p. 367.

12 *Ibid.*, pp. 359, 395-397.

13 *Ibid.*, p. 396.

choose to preserve their built environment in order to maintain cultural stability, achieve constancy and protect associations that people connect with certain places¹⁴. In shaping policies and regulations, the policy-maker should therefore identify the associational bonds between the historic building and the related community¹⁵. Only after doing so should the decision maker determine whether protecting the historic element will promote identity and stability values.

Costonis' aim was to improve the aesthetic debate in the U.S. Nevertheless, his recommendations are transferable to many countries that face the constraints of historic preservation and the need to justify current practice while barring arbitrariness and constitutional harm.

1.3 Why Should Local Legislators Give Preference to Considerations of Social Stability and Identity When Dealing with Historic Preservation?

First of all, it should be noted that Costonis' perspective goes beyond the role of municipalities. He suggested that both adjudicators and other policy-makers, including government agencies, should refrain from using the appeal of "beauty" as a rationale for historic preservation¹⁶.

What is the reason behind this assertion? In a nutshell, Costonis believes that an aesthetic debate should be conducted in a way that prevents or at least minimizes the possibility of successful constitutional challenges to the Fifth and Fourteenth Amendments¹⁷. These challenges may be raised by property owners who seek compensation or otherwise attempt to nullify the local town planning scheme that nominated their property for preservation (without their consent).

Incursions into property may be executed under certain conditions prescribed by law and case law¹⁸. Also, historic preservation may amount to a violation of property rights if conducted in an arbitrary, unreasonable manner¹⁹ while restricting landowners without effectively promoting general welfare²⁰. Regrettably, due to their subjective, vague and erroneous character, "beauty" rationales play a key

14 *Ibid.*, pp. 392-393.

15 *Ibid.*, p. 434.

16 *Ibid.*, pp. 385-386.

17 *Ibid.*, p. 442.

18 A prominent precedent reaffirming the practice of historic preservation, under certain circumstances, in New York is *Penn Central Transportation Company vs. City of New York* 438 U.S. 104 (1978).

19 *A.S.P. Associates v. City of Raleigh* 258 S.E. 2d 444 (1979).

20 This position can be derived from several cases (*County of Sacramento vs. Lewis*, 523 U.S. 833 (1998); *Lingle vs. Chevron U.S.A. Inc.* 544 U.S. 528 (2005)). *Case law prescribes two major conditions for avoiding due process violations*: a) effectiveness and reasonableness in achieving public aims, b) pursuing an objective that is essentially public.

part in making historic preservation policy and regulation less defensible. Instead, if given a different justification, aesthetic policy in general and historic preservation in particular may overcome constitutional challenges of due process. Social stability and identity are viable alternative considerations in this context.

Costonis points out several reasons for this:

■ Due process stricture²¹ demands that a regulatory policy pursue a public-oriented objective. For that reason, a justification for aesthetic regulation beyond the pursuit of "beauty" (as a goal in itself) is required. Consequently, identity-stability rationales are preferable for defending aesthetic practice, including historic preservation, since they promote a clearer social aim, which is a proper police power concern²².

■ Theories of visual beauty fail to explain why certain historic areas and buildings are nominated for preservation although their advocates may not describe them as "beautiful"²³.

■ Identity-stability rationales better explain the social harm that regulation seeks to prevent²⁴.

■ Identity-stability considerations provide the framework for historic preservation regulation because they demonstrate that regulation aims are not solely economic or functional (if at all), but primarily symbolic and associational²⁵.

■ Identity-stability considerations are more realistic: inextricable from an understanding that preservation is a form of political and social action, and that there is no objective standard to be used when measuring the efficacy of this action²⁶. The importance of these considerations is that they expose the intersubjective patterns of communities and make it clearer that each community may have its own preference for protecting its historic buildings. This does not necessarily imply that policy-makers cannot devise objective regulations to prevent associational dissonance and promote preservation²⁷.

All of the above supports the notion that policy-makers, regulators and adjudicators should not be misled by the consideration of "visual beauty" when making decisions, shaping policies and judicially reviewing existing legislation.

21 This stricture is embedded in the United States Constitution. It is also present, in one form or another, in similar legal systems.

22 Costonis, *supra* note 8, p. 413.

23 Costonis, *supra* note 8, p. 427.

24 Costonis, *supra* note 8, p. 428.

25 Costonis, *supra* note 8, pp. 444-445.

26 Costonis, *supra* note 8, p. 432.

27 Costonis, *supra* note 8, pp. 437, 439.

1.4 *Are Considerations of Social Stability and Identity Applicable to Other Legal Systems?*

Are *identity-stability* considerations applicable to other states, or are they in fact unique to the American experience? We maintain that identity-stability rationales can be transferable to other countries where historic preservation is practiced. Identity-stability rationales can especially enrich the legal discourse of historic preservation. This may be attributed²⁸ to the following reasons:

- *Beauty* is a subjective idea that can hardly be legally defined in a clear and standardized manner²⁹. Regulators in general, not only in the U.S., cannot devise policies that will leapfrog over the deficiencies of "visual beauty".

- Non-American legal systems reject subjective and arbitrary practices that violate individual liberties³⁰. In other words, these systems do not easily acknowledge the idea of "beauty" as a stand-alone intelligible guideline. In turn, they may be assisted by alternative justifications for planning practices, such as promoting communal identity and stability.

- Several legal systems demand the protection and reasonable-beneficial use of property³¹. Subjective trends undermine the demand for property protection. In other words, since identity-stability considerations are clearer and more objective³², they may substitute "beauty" trends when justifying the appropriation of and incursions into property in such legal systems.

28 Costonis names several other reasons, which cannot be specified here. He also challenges beauty rationales and stresses that they suffer from sensory, formalistic and semantic fallacies. See Costonis, *supra* note 8, p. 397.

29 Israel's High Court has faced the hard-to-implement (if not impossible) idea of "beauty" on several occasions. For example, in Civil Appeal 513/89 Interlego A/S vs. Exin-Lines Bros. S.A., IsrSc 48(4) 133 (1994) the court debated the notions of "art" and "artistic features" as stated in legislation. Further, in Civil Appeal 448/60 Lev vs. Central Mashbir Inc. IsrSc 16, 2688 (1961) the court debated the relationship between the ideas of "beauty" and "art", claiming that not all "artistic" buildings could be described as "beautiful". The court further alleged that "beauty" was a vague term that did not provide the court with solid tools to predetermine whether a building should fall into the category of "beauty" or not. Aesthetic judgment were highly subjective, according to the court, and therefore there were no universal truth regarding "beauty".

30 The Israeli legal system calls for implementing governmental power in a way that is consistent with constitutional principles, in a way that is consistent with the Israeli Basic Law on Human Dignity and Liberty (1992). See for instance Bagatz 953/87 Poraz vs. Lahat IsrSc 42(2) 309.

31 As in the American legal system, the right to property has constitutional weight in Israeli law: Article 3 of the Israeli Basic Law on Human Dignity and Liberty (1992) states that a person is entitled to hold property. Article 8 of the same law determines conditions under which the appropriation of and intrusion upon property may occur.

32 It is important to note, nonetheless, that professor Costonis acknowledges the fact that even the setting of standards under the identity-stability idea may prove a difficult task because the idea itself has a subjective component to it. However, Costonis believes that even community preferences under the identity-stability rationale may be devised using objective visual controls that govern the historic area and administer changes (Costonis, *supra* note 8, pp. 437-438).

■ Identity-stability rationales can be applied in different social settings around the world. They can fit in a variety of communities, given the existence of cultural bonds with their surroundings³³. These bonds may call for regulatory intervention by means of historic preservation. In other words, identity-stability rationales have no borders since communities worldwide wish to defend themselves from associational dissonance. This is a result of social as well as psychological conditions, which may apply regardless of nationality or geography.

■ Identity-stability rationales may fit comfortably into legal systems that are based on a constitution and protect their people from the arbitrary "taking" of property. Under such circumstances, considerations that explain their social aim more clearly, and are hence easier to implement, may be advantageous for reinforcing regulatory practices like those aimed at historic preservation. This is because in many constitutional frameworks a "proper public purpose" should be waived against constitutional and other due process-like challenges³⁴.

However, we would like to emphasize that the application of professor Costonis' thesis beyond the American context is limited to legal issues: we attempt to apply the legal implications of Costonis' idea to other legal frameworks. Consequently, it is not our intention to suggest that the cultural and social notions of identity, stability and "beauty" are of equal international validity. Nevertheless, we dare argue that in both Israel's and Tel Aviv's settings considerations of identity-stability possess a firm basis³⁵. This is due to thousands of years of rich history, both Jewish and non-Jewish, Israeli and non-Israeli, embedded in biblical settings and engraved in stone and buildings – a deeply rooted heritage shaping civic and community existence, which are constantly at risk in the fragile environment of the Middle East.

33 This position draws from the social sciences and psychology. It maintains that not only American communities choose to protect themselves by securing their identity and by prohibiting uncontrolled change. Studies have demonstrated that communities worldwide choose to preserve (and plan) their physical environment in order to maintain their own sense of self. See for example Kenneth B. Hall and Gerald A. Porterfield, *Community by Design*, New York (2001), pp. 5-10, who note that communities wish to maintain a sense of belonging and place through the design of their built environment.

34 This may be demonstrated by Israeli High Court jurisprudence indicating that property appropriation, as well as other incursions into property, are subject to a solid, proper and well-considered public aim. See for instance Civil Appeal 6821/93 United Mizrachi Bank Inc. vs. Migdal Cooperative Village IsrSc 49(4) 221 and compare it to the American imperative of advancing public welfare as a precondition for deflecting due process challenges concerning limitations on property: *Penn Central Transportation Company vs. City of New York* 438 U.S. 104 (1978).

35 We are gratefully indebted to professor Costonis who was kind enough to illuminate this point.

1.5 Why Should Considerations of Social Stability and Identity Dominate the Legal Discourse of Historic Preservation in Israel (and in Tel Aviv in Particular)?

Similar to other countries, Israel seeks to preserve its long and rich heritage. The city of Tel Aviv in particular strives to preserve different buildings and elements that symbolize its 100 years of communal efforts, narratives and social as well as cultural uniqueness. As noted, identity and stability are important for non-American communities. As a result, the social advantages of historic preservation (as a legal practice) become apparent.

Indeed, historic documents demonstrate that Tel Avivians have suffered from the careless demolitions of their built environment³⁶. Therefore, identity-stability rationales should also become central to Tel Aviv's preservation policy (even if not always emphasized). This conclusion also reinforces Costonis' claim that laws, and town planning schemes in particular, should be designated to fulfill the social imperative of achieving identity and stability.

Here, we shall explore this idea from a comparative legal perspective. We maintain that Israel's/Tel Aviv's legal system leads to the same conclusion reached by Costonis: namely that identity-stability should guide heritage preservation policy.

1.5.1 Comparative Risks and Similar Patterns

Israel's constitutional fundamentals resemble those dominant in the U.S. It is certainly risky to overstate comparisons between two legal systems: each is laden with its own historic background and legal heritage³⁷; each features a different set of procedures, rights and liberties; each protects these rights and liberties in a different manner.

Nevertheless, similar patterns are evident: both legal systems allow certain courts to reject legislation that is contrary to constitutional principles³⁸; both allow

36 The Tel Avivian sense of self, the city's identity and communal stability were severely impaired by the demolition of cultural artifacts – cherished symbolic buildings – that marked historical efforts and the pride of the first Hebrew city: Azaryahu Maoz, *supra* note 3, pp. 113-118.

37 Some theories of law imply that the solution to a problem depends on the legal culture and heritage embedded in the respective legal system. Each system has a special rule of adjudication (or "recognition") that determines norms of upper-hierarchy and lower-hierarchy. This rule is not made in a void but is rather a product of the community's perceptions (although it is theoretically possible for two separate societies to adopt a similar rule of adjudication, given that a certain problem is to be solved). This idea is supported by H. L. A. Hart, *The Concept of Law*, Oxford (1994), p. 100.

38 Comparisons and analogies between legal systems can sometimes be drawn without sinking into mire, especially when a given legal system is influenced by another. Indeed it seems that in the Israeli-American case the latter has an enormous effect on the former in the area of judicial constitutional review of laws. For a deliberation regarding American principles and their implementation in

judicial review of legislation and its inspection following constitutional principles based on the system of checks and balances³⁹; furthermore, both systems call on adjudicators to interpret constitutional aims in a "generous" non-legalistic way, delving into the *purpose* and meaning of the constitutional norm⁴⁰.

In addition, a rough analysis shows a similar (not identical) attitude towards the protection of property⁴¹. Also, similar notions of property "takings"⁴² illustrate that Israel's historic preservation efforts can be improved by referring to identity-stability considerations.

Israeli constitutional law, see Mizrachi Bank Inc. *supra* note 34, pp. 349-350, where Judge Shamgar cites Judge Brandeis in *Blair vs. United States*, 250 U.S. 273.

39 Judicial review in the U.S. (and Israel alike) depends on the subject matter at stake. Courts do not review every aspect of legislation. For instance, economic legislation is treated carefully in both Israeli and American jurisprudence. See for example *Ferguson vs. Skrupa* 372 U.S. 726 (1963) and a similar approach in *United Mizrachi Bank Inc.* *supra* note 34, p. 339.

40 Mizrachi Bank case, *supra* note 34, p. 430. See also, in the U.S. context, *McCulloch v. Maryland* 17 U.S. 316 (1819).

41 However, the American arrangement is complex. The U.S. Constitution prohibits "taking" without due process and just compensation, but it does not protect "property" per se. In contrast, Israeli constitutional law declares the right to property to be a basic human right. Further, American jurisprudence has adopted different levels of scrutiny for different constitutional rights. Thus, when freedom of expression is concerned and damaged, the government has to prove a "pressing public necessity"; when property is at stake, the "reasonability" parameter is often called upon (lower level of scrutiny). Israeli case law has also acknowledged that property rights are relative and may be withdrawn, given the existence of a proper public aim and a proportional, efficient and reasonable act of governance.

42 The level of judicial scrutiny of property-related harms in American case law may not be the highest. Nevertheless, the "taking" of property is regarded as a constitutional violation. The question of what constitutes a legal "taking" cannot be answered plainly since the judiciary distinguishes between several categories. These categories include: physical incursions into property, diminution in property value (inverse condemnation), "takings" through exactions and more. The question in the U.S. is one of degree (see *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922)): Some forms of "takings" are evident and constitute a "taking" per se (permanent invasions and inverse condemnation), other acts of governance require an essential nexus and rough proportionality to be established (when exactions are concerned); other cases examine general parameters, such as the character of the respective governmental act and the extent to which regulation violates expectations. A similar approach is echoed in Israeli jurisprudence: appropriation is not prohibited when compensation is paid. Furthermore, given certain conditions prescribed by article 8 of the Israeli Basic Law on Human Dignity and Liberty (1992), an appropriation may be carried out without being regarded as an unconstitutional "taking". Moreover, whether a governmental act constitutes a "taking" depends on the degree of harm and on other polycentric considerations (Supreme Court Case 4466/94 *Noseyba vs. Minister of Finance* IsrSc 49(4) 68, 88 (1995); see also Civil Appeal 6821/93 *United Mizrachi Bank Inc. vs. Migdal Cooperative Village* IsrSc 49(4) 221, 329-332).

1.5.2 General View of Property Rights in Israel and the U.S.

Israel's constitutional foundations call for the protection of property. That is why land use planning that impairs the right to unrestricted property use may become void⁴³.

Also, policy measures that do not advance proper public aims might become void⁴⁴. Consequently, historic preservation regulations and town planning schemes, both in Tel Aviv and elsewhere in the country, may be rejected on constitutional grounds. One way to determine constitutionality is to inspect policy objectives.

In the American arena we find a similar pattern: a regulatory act of historic preservation may violate the provisions of the Fifth Amendment⁴⁵ if it imposes restrictions that are not related to the promotion of general welfare, or if it is unreasonable or ineffective in achieving this goal⁴⁶. Further, several "tests" are used to verify a "taking". They include tracing disproportionate, illegal measures; reviewing government action as a whole; examining the ability to reasonably benefit from the land in question⁴⁷, and measuring the extent of the harm caused.

The analysis set out above indicates similarities between the two legal systems⁴⁸: both share constitutional values that call for reasonable, proportionate measures to advance a clear public interest as a vital condition for government interference in historic areas. Consequently, legal instruments of historic preservation that restrict the ability of landowners to build or carry out certain works could in both systems be regarded as a violation of property rights. It follows that it is useful to debate historic preservation practices in both legal systems in a manner that makes

43 This principle is dominant in Israeli judicial discourse, for instance when land appropriation is executed without just compensation or in a disproportionate manner (Civil Appeal 5546/97 Local Planning Authority of Kiryat Ata vs. Holtsman IsrSc 55(4) 629 (2001)).

44 Israeli law provides guidance in this matter. When land appropriation is concerned, for example, the Israeli Planning and Building Law (1965) prescribes several public uses for which appropriation may be carried out. Also, a proper aim is determined in local case law and varies according to the issue at stake.

45 As well as Fourteenth Amendment stricture.

46 Due process is not curtailed when the means chosen to implement the policy are reasonable, proportionate and advance a valid public purpose. See *United States vs. Gettysburg Electric Railway Co.* 160 U.S. 668 (1896).

47 *Manhattan Club vs. New York City Landmarks Preservation Commission*, 51 Misc. 2d. 556, 273 N.Y.S. 2d. 848 (1966).

48 However, property rights in the U.S. are not stated independently in the Constitution. Instead, a person's right to property is granted indirectly – it exists because the Constitution prescribes that property may not be taken unless under the Due Process and Just Compensation Clauses. In comparison, property rights are stated clearly as a constitutional fundamental in Israeli law. Thus, property is protected at both the state and municipal levels. However, unlike in the U.S., the right to property in Israel is not absolute. Article 8 of the Israeli Basic Law on Human Dignity and Liberty (1992) states that the government may take one's property by an act of law, under certain conditions – these include the proportionality clause as well as the proper-aim clause.

regulatory provisions more defensible, and in a manner that allows a better understanding of historic preservation aims⁴⁹ (given that such aims include the associational protection of communities, regardless of their nationality). Therefore, we argue that in both systems identity-stability rationales may be implemented advantageously.

Part 2

2.1 Tel Aviv Town Planning Schemes as a Regulatory Act

An Israeli town planning scheme is formed by planning teams and committees (with or without private consent or initiative). Its authorization constitutes an act of legislation executed by a planning body. After its enactment, the town planning scheme becomes a local law (similar to an ordinance), depicting uses and building rights and sometimes designating historic buildings for preservation.

As noted above, a town planning scheme should abide by constitutional fundamentals. It should state a clear and proper public aim that is to be advanced. This aim can be reassessed when claims of "taking" arise. As Costonis notes, a blurry public goal like "beauty" may make it harder to uphold a town planning scheme in court. This is why it is intriguing to examine the objectives of current planning schemes for Tel Aviv and compare them with Costonis' advocacy of community identity and stability.

2.2 Tel Aviv Town Planning Schemes and Their Rationales for Preservation

Table 1 depicts ten major town planning schemes for Tel Aviv⁵⁰, covering hundreds of buildings listed for preservation. The table examines rationales given by local and regional planning committees for preserving Tel Aviv's historic heritage.

From the outset it is well apparent that Tel Aviv-style historic preservation is led by design and architecture. The main emphasis is not societal but structural. It is not identity-stability-based, but rather focuses on preserving the original architectural features and components. The issue celebrated in Tel Aviv's town planning schemes is the unique attributes of the remnants from the past. However, the present is no less important, so that the schemes create a viable living environ-

49 Both legal systems explore the regulation's purpose *as well as* its internal rationality in order to determine its constitutionality. See for instance *Williamson vs. Lee Optical Co.* 348 U.S. 483, 488 (1955), wherein the court stressed that "... *the law needs not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it*".

50 And Jaffa, which lies within Tel Aviv's municipal boundaries.

ment through preservation. On the face of it, the preservation process is only motivated by and directed at securing built form, whereas identity-stability considerations strengthening the city's sense of self are not on the agenda.

The beauty rationale is not invoked at all, indicating a more sophisticated policy that distances itself from issues of taste. Nevertheless, *architectural qualities* and attributes are key goals of Tel Aviv policy, and these are almost as subjective as "beauty". On the other hand, it may well be argued that the discipline of architecture is a better (intelligible) rationale and indicator for policy objectives, since architectural styles and rarities can be highlighted in surveys and in-depth studies. In other words, using the architectural criterion for the purpose of preservation may be less subjective than "beauty"; however, it may hide the same fallacies⁵¹.

Achieving community identity and stability does not play a major role in Tel Aviv's historic preservation schemes. The policy-makers have avoided such societal goals and have focused instead on built form. Consequently, the discourse has become one of architects and aestheticians; the policy has fallen short of framing key rationales that would better explain its aim and go beyond the narrow view of architectural significance.

Having said that, it could be argued that maintaining identity-stability is indirectly apparent in current policy: Rationales that deal with "preserving urban character" may be identified as focusing on monitoring change. They therefore protect the sense of self in urban settings. Moreover, open-ended rationales as offered in plan 2650 (namely "preserving other unique values") may allow multifarious rationales to be added when legally debating historic preservation.

Another key rationale that surfaces is the protection of *historic qualities* of listed buildings. This criterion may be considered as subjective as "beauty". History is a social construct and determined by historians, rulers, opinion polls and social actors in general. It may be rewritten, understood or misunderstood, hidden or ne-

51 It can be argued that architecture and design are subjective and transitory; they reflect values and changing perceptions through time; they are a product of power struggles in a society, but may also be perceived as a process, rather than a finalized product (Lefebvre Henry, "Production of Space". In Kallus Rachel and Tali Hatuka Ed. *Architectural Culture: Place, Representation, Body*, Tel Aviv 2005). In this, design and architecture are similar to matters of taste and changing perceptions of "beauty": they reflect the tastes and subjective understandings of professionals who examine the so-called "architectural qualities". On the other hand, the creation of architecture and the determination of its "quality" are professional tasks, to be completed by a group of trained specialists who are in charge of "presentations of space" and therefore provide a more objective element to the task of determining quality. In other words, architectural perceptions can be formed and can reflect a common set of values, making preservation a matter of culture and society rather than a purely subjective preference: Scruton Roger "Judging Architecture" in *Design and Aesthetics – A Reader* Ed. by Palmer Jerry and Dodson Mo. London 1996, p. 13.

glected. This is the reason for its vagueness and its poor reliability⁵². Nevertheless, a building may be surveyed and studied throughout time, and its historic elements may be listed and exposed. Listing its historic features and identifying historic events related to a building may be no less subjective than giving reasons for characterizing it as "beautiful" or "ugly". In view of this opposition, the rationale of *historic qualities* carries the risk of hiding majoritarian ideologies, but also provides the opportunity to devise historic manuals and surveys, depicting several "histories". This may promote preservation in an informative manner, which reduces arbitrariness and evokes public discussion. Given time and place, this also allows an informed debate regarding the elements of history that contribute to a community's sense of self, to its identity or stability.

It can be argued that the rationale of *historic qualities* calls for deliberation by professionals and the lay public alike. This deliberation – if conducted fairly – can expose social meanings that people attach to buildings. It can also objectify the debate (although not entirely), because it brings forth the ideas, ideologies and perceptions of large groups and communities, rather than single actors or single groups of professionals from the field of heritage preservation.

2.3 Future Research

Future research should identify the reasons behind the current "bank of rationales" that constitute the foundations of historic preservation in Tel Aviv. These rationales should be further examined in light of their alleged failure to comply with Costonis' guidelines. The meaning of the existing rationales and the way they are implemented and understood should also be explored. This examination is fundamental since the interpretation of various schemes may demonstrate that actors in the field of preservation attach societal or other undeclared meanings to current rationales, thus adopting Costonis' view nevertheless.

In addition, the assessment of Tel Aviv's preservation practices must be reinforced and supplemented through ancillary inspections. These may include exploring how other institutions and branches of government perceive the motivations for heritage preservation (for example: what is the judiciary's outlook on preservation? What does national legislation have to say in this regard?). An international comparison of heritage preservation may also be carried out. Due to limitations of scope, this could not be explored here.

52 20th-century lessons in the philosophy of history have shown that history "*is not a given, fixed category, but exists only by virtue of being made, and remade in the present!*". Forty Adrian, *Words and Buildings: A Vocabulary of Modern Architecture*, London 2004, p. 205.

Number of Town Planning Scheme	Name of Scheme (Area)	General Aims	Rationales and Aims in Relation to Preservation	Other Features Relevant to Preservation
2385	City Center – C	<ol style="list-style-type: none"> 1. Encouraging floor space additions for residential use 2. Preserving buildings that possess special architectural values 3. Minimizing traffic in pre-designated streets 	<ol style="list-style-type: none"> 1. Preserving special architectural values and qualities 2. Preserving original built form 3. Preserving historic qualities 	<ul style="list-style-type: none"> - Categorizing three types of listed buildings - Allowing alterations and demolitions (under certain preconditions)
2268 2510	City Center – Model Yemene Vineyard	<p>As in plan 2385</p> <ol style="list-style-type: none"> 1. Rehabilitation and neighborhood development 2. Creating urban continuity 3. Improving life quality 4. Condensing the area's urban fabric 5. Encouraging preservation activities 	<p>As in plan 2385</p> <ol style="list-style-type: none"> 1. Retaining the area's "special urban character" 2. Preserving special architectural qualities 3. Preserving "unique elements" 4. Protecting historic qualities 5. Preserving original built form 	<ul style="list-style-type: none"> - As in plan 2385 - Categorizing three types of listed buildings - Guiding the historical documentation of listed buildings
2570	Dante	<ol style="list-style-type: none"> 1. Improving life quality 2. Determining the maximum number of residential units 3. Allowing building extensions 4. Strengthening local welfare and services 5. Encouraging the rehabilitation of buildings, yards and public open spaces while preserving the area's unique urban character and architectural quality 	<ol style="list-style-type: none"> 1. Preserving architectural qualities 2. Protecting historic qualities 3. Promoting the area's urban character 4. Preserving valuable details and attributes 	<ul style="list-style-type: none"> - Listing two categories of preservation - Determining the conditions under which planning permits are to be granted for listed buildings
2572	Jaffa Clock Tower Square	<ol style="list-style-type: none"> 1. Revitalizing the area for mixed and residential uses while retaining its urban fabric and character 2. Creating urban continuity 	<ol style="list-style-type: none"> 1. Preserving original built form 2. Preserving architectural qualities 3. Protecting historic qualities 	<ul style="list-style-type: none"> - Creating favorable conditions for tree preservation - Categorizing two types of listed buildings - Allowing alterations and demolitions (under certain preconditions)

2606	Jerusalem Boulevard	<ol style="list-style-type: none"> 1. Revitalizing the Boulevard for mixed and residential uses while creating a unique urban fabric 2. Allowing urban continuity between Jaffa and Tel Aviv 	<ol style="list-style-type: none"> 1. Preserving original built form 2. Protecting architectural qualities 3. Protecting historic qualities 	<ul style="list-style-type: none"> - Creating favorable conditions for tree preservation - Categorizing two types of listed buildings - Allowing alterations and demolitions (under certain preconditions) - Allowing alterations and demolitions (under certain preconditions) - Determining special procedures and prerequisites for granting planning permits for listed buildings - Creating guidelines and mechanisms to expedite preservation (transferring development rights etc.)
2650	Tel Aviv Preservation Plan	<ol style="list-style-type: none"> 1. Using preservation as a leverage for protecting the city's built heritage and architectural features while bettering its architecture 2. Using preservation as a mechanism for urban renewal and regeneration 	<ol style="list-style-type: none"> 1. Exposing original architectural values and features 2. Encouraging economic, cultural and touristic activities 3. Preserving other unique values 	<ul style="list-style-type: none"> - Allowing alterations and demolitions (under certain preconditions) - Determining special procedures and prerequisites for granting planning permits for listed buildings and in preservation areas - Allocating permitted uses in listed buildings
2660	Ajami	<ol style="list-style-type: none"> 1. Rehabilitating the neighborhood for its future and current residents 	<ol style="list-style-type: none"> 1. Preserving the area's urban character 2. Preserving the area's architectural significance 3. Preserving unique qualities of urban spaces (streets, gardens etc.) 	<ul style="list-style-type: none"> - Allowing alterations and demolitions (under certain preconditions) - Determining special procedures and prerequisites for granting planning permits for listed buildings and in preservation areas - Allocating permitted uses in listed buildings
2720	City Center – Update	<ol style="list-style-type: none"> 1. Improving former plans 2. Providing additional tools for historic preservation 3. Improving current design guidance 	Not specified	<ul style="list-style-type: none"> - Naming types of modifications to listed buildings that mandate special consent - Defining flat sizes for listed buildings
3000	Sarona - South-em Kirya	<ol style="list-style-type: none"> 1. Establishing a new business district, including residential condominiums 2. Integrating public open space and buildings listed for preservation 3. Tree preservation 	<ol style="list-style-type: none"> 1. Preserving original built form (external and internal) 2. Preserving the area's architectural quality 3. Retaining historic features 	<ul style="list-style-type: none"> - Designating permitted uses in various listed buildings - Specifying listed buildings that are to be moved to a different location - Depicting phases in the preservation process

Table 1: Inspecting Tel Aviv's preservation plans

Legend: "listed buildings" – buildings listed for historic preservation

3. Summary

The law's foray into aesthetics raises hard-pressing questions. In this respect, the American experience may be of relevance to other countries. Costonis' works contribute considerably to this debate as they provide valuable insight for legislators, judges and policy-makers in general.

The purpose of this essay was to attempt a preliminary analysis of Tel Aviv's local planning schemes, given the legal experience in the U.S., the similarities between the two legal systems and professor Costonis' argument in favor of less subjective and more intelligible approaches to policy making. In addition, our examination of preservation policy was conducted with view to both the social aim of historic preservation and the legal framework that calls for certain rationales to be applied. Furthermore, we maintained that ideas of identity-stability (which represent a social, cultural and behavioral perspective) are locally applicable, considering the multifaceted history of Israel and the strong community attachment to this history.

The analysis showed that historic preservation plans for Tel Aviv demonstrate maturity alongside rigidity: maturity because they refuse to rely on visual beauty as a prominent criterion for preservation, rigidity because they fail to adopt a widespread social prism as a foundation for policy making. In this context it was found that at first glance identity and stability rationales are not apparent in Tel Aviv, though further research may prove otherwise. Also, other rationales that justify current preservation efforts in Tel Aviv, such as the protection of historic qualities, may be indicative of a thrust towards a (more) social perspective in preservation.

Finally, current town planning schemes for Tel Aviv present historic preservation as a mainly physical enterprise: the schemes emphasize architectural qualities that call for preservation of the original built form. Such considerations may prove less subjective than "beauty", although they may carry the same fallacies.