

# MOVING BEYOND PRESERVATION PARALYSIS? EVALUATING POST-REGULATORY ALTERNATIVES FOR TWENTY-FIRST CENTURY PRESERVATION

Jess R. Phelps\*

## INTRODUCTION

*You are the one fixed point in a changing age. There's an east wind coming all the same, such a wind as never blew on England yet. It will be cold and bitter . . . and a good many of us will wither before its blast. But it's God's own wind none the less, and a cleaner, better, stronger land will lie in the sunshine when the storm has cleared.*<sup>1</sup>

Preservationists are increasingly aware of a growing reluctance in many communities against the formation of new local historic districts (LHDs) or other forms of local regulatory preservation restrictions.<sup>2</sup> This resistance flows out of an increasing opposition to new regulation and a sense that preservation ordinances are somehow fundamentally violative of individual property rights—or at least as these rights are widely understood, as providing property owners the almost absolute right to determine what to do with their own property.<sup>3</sup> From a preservation standpoint, this is particularly unfortunate. It is widely accepted that LHDs are the most effective tool within the preservationist's arsenal.<sup>4</sup> LHDs are widespread,

---

\* Team Leader for Historic Preservation, Historic New England; J.D. Drake University Law School, 2007; B.S. Iowa State University, 2004. The views expressed in this Article are solely the views of the Author as are any errors or omissions.

1. Arthur Conan Doyle, *His Last Bow*, in 2 THE ANNOTATED SHERLOCK HOLMES 792, 803. (William S. Baring-Gould ed., Clarkson N. Potter, Inc. 1967) (1917).

2. See, e.g., Brenda J. Brote, *Debate in Newburyport over Proposed Historic District*, BOS. GLOBE, Feb. 9, 2012, [http://www.boston.com/news/local/massachusetts/articles/2012/02/09/debate\\_in\\_newburyport\\_over\\_proposed\\_local\\_historic\\_district/](http://www.boston.com/news/local/massachusetts/articles/2012/02/09/debate_in_newburyport_over_proposed_local_historic_district/) (discussing local opposition to the effort to create a new local historic district in the highly significant town of Newburyport, Massachusetts); Stephen R. Brown, *Historic District Dispute Heats Up*, N.Y. TIMES, July 7, 2011, <http://eastvillage.thelocal.nytimes.com/2011/07/07/historic-district-dispute-heats-up/> (detailing opposition to a proposed district around New York's Tompkins Square Park).

3. See STEVEN W. SEMES, *THE FUTURE OF THE PAST: A CONSERVATION ETHIC FOR ARCHITECTURE, URBANISM, AND HISTORIC PRESERVATION* 34–35 (2009) (discussing the need for a conservation ethic within the preservation movement that fosters community, tradition, and culture).

4. Julia H. Miller, *Historic and Cultural Resources Protection Under Historic Preservation Law*, in *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT* 17, 25 (Sherry Hutt et al. eds., 1999) (“The strongest protection for historic properties generally occurs at the local level—not federal or state—where laws are more likely to regulate actions affecting privately owned property.”); see also Christopher J. Duerksen, *Local Preservation Law*, in *A HANDBOOK ON HISTORIC PRESERVATION LAW* 29, 30–31 (Christopher J. Duerksen ed., 1983) (discussing the primary role of local preservation efforts).

legally well-established, and effective at preserving the *tout ensemble* of an historic area or neighborhood in a way that no other mechanism developed to date has been able to accomplish.<sup>5</sup> Absent such controls, highly historic and significant structures are vulnerable to insensitive alteration or even teardown—often without notice to local preservationists who could otherwise intervene and work to find an alternative solution to potentially avoid this impact.<sup>6</sup> These losses can dilute a community's character and destroy a fragile shared or collective sense of place—which once lost cannot be recovered.<sup>7</sup>

How did we get to this point where many, if not a majority, of proposals to establish new LHDs or other local preservation controls have become hotly debated political exercises, generating high emotion and fervor?<sup>8</sup> Initially, preservation controls were broadly tolerated by communities considering whether to implement these protective measures.<sup>9</sup> In fact, LHDs were widely adopted through the 1990s and 2000s, but this is no longer the case.<sup>10</sup> Recently, some existing LHDs have even been threatened with de-designation, and in a few instances, this has actually

---

5. See Miller, *supra* note 4, at 17–26 (describing various federal, state, and local preservation laws and noting their impact); see also Byrd Wood, *Local Government and Historic Preservation*, FORUM J., Summer 2001, at 4, 4–5 (detailing the role of LHDs in the preservation movement).

6. See, e.g., William Safire, *What Government is For*, GAINESVILLE SUN, Mar. 9, 1981, at A9 (registering his disgust for preservationist successes in listing numerous Washington, D.C. properties on the National Register of Historic Places that, in the prominent columnist's view, infringed upon private property rights).

7. NED KAUFMAN, PLACE, RACE, AND STORY: ESSAYS ON THE PAST AND FUTURE OF HISTORIC PRESERVATION 2–4 (2009) (explaining the role of preservation efforts in establishing a community's character and shared sense of oneself).

8. Ariella Monti, *A District Divided: Raleigh Historic District Overlay Debate Continues*, RALEIGH PUBLIC RECORD, Dec. 28, 2011, <http://www.raleighpublicrecord.org/news/2011/12/28/a-district-divided-raleigh-historic-district-overlay-debate-continues/> (exploring the contentious debate over historic preservation controls within Raleigh, NC); Aaron Short, *Into the Dustbin! Preservation Group Dumps Greenpoint Historic District Bid*, BROOKLYN DAILY, Dec. 11, 2011, [http://www.brooklyndaily.com/stories/2011/50/dtg\\_districtdenied\\_2011\\_12\\_16\\_bk.html](http://www.brooklyndaily.com/stories/2011/50/dtg_districtdenied_2011_12_16_bk.html) (discussing lack of public support behind LHD bid for the Greenpoint section of Brooklyn, which led to the project being abandoned or at least temporarily mothballed); see also Elizabeth A. Lunday, *Who's in Control Here?*, PLANNING, June 2005, at 18, 18–20 (discussing a related issue—the issue of owner consent provisions in many states in driving determinations on how to craft district boundaries to avoid objectors).

9. See WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 103–07 (1988) (explaining the critical role of public support for early preservation ordinances as being critical to both their implementation and survival); Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 776 (2007) (explaining that early LHDs were enacted in areas of unquestioned significance where “the overriding value of external legal controls was understandable, if not always enthusiastically received by local owners”).

10. Robert E. Stipe, *Where Do We Go From Here?*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 451, 475–76, (Robert E. Stipe ed., 2003) (charting the significant growth in numbers of local historic districts through the 2000s).

occurred, leaving important districts without regulatory protection.<sup>11</sup> As a result of this intense regulatory opposition, it is becoming increasingly apparent that there are strong limitations to any measurable expansion in the utilization of this tool, at least in the near term. If preservationists are to continue their critical work, they need to develop and implement alternative mechanisms to avoid the irreversible loss of significant resources—particularly in those communities most opposed to any form of regulatory control. This is problematic, however, as most non-regulatory mechanisms utilized by preservationists are not well-suited for communal preservation (or the preservation of neighborhoods or other assemblages of structures) but are centered instead on protecting individual historic properties.<sup>12</sup>

To address this problem, this Article explores the potential for several non-regulatory alternatives to provide at least a backstop against this regulatory resistance and allow preservationists to still have a variety of tools at their disposal to protect areas or neighborhoods where LHDs are deemed politically impossible. This Article is organized in three parts. Part I of this Article will broadly survey the development of preservation efforts, explaining how these activities progressed from individual actions focused on protecting local or national treasures to regulatory actions designed to protect entire historic neighborhoods and the impacts of this shift. Part II will explain the role that LHDs currently play within the preservation movement—including an examination of the values these districts promote as well as the reasons opposition has coalesced against their expanded use. Finally, Part III will evaluate a suite of potential non-regulatory alternatives to LHDs and evaluate their potential for protecting resources remaining outside of the district structure. Overall, if the preservation community explores, adopts, and embraces these alternative mechanisms, the gathering storm of resistance to regulatory preservation controls—which is currently threatening to cause irreparable losses to our nation’s historic fabric—can perhaps be mitigated.

---

11. See, e.g., L.M. Schwartz, *Local Historic District Abolished*, THE VIRGINIA LAND RIGHTS COALITION, <http://www.vlrc.org/articles/94.html> (last visited Nov. 13, 2012) (detailing the removal of historic district controls from a small community—Monterey, Virginia); Jenna Russell, ‘*Historic District*’ Dissolved in Property Rights Dispute, BOS. GLOBE, Dec. 3, 2006, [http://articles.chicagotribune.com/2006-12-03/business/0612030412\\_1\\_historic-district-town-council-town-s-benefit](http://articles.chicagotribune.com/2006-12-03/business/0612030412_1_historic-district-town-council-town-s-benefit) (discussing the dispute over Standish, Maine’s local historic district, which ultimately led to the district being dissolved—at least in its binding or mandatory form).

12. JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 29–32 (2008) (surveying voluntary preservation tools utilized by the preservation community and their current limitations).

## I. EVOLUTION AND PROGRESSION OF AMERICAN PRESERVATION EFFORTS

Understanding the evolution of efforts to protect cultural resources is critical to understanding the moment that LHDs occupy within the overall preservation movement. While categorization is always difficult, these efforts have passed through several distinct stages, which have been driven by societal values, external threats, and, in many instances, critical legal decisions.<sup>13</sup> Generally, there are three predominant phases meriting individual attention: (1) the advent of collective action to preserve local or national treasures; (2) the growth of regulatory alternatives to protect historic neighborhoods; and (3) the rise of incentives to protect individually and privately owned historic properties.<sup>14</sup>

*A. Collective Action to Save Local and National Treasures*

As the United States developed a wider historical horizon and longer collective memory, individuals began to recognize the value of ensuring that our built heritage would survive.<sup>15</sup> In its nascent beginnings, these efforts focused on: (1) preserving structures associated with our colonial past as reverential objects (particularly around the founding fathers or other prominent historical figures);<sup>16</sup> (2) establishing historic museum complexes (outdoor history museums) as educational settings or tools for promoting shared values and cultural ideals;<sup>17</sup> and (3) preserving outstanding examples of significant architectural styles for their representative qualities and aesthetic merit.<sup>18</sup>

---

13. See Francis P. McManamon, *What Are Heritage Resources and Why Are They Protected?*, in HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT 1, 1–13 (Sherry Hutt et al. eds., 1999) (exploring the evolution of thought regarding how to protect American cultural resources).

14. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 481 (1981) (detailing the various stages in the development of the preservation movement).

15. Walter M. Whitehill, “Promoted to Glory”: *The Origin of Preservation in the United States*, in WITH HERITAGE SO RICH 35, 35–44 (1966) (charting the development of the preservation movement over the nation’s history).

16. See Diane Lea, *America’s Preservation Ethos: A Tribute to Enduring Ideals*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 10 at 1, 1–4 (documenting several key events in the history of the preservation movement); see also CONSTANCE M. GREIFF, *LOST AMERICA FROM THE ATLANTIC TO THE MISSISSIPPI* 1–7 (1971) (discussing the early development of the preservation movement and its focus on restoring and preserving America’s colonial past rather than old beautiful buildings).

17. J. Myrick Howard, *Non-Profits in the American Preservation Movement*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 10, at 313, 316–18 (describing the development of this mode of preservation destination after the birth of the automobile age).

18. NORMAN TYLER, *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE*, 34–35 (2000).

## 1. Preservation of Historical Associations

The first real wave of preservation activity centered on saving properties associated with distinguished historical personages by creating specific interest groups to purchase these structures for museum use.<sup>19</sup> Despite some earlier isolated efforts, this wave really began in the 1850s with the Mount Vernon Ladies Association and its efforts to purchase an iconic presidential estate and, in turn, open it to the public as a museum.<sup>20</sup> After this campaign's success, other groups replicated this model to save individual resources throughout the country—including Thomas Jefferson's Monticello and hundreds of other famous homes.<sup>21</sup> In a related vein, many extended families also formed organizations during this period to collectively preserve significant houses associated with their own notable ancestors as house museums.<sup>22</sup> For example, the Fairbanks family formed an association to protect their earliest American forbearer's dwelling, the Fairbanks House, in Dedham, Massachusetts, which was later determined to be the oldest surviving timber framed house in the United States.<sup>23</sup>

Overall, these efforts focused largely on preserving houses connected with historic personages (the so-called "Washington slept here" school of preservation) and were aimed at preserving historical associations—connections between existing structures and events that made significant historical contributions, or associated with the lives of significant historical figures—or memories. These efforts were still a generation removed from later attempts to utilize preservation as a planning tool for maintaining a greater sense of place or an historic community context.<sup>24</sup> Again, organizations formed

---

19. *Id.* (discussing the early preservation movement's focus on "sav[ing] landmark buildings more for patriotic reasons than for their architectural ones"); see also Rose, *supra* note 14, at 481–82 (describing this first wave of preservation activity as "[p]reservation as [i]nspiration"—or serving as reminders of a collective and seemingly unified past).

20. See CHARLES B. HOSMER, PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG 41–45 (1965) (explaining the genesis of the ultimately successful effort to purchase Mount Vernon from Washington's heirs and preserve it as an historic house museum); but see LEWIS MUMFORD, THE CULTURE OF CITIES 454 (1938) (criticizing this form of preservation effort as an attempt to create "concrete utopias of escape: the desire to establish little dream islands in the steely sea of reality").

21. See HOSMER, *supra* note 20, at 153–92 (discussing the effort to preserve Monticello); Howard, *supra* note 17 (charting the development of a host of other house museums).

22. HOSMER, *supra* note 20, at 115–21.

23. See, e.g., *The Country's Oldest Timber Frame House*, THE FAIRBANKS HOUSE, <http://www.fairbankshouse.org> (last visited Nov. 13, 2012) (charting the house's history as well how it came to be preserved).

24. See HOSMER, *supra* note 20, at 237–50 (discussing the preservation movement prior to William Sumner Appleton and the Society for the Preservation of New England Antiquities' focus on architectural significance); see also DANIEL BLUESTONE, BUILDINGS, LANDSCAPES, AND MEMORY: CASE STUDIES IN HISTORIC PRESERVATION 25–29 (2011) (explaining the underlying role of patriotism

during this period were focused on protecting the earliest houses, individual landmark properties, and houses associated with what was widely perceived as a disappearing American past.<sup>25</sup>

## 2. Preservation as a Set Piece

From protecting individual landmarks, the preservation movement expanded to creating improvised versions or outright historical reproductions.<sup>26</sup> The classic example of this type of preservation remains Dr. Goodwin's efforts in restoring and expanding the surviving remnant of what was a significant period village—Colonial Williamsburg.<sup>27</sup> This aggressive restoration is often criticized for relying on reconstruction and its generally heavy-handed approach, but Williamsburg achieved, and continues to fulfill, its patron John D. Rockefeller Jr.'s goal of creating an effective platform for introducing millions to our nation's history.<sup>28</sup> Henry Ford's Greenwich Village in Dearborn, Michigan provides a similar example.<sup>29</sup> To create this venue, Ford actually relocated many historic properties to his "village," intending that this collection ultimately serve as an educational tool to enlighten future generations of Americans as to their history and a traditional American "way of life."<sup>30</sup> Other outdoor history museums adopted similar approaches, including Plimoth Plantation (Plymouth, Massachusetts) and Old Sturbridge Village (Sturbridge, Massachusetts).<sup>31</sup> This wave of preservation activities, focused on

---

in fueling early preservation thinking through the lens of reinterpreting Marquis de Lafayette's visit to the United States during 1824 and 1825).

25. JAMES M. LINDGREN, PRESERVING HISTORIC NEW ENGLAND 3–21 (1995) (citing the role that turbulent changes, particularly mass immigration, played in fueling the early preservation movement during this period). For example, Boston's population went from approximately 250,000 in 1870 to over 650,000 just forty years later in 1910—creating unprecedented development pressure that fueled a desire to preserve what was perceived as a rapidly disappearing past. *Id.* at 29.

26. TYLER, *supra* note 18, at 35–39.

27. *Id.*

28. ANDERS GREENSPAN, CREATING COLONIAL WILLIAMSBURG: THE RESTORATION OF VIRGINIA'S EIGHTEENTH CENTURY CAPITAL 173–75 (2nd ed. 2009); *see also* Edward Rothstein, *An Upgrade for Ye Olde History Park*, N.Y. TIMES, Apr. 6, 2007, [http://www.nytimes.com/2007/04/06/arts/06will.html?pagewanted=all&\\_moc.semityn.www](http://www.nytimes.com/2007/04/06/arts/06will.html?pagewanted=all&_moc.semityn.www) (critiquing recent upgrades to the facility and quoting Frank Lloyd Wright's earlier criticisms—describing Williamsburg as "as an example of America's 'mawkish sentimentality for a past that wasn't any good.'").

29. *See generally* Carroll V. West, *A Greenfield Village: A Landscape for the Present, the Past . . . and of Mr. Ford*, 8 THE INT'L J. OF MUSEUM MGMT. & CURATORSHIP 263, 263–64 (1989).

30. STEVEN WATTS, THE PEOPLE'S TYCOON: HENRY FORD AND THE AMERICAN CENTURY xii, 402–15 (2005) (detailing the development of Greenfield Village and the Henry Ford Museum, the acquisition of antiques and relocation of several historic structures, and Ford's motivation behind the creation of the museums).

31. *About Us*, PLIMOTH PLANTATION, <http://www.plimoth.org/about-us> (last visited Nov. 13, 2012); *Our Museum*, OLD STURBRIDGE VILLAGE, <http://www.osv.org/museum/index.html> (last visited Nov. 13, 2012).

creating assemblages of “representative” historic properties (at least representing one perception of an historic period), was largely designed to serve as a tool for teaching via living history displays, rather than introducing preservation planning to protect a broader range of societal values.<sup>32</sup>

### 3. Preservation of Architectural Significance

A third wave within the early preservation movement began to depart from the reliance on historic associations as an orienting principle, focusing instead on preserving historic properties for their architectural merit and significance.<sup>33</sup> The first group to take on this challenge was the Society for the Preservation of New England Antiquities (SPNEA) (now Historic New England) which, in the early decades of the twentieth century, began acquiring lesser-known buildings because of their quality or representation of a particular architectural style or genre.<sup>34</sup> By 1980, SPNEA had acquired over fifty properties—ranging in construction date from the seventeenth to twentieth centuries, from First Period timber framing to mid-century modernity—but even these properties were slated to be protected as house museums.<sup>35</sup> Overall, even within this shift toward an appreciation for larger architectural significance, this campaign more closely resembled earlier efforts than the community planning aspects that the preservation movement would take on in its later iterations.<sup>36</sup>

In sum, for the majority of its entire first century, the preservation movement had three dominant strands: (1) it preserved individual landmarks significant for their historical associations; (2) it created museum complexes

---

32. See HOSMER, *supra* note 20, at 298–99 (discussing the impact of Williamsburg on the preservation movement and in shifting the paradigm of public perceptions of these efforts).

33. Rose, *supra* note 14, at 480 (noting the emergence of architectural significance and artistic merit within the overall preservation milieu at the beginning of the twentieth century).

34. HOSMER, *supra* note 20, at 241–42.

35. JANE NYLANDER & DIANE VIERA, *WINDOWS ON THE PAST: FOUR CENTURIES OF NEW ENGLAND HOMES* 17 (2d ed. 2009). Operating this large a number of properties as house museums eventually proved to be unsustainable and SPNEA in the 1970s and 1980s began the process of deaccessioning a large number of these properties with preservation easements—which led to the formation of its Stewardship Program. See Jessica Neuwirth et al., *Abbott Lowell Cummings and the Preservation of New England*, 29 *PUB. HISTORIAN* 57, 65–67 (2007) (explaining SPNEA’s deaccessioning process and that “SPNEA was over-extended beyond belief” by the number of museums it was attempting to operate).

36. James M. Lindgren, *A Spirit that Fires the Imagination*, in *GIVING PRESERVATION AN HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES* 107, 117–18 (Max Page & Randall Mason eds., 2004) (discussing SPNEA’s efforts to protect historic structures at the turn of the twentieth century and the moment in the history of the preservation movement this represented); LINDGREN, *supra* note 25, at 69 (explaining that although SPNEA initially intended to acquire control over properties and then lease them to tenants under restrictions, a majority of SPNEA’s properties ended up being utilized as house museums).

as platforms for inculcating a perceived shared cultural experience and memory; and (3) it preserved buildings of outstanding architectural and aesthetic significance.<sup>37</sup> All of these efforts remained outside of the regulatory realm and relied on either individual or collective initiative rather than governmental action, and were not capable of dealing with preservation on a level that actually addressed properties remaining under private ownership.<sup>38</sup>

### B. Growth of Regulatory Alternatives

By the mid-twentieth century, ideas regarding the role of preservation began to move beyond preserving properties as set-piece museums, towards moderating changes to privately owned properties through a burgeoning body of regulations at the federal, state, and local levels.<sup>39</sup> Generally, these regulations focused on preserving larger contexts and settings—and began to regulate or limit changes on those privately owned properties where Americans actually live.<sup>40</sup> This shift is perhaps best explained in the “Conclusions to the Findings” to the landmark preservation book, *With Heritage So Rich*, published by the United States Conference of Mayors, which summarizes this body’s views as to why such a shift was desirable and actually necessary:

The pace of urbanization is accelerating and the threat to our environmental heritage is mounting; it will take more than the sounding of periodic alarms to stem the tide.

.....

If the preservation movement is to be successful, it must go beyond saving bricks and mortar. It must go beyond saving occasional historic houses and opening museums. It must be more than a cult of antiquarians. It must do more than revere a few precious national shrines. It must attempt to give a sense of orientation to our society, using structures and objects of the past to establish values of time and place.

---

37. See Lea, *supra* note 16, at 4–6; see also Christopher Tunnard, *Landmarks of Beauty and History*, in *WITH HERITAGE SO RICH* 29, 31 (1966) (explaining that in 1890 there were twenty house museums, a number that, by the mid-1960s, had ballooned to over a thousand).

38. See Rose, *supra* note 14, at 480 (discussing the emergence of architectural significance and artistic merit into the preservation milieu at the beginning of the twentieth century); see, e.g., Lindgren, *supra* note 36, at 117 (quoting SPNEA’s founder William Sumner Appleton’s concerns that “if the government took charge of preservation, it would ‘become the foot ball of politics.’”).

39. See, e.g., Nicholas A. Robinson, *The Metes and Bounds of a New Field*, 1 *PACE L. REV.* 511, 517–20 (1980) (explaining the evolution of historic preservation laws as various land use controls and regulations).

40. MILLER, *supra* note 12, at 7.

This means a reorientation of outlook and effort in several ways.

....  
 . . . [T]he new preservation must look beyond the individual building and individual landmarks and concern itself with the historic and architecturally valued areas and districts which contain a special meaning for the community. An historic neighborhood, a fine old street of houses, a village green, a colorful marketplace, a courthouse square, an esthetic quality of the townscape—all must fall within the concern of the preservation movement.<sup>41</sup>

The move from individual to collective action is best examined in two distinct phases: (1) local regulatory initiatives and (2) federal efforts designed to provide a framework for designating historic resources and limiting the impact of federal projects on historic resources nationwide.<sup>42</sup>

### 1. Local Historic Districts

In the 1930s, preservationists began to take their first tentative steps into the regulatory sphere.<sup>43</sup> This shift was fueled by changes in society—both perceived and real—and also by the expansion of the automobile and its corresponding impact on the nation’s urban character.<sup>44</sup> A dizzying array of mid-century urban renewal efforts only heightened this change dynamic, which proceeded to gut the historic areas of older cities in a misplaced effort to give them new life and vitality through “slum-clearing” and the corresponding development of large urban housing projects.<sup>45</sup> What was lost in this effort, however, was any consideration of the historic character of these areas and whether this wholesale clearing would actually

---

41. Whitehill, *supra* note 15, at 207–08.

42. States obviously play a role as well, and are responsible for enabling legislation that allows this form of regulation to even exist but largely mirror and support federal and local mechanisms. See CONSTANCE BEAUMOND, *SMART STATES, BETTER COMMUNITIES* 45–51 (1996) (discussing the role of states in preservation efforts).

43. See, e.g., Heuer, *supra* note 9, at 774–75 (discussing early preservation legislation).

44. MURTAGH, *supra* note 9, at 62–64; see also PEIRCE F. LEWIS, *NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE* 1–2 (1976) (discussing the changes in New Orleans’s urban character caused by suburban development, which ultimately fueled the desire for regulatory control over this historic neighborhood).

45. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 5–6 (1961) (providing a scathing critique of the unintended consequences of urban renewal efforts); TYLER, *supra* note 18, at 44–46 (describing 1950s and 1960s regulatory efforts as a reaction to urban renewal).

accomplish any of its objectives.<sup>46</sup> In response to this transition, preservationists began to look for better ways to protect neighborhoods and play a larger role within the planning sphere—and the LHD, which developed out of earlier local initiatives, was the tool often selected to achieve these ends.<sup>47</sup>

Overall, historic district ordinances were first adopted in a few large cities and in neighborhoods with widely recognized historic value.<sup>48</sup> In 1931, Charleston, South Carolina was the first city to adopt a preservation ordinance to protect its historic center (known as “The Battery”).<sup>49</sup> Community concern regarding a proposal to demolish an historic structure and replace it with a gas station largely fueled this effort.<sup>50</sup> In reaction, concerned residents passed an ordinance barring “service or filling stations, automobile repair shops, factories or other buildings or businesses which would serve to detract from the architectural and historical setting.”<sup>51</sup> This nascent LHD adopted or incorporated many of the elements that would later become standard components of this regulatory mechanism—including requiring impacted homeowners to obtain a certificate of appropriateness for proposed work on designated historic properties and creating a “board

---

46. JAMES L. GARVIN, *A BUILDING HISTORY OF NORTHERN NEW ENGLAND* vii (2001) (describing the impact of urban renewal on Portsmouth, New Hampshire); *see also* THOMAS H. O’CONNOR, *BUILDING A NEW BOSTON: POLITICS AND URBAN RENEWAL 1950–1970* 125–39 (1993) (detailing the urban renewal efforts that led to the wholesale clearance of Boston’s historic West End neighborhood).

47. It should be noted that the actual concept of historic districts was not formally given definition until passage of the National Historic Preservation Act of 1966. *See* Michele A. Brozek, *Local Versus National Historic District Designation: The Effect of Preservation Policy on Two Historic Districts in Covington, Kentucky* 6 (May 28, 2004) (unpublished Ph.D. dissertation, Cincinnati University) (on file with author). The Act “recognized the need for the designation of individual properties, but also recognized that in many instances it is necessary not only to preserve a building but also the context in which it and adjacent buildings are placed.” TYLER, *supra* note 18, at 50. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915–919 (1966) (codified as amended at 16 U.S.C. §§ 470–470 x-6 (2006)). Overall, this was the culmination of an important conceptual shift in preservation law and philosophy that had been gaining momentum since the Charleston ordinance was enacted three decades earlier. George B. Abney, *Florida’s Local Historic District Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims*, 25 FLA. ST. U. L. REV. 1017, 1018–22 (1998).

48. TYLER, *supra* note 18, at 39–40; *see also* MURTAGH, *supra* note 9, at 103–04.

49. TYLER, *supra* note 18, at 39. This district was particularly interesting as it was promulgated without legal precedent—or any form of enabling legislation permitting this type of local zoning control. *Id.*

50. *See* STEPHANIE E. YUHL, *A GOLDEN HAZE OF MEMORY: THE MAKING OF HISTORIC CHARLESTON* 166–67 (2005) (discussing the origins of Charleston’s LHD).

51. Robin E. Datel, *Southern Regionalism and Historic Preservation in Charleston, South Carolina, 1920–1940*, 16 J. OF HIST. GEOGRAPHY 197, 203 (1990) (quoting J. OF THE CITY COUNCIL, Apr. 8, 1930, at 447).

of architectural review” to review project requests.<sup>52</sup> Even without clear constitutional authority, the Battery was able to thrive largely because of its considerable support within the Charleston community.<sup>53</sup> Other local historic districts quickly followed:

Charleston became a prototype for other early historic districts, including the Vieux Carré section of New Orleans, authorized through a Louisiana state constitutional amendment in 1936. San Antonio, Texas followed suit in 1939; Alexandria, Virginia, in 1946; Williamsburg in 1947; Winston-Salem, North Carolina, in 1948; and the Georgetown section of Washington, D.C., in 1950.<sup>54</sup>

These early preservation controls were not without controversy.<sup>55</sup> A 1956 survey of preservationists noted that compliance with these ordinances—although facially binding—was generally voluntary, and that most issues arising under the ordinances were resolved through mutual negotiation between commissions and the impacted homeowner rather than regulatory fiat.<sup>56</sup> Not surprisingly, however, a litany of constitutional challenges was brought against these early regulatory controls, but courts uniformly upheld their validity under the respective state constitutions.<sup>57</sup> In all, these early efforts demonstrated the effectiveness of LHDs in preserving both place and context as applied to a disparate mix of residential neighborhoods and housing types.<sup>58</sup>

---

52. TYLER, *supra* note 18, at 39–40.

53. *Id.* at 39.

54. *Id.* This list is not all encompassing as districts continued to be created throughout the 1950s. See, e.g., George W. Born, *The Beacon Hill Historic District: Pioneer of the 1950s with Lessons for Today*, HISTORIC NEW ENGLAND (OCT. 1, 2011), [http://www.historicnewengland.org/preservation/regional-resources/looking-forward-symposium/papers/Beacon%20Hill%20Historic%20District\\_G%20Born.pdf](http://www.historicnewengland.org/preservation/regional-resources/looking-forward-symposium/papers/Beacon%20Hill%20Historic%20District_G%20Born.pdf) (discussing the creation of Boston’s Beacon Hill district in 1955).

55. Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It’s Been, Where It’s Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 4, at 1, 6 (Christopher J. Duerksen ed., 1983).

56. *Id.* at 6–7.

57. See *City of New Orleans v. Impastato*, 3 So.2d 559, 561 (La. 1941) (upholding New Orleans’ ordinance protecting the Vieux Carre historic district); *Opinion of the Justice*, 128 N.E.2d 557, 562 (Mass. 1955) (upholding state legislation allowing historic districts in Nantucket).

58. See Duerksen & Bonderman, *supra* note 55, at 7 (discussing the emergence of early preservation ordinances as a tool to protect a wide variety of historic resources in the face of highway construction, urban renewal, and other government-funded projects).

## 2. Districts Gain Constitutional Protection

Despite the adoption of dozens of early districts, the historic district concept still lacked clear constitutional support.<sup>59</sup> The creation of this type of regulatory control had not come easily, and it would take years for the corresponding legal issues surrounding these districts to be resolved.<sup>60</sup> The first move in this direction came in 1955 with the Court's decision in *Berman v. Parker*.<sup>61</sup> The *Berman* Court established the principle that aesthetics provide a sufficient basis to support local regulatory action.<sup>62</sup> In short, the Court held that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean."<sup>63</sup> Additional decisions would follow at the state level, but some lingering doubt still remained as to the legitimacy of the LHD construct, which arguably limited the further expansion of this tool.<sup>64</sup>

In 1978, however, the U.S. Supreme Court's well-known decision in *Penn Central Transportation Co. v. City of New York* finally set these ordinances on firmer constitutional footing.<sup>65</sup> In *Penn Central*, a developer sought permission to construct a fifty-five-story addition on top of the iconic Grand Central Station, which had been designated as a landmark

---

59. See Linda Cofresi & Rosetta Radtke, *Local Government Programs, Preservation Where It Counts*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 10, at 117, 118–19 (explaining that prior to the enactment of NHPA in 1966 efforts to encourage LHDs were ineffective); see also TYLER, *supra* note 18, at 33–41 (noting early preservation activities leading up to 1966).

60. See TYLER, *supra* note 18, at 45, 83–91 (explaining early legal challenges made against LHDs and the lack of established precedent in this area).

61. *Berman v. Parker*, 348 U.S. 26 (1954).

62. *Id.* at 33.

63. *Id.*

64. See, e.g., *Maher v. City of New Orleans*, 371 F. Supp. 653, 663 (E.D. La. 1974) (analogizing *City of New Orleans v. Pergament*, 5 So.2d 129 (La. 1941), where the court found constitutional an ordinance in an LHD constitutional that regulated the type of sign placed on a property, to *Maher*, which denied a demolition permit in an LHD); *Figarsky v. Historic Dist. Comm'n. of the City of Norwich*, 368 A.2d 163, 169–71 (1976) (deciding that the Historic District Commission of Norwich may constitutionally deny plaintiff's application for a certificate of appropriateness to demolish their building located within the historic district).

65. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978). *Penn Central* involved a challenge to New York City's landmarks law—not the enactment of an LHD. Landmark laws vary somewhat from LHD ordinances, in the fact that they authorize the protection of individual properties—which makes this form of enactment particularly vulnerable to challenges of being impermissible as spot zoning, which continue to be raised despite repeated failure to prevail upon this basis. See, e.g., *Ely v. City of Ames*, No. 09-1424, 2010 WL 2598244, at \*6 (Iowa Ct. App. June 30, 2010) (upholding a landmark ordinance in the face of a challenge to City of Ames's landmarking of an individual historic property). Despite these differences, the underlying bases or underpinnings of both forms of regulatory enactments, however, largely overlap. MILLER, *supra* note 12, at 2–3.

under the city's landmark ordinance.<sup>66</sup> New York City's Landmarks Preservation Commission denied the developer's request based upon the historic stature of the terminal; the developer challenged this denial, and in the alternative, argued that if the proposed development remained barred, it was owed compensation under the regulatory takings doctrine.<sup>67</sup> The Court rejected both arguments and held that preservation was a permissible governmental goal, and that New York City's landmarks law was an appropriately tailored means toward that end.<sup>68</sup> This decision itself was a milestone in firmly establishing that LHDs do not constitute takings, and that a municipality has the ability to regulate and review alterations and modifications to its historic buildings and neighborhoods.<sup>69</sup> *Penn Central* finally paved the way for the expansion of LHDs throughout the 1980s and 1990s.<sup>70</sup>

### 3. Federal Legislation

As LHDs slowly gained a foothold both legally and culturally, the federal government enacted a series of significant preservation laws that represented the real advent of any form of meaningful federal role within the larger preservation movement.<sup>71</sup> Unquestionably, the most prominent legislation passed during this period was the National Historic Preservation Act of 1966 (NHPA).<sup>72</sup> NHPA had three principal components: (1) the National Register of Historic Places (an honorific list of significant historic properties that provided much needed attention and recognition for designated properties); (2) a review requirement (known as Section 106

---

66. *Penn Cent.*, 438 U.S. at 116. The building names in this case are a source of occasional confusion. The property that was considered for the Marcel Breuer designed addition at issue in this case was, in fact, New York's Grand Central Station. *Id.* The confusion lies in the fact that Grand Central was owned by Penn Central Transportation, the owner, at the time, of both prominent terminals. *Id.*

67. *Id.* at 117–19.

68. *Id.* at 138.

69. John Nivala, *The Future For Our Past: Preserving Landmark Protection*, 5 N.Y.U. ENVTL. L.J. 83, 82–83 (1996) (noting the significance of the *Penn Central* decision).

70. Duerksen & Bonderman, *supra* note 55, at 18 (explaining how *Penn Central* opened the door to stronger landmark restrictions).

71. ADVISORY COUNCIL ON HISTORIC PRES., AN OVERVIEW OF HISTORIC PRESERVATION LAW, 1966–1996 1–5 (1996) (discussing the evolution of federal historic preservation law).

72. National Historic Preservation Act of 1966, Pub. L. 89-665, 80 Stat. 915–919 (1966) (codified as amended at 16 U.S.C. §§ 470–470x-6 (2006)); ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 71, at 3–4 (discussing the adoption of the NHPA as a “watershed in preservation law, as it created a means by which the Nation's preservation goals could be achieved”); *see also* J. Peter Bryne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TULANE ENVTL. L.J. 203, 213 (2009) (noting that the NHPA not only expanded the role of the National Park Service, but also gave authority to the Advisory Council on Historic Preservation to oversee its “mandatory planning and consultation process to protect historic properties”).

review) that compelled federal agencies to assess and at least consider the potential impact of major federal projects on historic resources before undertaking this work; and (3) the requirement that federal agencies identify, care for, and preserve those historic structures under their direct control.<sup>73</sup>

Beyond NHPA, two contemporaneous legislative enactments would also impact historic preservation efforts.<sup>74</sup> The first enactment—the National Environmental Policy Act (NEPA)—also requires that federal agencies consider the impact of major federal projects on cultural resources, but was drafted to provide an alternative review authority to complement NHPA.<sup>75</sup> The Department of Transportation Act of 1966 would also have a positive impact on preservation efforts.<sup>76</sup> Section 4(f) of the Act requires federal agencies seeking transportation funding to avoid impacting historic resources unless there was no feasible alternative.<sup>77</sup> In the case of no feasible alternative, the Act requires that the Department of Transportation (DOT) mitigate the adverse impacts to the utmost extent possible.<sup>78</sup> In short, Section 4(f) went beyond requiring that DOT consider the potential impact to requiring avoidance and mitigation of adverse impacts. This has proven to be a significant negotiating tool for preservationists seeking to obtain positive outcomes where leverage and political will could otherwise be lacking.<sup>79</sup>

This wave of legislation provided a base layer of federal regulatory authority applicable to the entire preservation field—but upon deeper analysis it becomes evident that this veneer of federal regulatory authority

---

73. *National Historic Preservation Act*, NAT'L TRUST FOR HIST. PRESERVATION, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/understanding-preservation-law/federal-law/nhpa.html> (last visited Nov. 13, 2012); John M. Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31, 41 (1976).

74. MILLER, *supra* note 12, at 3–6.

75. National Environmental Policy Act, 42 U.S.C. §§ 4321–4327 (1969); *see also* Jennifer Kuntz, *A Guide to Solar Panel Installation at Grand Central Terminal: Creating a Policy of Sustainable Rehabilitation in Local and National Historic Preservation Law*, 10 VT. J. ENVTL. L. 315, 321 (2009) (discussing NEPA's role within the preservation context).

76. Department of Transportation Act of 1966, 49 U.S.C. § 303; *see also* Barbara Miller, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633 (1987) (outlining the preservation impact of the Department of Transportation Act of 1966).

77. Nathaniel C. Guest, Note, *Putting History on a Stone Foundation: Toward Legal Rights for Historic Properties*, 18 TEMP. POL. & CIV. RTS. L. REV. 699, 741 (2009) (discussing section 4(f)'s role within the preservation movement).

78. Stanley D. Olesh, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 156–57 (1986).

79. *Id.*

is surprisingly thin.<sup>80</sup> All of the major federal preservation laws apply only to federal projects, not private property, which is perhaps not surprising given that this legislation was fueled by the negative backlash to the huge federal urban renewal and interstate highway projects of the 1950s and 1960s.<sup>81</sup> Additionally, this legislation generally only requires that agencies consider their impacts on historic resources—not affirmative avoidance or mitigation.<sup>82</sup> However, these review requirements had a salutary impact in allowing preservationists to force the consideration of historic resources within general federal project planning, and assisted the preservation field in transitioning from an amateur pursuit to a professional discipline.<sup>83</sup>

### C. *The Rise of Incentives to Spur Private Action*

By the 1980s and 1990s, legislative efforts shifted towards incentivizing individual preservation efforts as it became apparent that local demolition controls alone were not enough to prevent demolition of significant historic structures.<sup>84</sup> At the federal level, these efforts took the form of tax credits designed to encourage the development community to channel its energy and capital into rehabilitating historic areas and to also encourage individual homeowners to perpetually protect their historic properties by introducing tax incentives to facilitate easement donations.<sup>85</sup>

#### 1. Federal Tax Incentives

Federal tax incentives helped diminish the economic calculus in favor of demolishing historic properties, and served as one tool to encourage

---

80. See Hunter S. Edwards, Note, *The Guide for Future Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation*, 20 U. FLA. J.L. & PUB. POL'Y 221, 229–32 (2009) (discussing the limits of existing preservation controls).

81. See Duerksen & Bonderman, *supra* note 55, at 8–10 (detailing the emergence of federal preservation laws during the 1960s).

82. MILLER, *supra* note 12, at 3–6.

83. John M. Fowler, *The Federal Preservation Program*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 10, at 35, 41–43 (discussing the transformative role of the National Register of Historic Places).

84. KAUFMAN, *supra* note 7 (explaining the two general strands of preservation effort and thought: regulatory authority aimed at controlling development and the alteration of historic resources and the utilization of financial incentives to promote the same efforts); see also Duerksen & Bonderman, *supra* note 55, at 18 (discussing the motivations behind the development of incentives as it became clear that demolition controls were not enough to address the economic issues leading to the loss of historic structures).

85. MILLER, *supra* note 12, at 30–32 (explaining federal, state, and local tax incentives for preservation work).

rehabilitation and adaptive reuse rather than wholesale clearing and destruction.<sup>86</sup> The rehabilitation tax credit, as it came to be known, “gives property owners either a 10 or 20 percent tax credit on rehabilitation expenses, depending on the classification of the building at issue. Certified historic structures are eligible for a 20 percent credit, and noncertified, nonresidential property placed in service before 1936 is eligible for a 10 percent credit.”<sup>87</sup> These incentives apply to development projects involving structures listed either on the National Register of Historic Places or as contributing to National Register Historic Districts.<sup>88</sup> These tax incentives provide developers an economic incentive to rehabilitate decrepit buildings and turn them into income-producing office or apartment spaces in urban corridors—and facilitated the influx of a considerable amount of capital into this variety of initiatives, creating a veritable industry associated with rehabilitative development.<sup>89</sup> This incentive was paramount in driving the preservation of thousands of historic structures.<sup>90</sup> Incentives supporting individual preservation efforts were clearly valuable in directing much-needed capital to these areas, and obviated some of the financial incentives that had fueled earlier clearing efforts, thereby augmenting and complementing the work of demolition controls.<sup>91</sup>

## 2. Preservation Easements

The other incentive-based preservation tool to “appear” during this period was the preservation easement—designed to facilitate the perpetual preservation of significant individual historic properties.<sup>92</sup> Preservation

---

86. Sharon C. Park, *Material on Federal Tax Incentives for Historic Preservation*, in HISTORIC PRESERVATION LAW 917, 919 (ALI-ABA Course of Study, April 26, 2007). Significant tax incentives also exist in many states. See CONSTANCE E. BEAUMONT & ELIZABETH G. PIANCA, STATE TAX INCENTIVES FOR HISTORIC PRESERVATION: A STATE-BY-STATE SUMMARY (2001) (discussing state rehabilitation tax credits).

87. Miller, *supra* note 4, at 28–29.

88. Kathryn W. Howe, *Private Sector Involvement in Historic Preservation*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 10, at 279, 289–91 (discussing federal incentives for the rehabilitation of designated properties).

89. See Carolyn E. Chevrine & Charlotte M. Hayes, Note, *Rehabilitation Tax Credit: Does It Still Provide Incentives?*, 10 VA. T. REV. 167, 180–82 (1990) (exploring the rehabilitation tax credit and its impacts on the regeneration of formerly moribund properties).

90. Nat’l Park Serv., Federal Preservation Program Notes: Federal Historic Preservation Tax Incentives Program (2006), [http://www.achp.gov/docs/BRAC/Federal\\_Historic\\_Preservation\\_Tax\\_Incentives\\_Program-June\\_06.pdf](http://www.achp.gov/docs/BRAC/Federal_Historic_Preservation_Tax_Incentives_Program-June_06.pdf) (explaining that as of 2006, federal tax credits had leveraged over \$33 billion in investment to restore 32,000 historic properties and create 185,000 housing units).

91. Cofresi & Radtke, *supra* note 59, at 118–19 (explaining this interaction and its impact on preservation efforts).

92. ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT

easements are voluntary agreements between homeowners and preservation organizations (easement holders) that restrict certain changes to historic properties and ensure their long-term preservation.<sup>93</sup> Preservation easements had been around in various forms for decades, but federal tax incentives made this tool a viable financial option for many individual homeowners seeking to preserve their properties by allowing those homeowners to deduct any loss in their property value as a charitable tax deduction.<sup>94</sup> Generally, these easements allowed individual homeowners to voluntarily take action to protect their property on a “one-off” basis—but these donations did not have a larger impact as far as preserving any broader historic context.<sup>95</sup>

The net impact of these incentive-based initiatives was to take preservation in a new direction, away from the existing regulatory paradigm.<sup>96</sup> While this shift was effective in reducing the incentives that drove property losses, it may have had the unintended consequence of re-orienting the preservation mindset to focus on “compensating” some property owners for their preservation work.<sup>97</sup> In other words, did the move to incentivize these targeted preservation efforts place additional scrutiny on the LHD model, a regulatory form for which no compensation was provided?<sup>98</sup>

---

PROGRAM TO PROTECT HISTORIC RESOURCES 2–3 (2007) (discussing the development of the preservation easement).

93. MARILYN MEDER-MONTGOMERY, *A LEGAL MECHANISM FOR PROTECTING CULTURAL RESOURCES* 1–7 (1984) (explaining the origins and use of this relatively new preservation tool).

94. WATSON & NAGEL, *supra* note 92, at 2 (explaining that Congress’ authorization of the tax deduction for the donations of easements in 1984 really made preservation easements more viable for homeowners interested in protecting their properties); *see also* Jess R. Phelps, *Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future*, 91 NEB. L. REV. (forthcoming Fall 2012) (discussing the common law tools utilized to afford long-term protection to historic resources prior to the 1970s).

95. *See* Stefan Nagel, *A Guide to Preservation and Conservation Easements*, FRANK LLOYD WRIGHT BUILDING CONSERVANCY BULL., Summer 2002, at 8 (noting the benefits that preservation and conservation easements provide property owners). This, of course, is a bit of an oversimplification as one way to qualify for federal tax incentives is for a property to contribute to a National Register Historic District—thus this federal tax incentive does indirectly serve to channel preservation activity into designated geographic areas. *Id.*

96. *See* TYLER, *supra* note 18, at 191 (“[T]he federal government lay much of the groundwork for preservation efforts through the National Historic Preservation Act of 1966, little was done up to that time to give financial incentives for preservation.”).

97. *See, e.g.,* Dan McCall, *The Role of Easements in Historic Preservation: Implications of Valuing a Property Right as a Commodity* 4, 8–20 (Georgetown Law: The Scholarly Commons, Working Paper No. 7, 2004), *available at* [http://scholarship.law.georgetown.edu/hpps\\_papers/7](http://scholarship.law.georgetown.edu/hpps_papers/7) (discussing six cases determining whether tax incentives are still appropriate when homeowners already have to abide by local regulations).

98. *Id.* Anecdotally, this bears out in practice. The most common type of call we receive, as a representative of a preservation organization, relates to individual homeowners looking for incentives or

Over the past century and a half, the preservation movement has evolved in its approaches, focuses, and priorities—moving from protecting individual landmarks to playing a significant role in preserving whole areas and communities. Similarly, the legal mechanisms facilitating these efforts have undergone a corresponding transition from the purchase of significant properties for use as public museums to the development of regulatory demolition controls over private property, and finally to the adoption of various incentives designed to lessen development pressures and promote positive development activity. Despite this evolution, LHDs and other local regulatory controls continue to play the predominant role in preserving large swaths of historic areas across the nation. No mechanism—federal, state, or local—has developed to challenge the LHD’s predominant status in providing binding control over privately owned property.<sup>99</sup>

## II. LOCAL HISTORIC DISTRICTS: AN OVERVIEW

Despite being somewhat widespread after nearly eighty years of operation, LHDs remain misunderstood—particularly as to their impacts on individual property owners, neighborhoods, and whole communities.<sup>100</sup> This Part addresses a number of the larger misconceptions, provides a working context to this regulatory authority, evaluates the role LHDs play in their communities and the benefits they provide, and uncovers the roots of the opposition to this regulatory form.

### A. *What Are Local Historic Districts?*

Generally, historic districts are defined as “a geographically definable area—urban or rural, large or small—possessing a significant concentration, linkage, or continuity of sites, buildings, structures, and/or objects united by past events or aesthetically by plan or physical development.”<sup>101</sup> Beyond this geographic construct, LHDs add a layer of regulatory control intended to guide future development of an area by limiting insensitive alteration or

---

compensation in exchange for performing preservation work on their homes—as there appears to be a large public misconception that such funds or incentives are available to facilitate this work on private properties used for residential purposes.

99. See Confresì & Radtke, *supra* note 59, at 131–33 (discussing the predominant role of local aesthetic regulations).

100. MASS. HISTORICAL COMM’N, *There’s a Difference! 2*, available at <http://www.sec.state.ma.us/mhc/mhcpdf/difference.pdf> (explaining the difference between LHDs and National Register Historic Districts).

101. MURTAGH, *supra* note 9, at 103.

demolition of designated historic properties.<sup>102</sup> “Through historic preservation ordinances, local jurisdictions regulate changes to historic resources that would irreparably change or destroy their character.”<sup>103</sup>

Overall, LHDs are formed under state enabling law authorizing municipalities to create regulations at the local level.<sup>104</sup> After state enabling legislation is in place, the remainder of the efforts occur at the local level and hinge solely upon the general willingness to enact districts within a given community.<sup>105</sup> Thus, this activity regulating private property is almost exclusively a local concern—from the areas protected, to the scope of authority available to individual districts, to the decisions made as far as what to regulate.<sup>106</sup> Thus, “[p]reservation ordinances vary widely from place to place depending upon several factors. Variations may arise, for example . . . because of differing levels of political support for preservation in a given community. No single approach works in every situation” and LHDs are flexible enough to accommodate this variability.<sup>107</sup>

Significant confusion exists as to the distinction between LHDs and National Register Historic Districts.<sup>108</sup> LHDs, although it may seem counterintuitive, are actually the more effective preservation mechanism and impose greater control on a listed historic property.<sup>109</sup> In the end, National Register Historic Districts are largely a symbolic designation providing a formal recognition of the property’s historic value.<sup>110</sup> National Register Historic Districts do, however, qualify contributing properties for tax credits if rehabilitation work is contemplated and can also require federal agencies to consider the impacts on these areas before the work is commenced—but lack

---

102. NAT’L TRUST FOR HISTORIC PRES., BASIC PRESERVATION 8–9 (2006).

103. MILLER, *supra* note 12, at 8–9.

104. RICHARD J. RODDEWIG, PREPARING A HISTORIC PRESERVATION ORDINANCE 1 (Am. Planning Ass’n, PAS Report No. 374, 1983), in HISTORIC PRESERVATION LAW 399, 399 (ALI-ABA Course of Study, 2004).

105. de Teel P. Tiller, *Still Local After All These Years*, FORUM J., Summer 2001, at 9, 9–12; see also Gwen Wright, *Use of the “Carrot and Stick” in Local Preservation*, FORUM J., Summer 2001, at 23, 23–27) (discussing local preservation efforts based upon local priorities).

106. MILLER, *supra* note 12, at 9. This variability also stems from other factors—such as the authority provided from state to state by various enabling acts, the relationships and communication between historic district commissions and other local agencies (for example, does the building inspector or planning department notify the historic commission when a permit has been pulled). *Id.*

107. *Id.* at 8–9.

108. MASS. HISTORICAL COMM’N, *supra* note 100.

109. *Id.* at 2–3.

110. *National Register of Historic Places Program: Fundamentals*, NAT’L PARK SERV., [http://www.nps.gov/nr/national\\_register\\_fundamentals.htm](http://www.nps.gov/nr/national_register_fundamentals.htm) (last visited Nov.13, 2012); see also Lunday, *supra* note 8, at 19–20 (addressing this distinction).

any regulatory authority whatsoever over private actions with regard to historic properties.<sup>111</sup>

### B. *Where are Local Historic Districts?*

LHDs are located across the country and protect many of the most significant historic areas—and when in place, they provide a strong layer of external protection for these critical cultural resources.<sup>112</sup> Currently there are approximately 2,300 historic districts across all fifty states.<sup>113</sup> These districts are not, however, uniformly distributed as approximately 220 are located in Massachusetts alone.<sup>114</sup> Overall, these districts protect significant historic areas and resources in villages, towns, and cities—from eighteenth-century resources in New Hampshire's seacoast to those of early twentieth-century suburbs around Houston, Texas.<sup>115</sup> As this broadness and inclusiveness demonstrates, LHDs play a fundamental role in protecting whole places—not just isolated properties—and can give us a sense of what an early fishing community looked and felt like, as well as capture the impact of the automobile on the post-World War II build-out of the American West on the cultural landscape.<sup>116</sup>

### C. *How Do Local Historic Districts Work?*

Local historic district commissions are responsible for the administration and efficient operation of LHDs.<sup>117</sup> The hallmark of local preservation,

---

111. *National Register of Historic Places Program: Fundamentals*, *supra* note 110 (discussing the benefits to listing in the National Register of Historic Places and the positive benefits for potential tax credits for development projects).

112. Albert H. Manwaring, IV, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designation*, 25 *NEW ENG. L. REV.* 291, 319–22 (1990) (explaining the ability of LHDs to protect historic facades but bemoaning their current limitations in protecting interior fabric).

113. CONSTANCE E. BEAUMONT, NAT'L TRUST FOR HISTORIC PRES., *A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1* (2002), available at [http://www.preservationnation.org/information-center/sustainable-communities/smart-growth/additional-resources/toolkit\\_citizens.pdf](http://www.preservationnation.org/information-center/sustainable-communities/smart-growth/additional-resources/toolkit_citizens.pdf); but see Edwards, *supra* note 79, at 224 n.5 (discussing the difficulty in establishing a precise estimate of the total number of LHDs enacted nationally).

114. MASS. HISTORICAL COMM'N, *ESTABLISHING LOCAL HISTORIC DISTRICTS 1–2* (2007) (detailing LHDs in Massachusetts).

115. See generally *Historic District Comm'n*, CITY OF PORTSMOUTH, <http://www.cityofportsmouth.com/planning/hdc.htm> (last visited Nov. 13, 2012) (using the Historic District of Portsmouth, NH as an example of an historic district that protects significant eighteenth-century historic areas and resources); *Woodland Heights Historic District Boundaries*, PRESERVE WOODLAND HEIGHTS, <http://www.preservewoodlandheights.org/> (last visited Nov. 13, 2012).

116. TYLER, *supra* note 18, 155–67 (exploring the reasons for enacting LHDs as well as the range of resources protected through this mechanism).

117. *Id.* at 67, 72–73.

however, is the tool itself—the local historic ordinance—which can vary from community to community and amongst the resources being protected.<sup>118</sup> Most ordinances provide for five basic components.<sup>119</sup> The first component of a typical LHD creates the historic district commission or design review committee, which is responsible for administering the district and reviewing project requests.<sup>120</sup> Requirements for filling these commissions vary from jurisdiction to jurisdiction; typically, they have monthly meetings to focus on their principal duties: determining which properties or areas are worthy of preservation and reviewing requests for project approvals (or applications for “certificates of appropriateness”) for projects falling under their jurisdiction.<sup>121</sup>

After establishing the historic district commission, “historic preservation ordinances generally set forth procedures and criteria for the designation of historic properties, along with procedures and criteria for reviewing requests to alter, move, or demolish such properties” in order to provide definition and structure to these reviews.<sup>122</sup> Beyond composing the commission and laying out a formal process for evaluating its decision-making, preservation ordinances may also consider hardship and establish a legally binding appellate process.<sup>123</sup> This provides an escape valve if a decision would place an undue financial burden upon a regulated homeowner and allows formal legal review of the commission’s determinations.<sup>124</sup> In all, these components are the principal features of the overwhelming majority of local preservation ordinances currently in place.<sup>125</sup>

---

118. *Id.* at 179–82 (discussing variations in ordinances based upon the community needs being filled by its enactment).

119. MILLER, *supra* note 12, at 9 (“[W]hile variations exist from ordinance to ordinance, most include at least five major parts.”); see also Mark D. Brookstein, *When History is History: Maxwell Street, “Integrity,” and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1867–68 (2001) (explaining the role of certified local governments in developing and implementing local historic preservation programs).

120. See Duerksen, *supra* note 4, at 70 (detailing the scope of a reviewing body’s power).

121. *Id.* at 70, 101.

122. *Local Preservation Laws*, NAT’L TRUST FOR HIST. PRESERVATION, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/understanding-preservation-law/local-law/> (last visited Nov. 13, 2012) (discussing preservation ordinances and the land-use principles they must comply with to pass constitutional muster). These procedures are critical in order to meet constitutional muster as far as the procedural due process implications raised throughout this process. See BRADFORD WHITE ET AL., *PROCEDURAL DUE PROCESS IN PLAIN ENGLISH* 1–5 (2008) (explaining these considerations and providing guidelines for defensible decision-making at the commission level).

123. MILLER, *supra* note 12, at 9.

124. *Id.* at 9–10.

125. *Id.*

Once established, the first task of an historic commission is to work with the jurisdiction to identify historic districts worthy of preservation.<sup>126</sup> After a potential district has been identified, it must be comprehensively surveyed to determine its borders and demarcate the area to be regulated.<sup>127</sup> The resources within this proposed district will be designated as either “contributing” or “non-contributing.”<sup>128</sup> This determination of the resource’s compatibility with the prevailing district norms will establish the level of review that will apply, as a contributing resource will potentially be held to a different level of design control than a non-contributing resource.<sup>129</sup>

Once districts are in place, an historic district commission’s primary role is to review and act upon applications for work on resources included within the regulated area.<sup>130</sup> “Most often, owners of property subject to a preservation ordinance must submit an application to a preservation commission for permission to alter, demolish, move, or construct additions and new buildings.”<sup>131</sup> These applications are for “certificates of appropriateness” or a finding that the proposed work comports with the preservation controls applicable to the given structure.<sup>132</sup> Despite the formality of this process, in practice an impacted homeowner will typically engage in pre-discussions with either professional staff working within the jurisdiction or the commission members to gauge reaction to the proposal and to see if changes can be made to comport with the district’s review standards.<sup>133</sup> After a proposal has been formally presented, a determination on the application will be made at a public hearing, and in accordance with the district’s review standards.<sup>134</sup> The commission’s final ruling will generally be a formal written determination, complete with specific factual

---

126. *Id.* at 9 (discussing how properties or districts are selected for landmark or LHD status).

127. MASS. HISTORICAL COMM’N, *supra* note 114, at 14–18 (discussing the process of surveying resources to establish an LHD).

128. TYLER, *supra* note 18, at 72.

129. MILLER, *supra* note 12, at 10 (“Contributing properties may enjoy full protection while changes to non-contributing property (including vacant land) are generally approved if ‘compatible’ with the character of the historic district.”).

130. Cofresi & Radtke, *supra* note 59, at 131.

131. MILLER, *supra* note 12, at 10.

132. *See* Duerksen, *supra* note 4, at 101–02 (describing procedures for reviewing certificates of appropriateness).

133. *How is a Local Historic District Administered?*, NAT’L TRUST FOR HIST. PRESERVATION, <http://www.preservationnation.org/resources/faq/historic-districts/how-is-a-local-historic.html> (last visited Nov. 13, 2012); *see also* MILLER, *supra* note 12, at 10 (“An increasing number of communities have also established an informal process to encourage property owners to consult with commission staff . . . before embarking on a major project.”).

134. RACHEL S. COX, DESIGN REVIEW IN HISTORIC DISTRICTS 3–10 (1997).

findings and conclusions of law.<sup>135</sup> This regulatory determination largely drives the controversy surrounding the use of this tool.

*D. What Goals Do Local Historic Districts Further?*

The goals articulated for LHDs have varied over time and generally must be tailored to fit the objectives of the community implementing the LHD. There are a number of benefits that LHDs can provide, including: (1) protecting historic resources; (2) controlling new development; (3) incentivizing development activity; and (4) stabilizing property values.<sup>136</sup>

1. Protection of Historic Resources

*“DUMBO’s distinctively designed buildings and sublime vistas survive to this day, and still define its character, even as it has evolved into a largely residential neighborhood. This [LHD] designation will ensure that this still-evolving neighborhood retains its unique historic character.”*<sup>137</sup>

The rationale provided for most LHD initiatives is to protect areas of historic resources, which is also the primary reason this regulatory form was created.<sup>138</sup> This objective also attempts to promote “[t]he associative value of historic resources”—or the preservation of context.<sup>139</sup> Under this view, “history is best viewed in context, and historic preservation, especially through the use of historic districts, enables a community to maintain the aesthetic value of an entire community for future generations to study and cherish.”<sup>140</sup> LHDs are capable of accomplishing this goal and are the most effective tool at protecting larger assemblages of historic properties—or historic context—that has been developed to date.

135. *Id.*

136. TYLER, *supra* note 18, at 60–65 (laying out various rationales for creating LHDs and also touching upon another reason for establishing a district—to provide recognition to an historic area for promotional purposes).

137. Sewell Chan, *Dumbo is Now Protected as a Historic District*, N.Y. TIMES (DEC. 18, 2007, 4:54 PM), <http://cityroom.blogs.nytimes.com/2007/12/18/dumbo-is-now-protected-as-a-historic-district> (quoting Robert B. Tierney, Chairman of New York City’s Landmarks Preservation Commission, commenting on the area known as “Down Under the Manhattan Bridge Overpass” (DUMBO) receiving its LHD).

138. TYLER, *supra* note 18, at 62–63 (explaining the history of LHDs and the reasons for creating them).

139. PRATT CASSITY, MAINTAINING COMMUNITY CHARACTER: HOW TO ESTABLISH A LOCAL HISTORIC DISTRICT 1 (rev. ed. 2001).

140. Edwards, *supra* note 80, at 224.

## 2. Controlling New Development

*Historic districts have the paradoxical twin virtues of stability and flexibility. They encourage continuity and the care of existing properties, while respecting changes over time—layers of life—that add architectural richness and visual variety to townscapes. But they do not prevent new construction, nor should they prohibit contemporary design that is respectful of existing resources.<sup>141</sup>*

Early on it was recognized that LHDs could do more than just protect historic resources directly—they could also provide a measure of protection for limiting insensitive development, or at least control its scale and massing.<sup>142</sup> In short, preservation controls are used as “part of the tactical arsenal available to residents as they struggle to retain a modicum of control over the character of their neighborhoods.”<sup>143</sup> In this regard, a distinct objective of historic preservation ordinances is to complement zoning efforts and promote architectural consistency within a geographic area.<sup>144</sup> LHDs have successfully imposed controls on new developments in historic areas; in some instances, by restricting inappropriate development, this control has been as important in preserving an area’s sense of place as protecting the historic structures themselves.

## 3. Providing an Incentive for Development Activity

*“In downtowns and in neighborhood commercial districts a major contribution to the local economy is the relative affordability of older buildings. . . . Historic buildings play the natural business incubator role, usually with no subsidy or assistance of any kind.”<sup>145</sup>*

Beyond controlling new development, LHDs can also provide an incentive for development activity.<sup>146</sup> National, state, and local tax

---

141. N.H. DIV. OF HISTORIC RES., WHAT ARE HISTORIC DISTRICTS GOOD FOR, ANYWAY? 1 (rev. 2008).

142. See Rose, *supra* note 14, at 489–91.

143. Robert Verrey & Laura Henley, *Creation Myths and Zoning Boards: Local Uses of Historic Preservation*, in THE POLITICS OF CULTURE 87, 94 (Brett Williams ed., 1991).

144. Lunday, *supra* note 8, at 18–21 (discussing the role of historic preservation ordinances in preventing oversized infill development and imposing architectural controls in given geographic areas).

145. DONOVAN RYMPKEMA, ECONOMICS, SUSTAINABILITY, AND HISTORIC PRESERVATION 12 (2005).

146. See TYLER, *supra* note 18, at 62–63 (discussing incentives for redevelopment and explaining the redevelopment project of the Manchester neighborhood of Pittsburgh, Pennsylvania during the 1960s).

incentives exist for targeted re-development of certified historic properties that are located within registered historic districts.<sup>147</sup> Thus, designation of an area as “historic” opens up the potential to directly infuse investment capital to re-develop the area for commercial and residential purposes.<sup>148</sup>

#### 4. Stabilizing Property Values

*Historic designations reversed the trend of neglecting and abandoning older houses to attracting urban pioneers who restored the homes and stabilized the neighborhoods. As these historic districts restored confidence in the area, adjacent neighborhoods began to improve and started a ripple effect in the next layer. What were slums 20 years ago are now prestige neighborhoods.*<sup>149</sup>

Various studies over time have attempted to quantify the economic impact of designating a property or area.<sup>150</sup> The general theory—at least on the preservation side of this debate—is that “historic district regulations stabilize[] the area and assure[] investors that properties surrounding theirs [will] not be allowed to be demolished or neglected.”<sup>151</sup> Anecdotally, there have been many instances that prove this to be true. For example, in the Lower Downtown (LoDo) area of Denver, Colorado, a district was implemented despite residents’ concerns that it would lower property values and accelerate the area’s general decline.<sup>152</sup> Within a ten-year period, however, the opposite occurred—this area of old warehouses had become a vibrant cultural center where property values doubled throughout most of the designated area.<sup>153</sup>

In sum, LHDs can be tailored to meet a variety of objectives from preserving historic fabric and context, serving as a planning tool preventing insensitive new development, to providing economic incentives such as

---

147. *Tax Incentives for Preserving Historic Properties*, NAT’L PARK SERV., <http://www.nps.gov/tps/tax-incentives.htm> (last visited Nov. 13, 2012).

148. *Id.*

149. TEXAS HISTORICAL COMM’N ET AL., *HISTORIC PRESERVATION AT WORK FOR THE TEXAS ECONOMY* 5 (1999) (quoting Dallas resident on the impacts of LHD in her community).

150. *See, e.g.*, CAROLINE CHEUNG & DONOVAN RYPKEMA, *MEASURING THE ECONOMIC IMPACTS OF HISTORIC PRESERVATION: A REPORT TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION* (2011), available at <http://www.achp.gov/docs/economic-impacts-of-historic-preservation-study> (explaining its recent study and supporting methodology for conclusion that historic regulations improve property valuations).

151. NORMAN TYLER ET AL., *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 163 (2d ed. 2009).

152. *Id.* at 162.

153. *Id.*

increasing property values and promoting new development within the infrastructure of these areas. The purpose of designating an LHD, however, is determined by the community or area impacted by this decision, and can be spurred by the area's experience or concerns.<sup>154</sup>

### *E. Why Resistance?*

Given the positive benefits that LHDs provide, why is there resistance to this regulatory form? Overall, the resistance to regulatory control over historic properties derives from a variety of factors that have collectively rendered efforts to enact new local regulatory controls ineffective—which are addressed in turn below.

#### 1. Property Rights Movement

*“Historic Districts are simply another scheme for government control of private property, and despite all the slick reassurances and arguments to the contrary, Historic Districts are another layer of bureaucracy.”*<sup>155</sup>

One of the most significant recent developments in this vein has been a meaningful shift towards an absolutist view of individual property rights.<sup>156</sup> This shift contrasts markedly with earlier conceptions of the balance between private and public control or rights over a given property and has ossified over time at least amongst its primary advocates. This property rights fervor has been reinforced by court decisions on the regulatory takings front, and has generally led to a growing public perception that unlimited property rights are a touchstone of American democracy and efforts to infringe upon these rights must be counter to our very core, which

---

154. For example, many LHDs have been the product of frustrations over a municipality's inability to prevent the destruction of a significant building. See CHRISTOPHER C. SKELLY, MASS. HIST. COMM'N, PRESERVATION THROUGH BYLAWS AND ORDINANCES: TOOLS AND TECHNIQUES FOR PRESERVATION USED BY COMMUNITIES IN MASSACHUSETTS 58 (2003), available at <http://commpres.env.state.ma.us/publications/PTBylaws/PTBO-1.pdf> (discussing the role of lost structures as catalysts for implementing LHDs).

155. L. M. Schwartz, *Six Reasons to Say No to Local Historic Districts*, THE VIRGINIA LANDS RIGHTS COALITION, <http://www.vlrc.org/articles/33.html> (last visited Nov. 13, 2012).

156. See Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U. L. REV. 111, 128–31 (discussing the origins of the property rights movement and its impact on historic preservation efforts); see also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108–14 (2009) (discussing the property rights movement after this significant decision).

fuels skepticism regarding the relative merit of regulatory preservation as a societal goal or objective.<sup>157</sup>

## 2. Unique Status of Houses in American Society

*For a man who owns his own home acquires with it a new dignity. He begins to take pride in what is his own, and pride in conserving and improving it for his children. He becomes a more steadfast and concerned citizen of his community. He becomes more self-confident and self-reliant. The mere act of becoming a homeowner transforms him. It gives him roots, a sense of belonging, a true stake in his community and its well-being.*<sup>158</sup>

Directly relating to this growing absolutist view of property rights is the lofty position that homeownership holds within our society. Homeownership itself has a unique role in the American psyche—the homeownership ideal has manifested itself deeply within our collective dreams and ideas as to what defines a contributing member of our society. This almost-sacred vision of homeownership and individual freedom impacts collective thinking as to what is appropriate as far as control over a homeowner’s rights to modify or alter their property. To a non-preservationist, it often beyond belief and understanding that an historic regulation should place limits on the amount of authority a homeowner has to modify their home—particularly if proposed work does not have the practical impact of changing the outward appearance of the structure but instead is designed to preserve as much historic fabric as possible.<sup>159</sup>

## 3. Overreaching by Preservationists?

*“In my former life as a seagull, I was flying up and down the California coastline and saw your house built shaped as a seashell, built out of driftwood and feathers, with the aperture facing out to sea.”<sup>160</sup>*

---

157. See generally Jane C. Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, Florida Bar J., Jan. 1996, at 55 (discussing the impact of various Florida legislative enactments within the context of the larger property rights debate).

158. 112 CONG. REC. 27,259 (1966) (statement of Sen. Cand. Charles M. Percy).

159. JAN CUNNINGHAM, VINYL SIDING: THE REAL ISSUES 7–10 (2001), available at [http://sohosandiego.org/images/ct\\_trust\\_vinylsiding.pdf](http://sohosandiego.org/images/ct_trust_vinylsiding.pdf) (discussing this issue within context of the vinyl siding debate).

160. Stephen Page, *Historic Preservation Controls?*, WALL ST. J., Dec. 24, 1994, at C9 (quoting (allegedly) a member of the architectural board reviewing a proposed design for a Pacific Grove, California residence).

Some of the reaction against local preservation ordinances and controls likely has to be laid at the feet of the preservation community itself. Setting up commissions to pass judgment on the design and maintenance decisions by their neighbors often places preservationists in a difficult position. In many instances, these decisions can seem arbitrary and without a rational basis to a general public that can be skeptical of their motivations. For example, a decision by a local historic district commission to prevent vinyl siding on a non-visible façade of an historic property has strong support as far as preservation philosophy is concerned, but may not mesh with the general public's perception of what a reasonable and balanced accommodation between preservation and practical economy should be.

#### 4. Failure to Articulate Vision or Value

*“If there is one point at which . . . preservation[ists] lose the broader public it is in a general inability to communicate a sustaining vision for older communities that is forward looking and embraces change.”*<sup>161</sup>

The preservation community's failure to articulate the value of historic districts is not for a lack of trying. But for whatever reason, historic districts have been pilloried as creating undue restrictions that inhibit developing property to its highest and best use without providing a corresponding and measurable public benefit. When compared to the amount of buy-in that the conservation movement has been able to obtain over approximately the same period, it is notable how far preservationists have fallen behind. Many perceive conservation of open space and even agricultural working lands positively—even if accomplished through regulatory means. This gap can largely be attributed to messaging or a failure to foster a working ideal of individual responsibility to preserve historic houses that corresponds to the widely-held stewardship ideal of landscape that the conservation movement has been able to build across wide swaths of the population.<sup>162</sup>

---

161. Bill Schmickle, *Preservation (and Environmental) Advocates Must Consider the Context of Our Advocacy*, guest post to *Kaid Benfield's Blog*, NRDC SWITCHBOARD (May 15, 2009), [http://switchboard.nrdc.org/blogs/kbenfield/guest\\_post\\_preservation\\_and\\_en.html](http://switchboard.nrdc.org/blogs/kbenfield/guest_post_preservation_and_en.html).

162. See SEMES, *supra* note 3, at 29, 34–35 (describing the need for the preservationists to adopt a conservation ethic).

## 5. Moving Further Afield from its Origins?

*“[T]he historic preservation movement has slowly expanded its emphasis from preserving grand homes and famous public buildings to preserving the vernacular history of everyday American life . . . .”*<sup>163</sup>

The shift towards protecting more vernacular neighborhoods through local historic districts has undoubtedly impacted the public’s perception of these regulations.<sup>164</sup> This is a net positive shift on the part of preservationists, as it directly responds to criticisms of preservation as an elitist pursuit and attempts to preserve the integrity of the type of communities that most Americans are familiar with.<sup>165</sup> This shift, however, further feeds into the messaging problem as opponents of preservation initiatives see such efforts to expand preservation controls as overreaching, and as an attempt to interject preservation controls beyond preserving “old and historic” neighborhoods imbued with a certain patina of age and historicity.<sup>166</sup>

## 6. Gentrification and Stifling Change?

*“Has preservation become a dangerous epidemic? Is it destroying our cities?”*<sup>167</sup>

More “progressive” challenges to LHDs focus on critiques of preservation as encouraging gentrification or as stifling creativity within urban planning and thinking.<sup>168</sup> One argument concerning gentrification is that the cost of historic preservation might be too high for some communities to bear—or raise property values, and in turn property taxes, both of which could potentially force long-term residents to move out of the designated area.<sup>169</sup>

---

163. Heuer, *supra* note 9, at 771–72.

164. *Id.* at 772.

165. *Id.*

166. *Id.* at 776.

167. Nicolai Ouroussoff, *An Architect’s Fear that Preservation Distorts*, N.Y. TIMES, May 23, 2011, <http://www.nytimes.com/2011/05/24/arts/design/cronocaos-by-rem-koolhaas-at-the-new-museum.html> (discussing architect Rem Koolhaas’s reaction to preservation efforts and their “stifling” impact). This critique is not necessarily new and has been around from the outset. See BLUESTONE, *supra* note 23, at 14–15 (discussing noted architect Philip Glass’s critique of preservation as a “phony movement”).

168. Ryan P. Howell, *Throw the “Bums” Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 541–42, 561–62 (2008) (exploring the impact of gentrification on historic neighborhoods); David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 64–65 (1985).

169. Verrey & Henley, *supra* note 143, at 94–95.

Many architects also criticize LHDs as locking neighborhoods into false re-engineered or imagined constructs of what we believe them to be, which actually serves to erase memory by making false distinctions between what should and should not be saved, not to mention limiting creative design and locking new construction into the prevailing stylistic paradigm.<sup>170</sup>

When combined, these disparate criticisms (whether accurate or not) make preservation districts a difficult proposition. New district proposals routinely fail when brought before the public, despite concerted efforts to lay the groundwork for a successful campaign by educating neighbors, gaining support and funds from neighbors, and putting together a comprehensive ground game to give the district a shot at being established. It is not for a lack of trying that district proposals are failing, but rather a general perception that these controls are unnecessary and burdensome. Short of a catastrophic local event—such as a demolition of a widely beloved resource—that spurs the community to action to prevent future losses districts are highly limited as a regulatory tool beyond their current adoption.

### III. POTENTIAL POST-REGULATORY TOOLS FOR THE FUTURE

Given the resistance to LHDs throughout many areas of the United States, not all areas or neighborhoods deserving collective preservation will be protected—at least not through regulatory means.<sup>171</sup> This does not mean that the preservation community should stop trying to establish LHDs. In fact, the opposite is true: these efforts should continue, and better articulate the benefits this would provide.<sup>172</sup> However, given the limitations on expanding the use of LHDs on any meaningful scale, the preservation community must explore alternative mechanisms to provide some base layer of protection to areas beyond the reach of any existing form of protection.

---

170. Herbert Muschamp, *Fitting in to History's True Fabric*, N.Y. TIMES, May 6, 2001, <http://www.nytimes.com/2001/05/06/arts/art-architecture-fitting-into-history-s-true-fabric.html?pagewanted=all&src=pm> (discussing the need for new construction to fit its time and not to become “Ye Old Theme Park-ish” in its application).

171. Brookstein, *supra* note 117, at 1863 (discussing the preservation of areas not designated as historic and the loss of significant properties outside of the existing district form); *see also* Confresì & Radtke, *supra* note 59, at 132 (explaining that while LHDs have expanded in scope over the past few decades—over eighty-five percent of U.S. communities still lack a single LHD which demonstrates the limits of even the current LHD framework).

172. *See* J. Jackson Walter, *Forward* to RICHARD C. COLLINS ET AL., AMERICA'S DOWNTOWNS: GROWTH, POLITICS & PRESERVATION 7 (Constance E. Beaumont ed., 1991) (discussing the importance of local historic preservation policies to downtown revitalization).

Confronting these obstacles will admittedly require imagination, and may require settling for less than optimal outcomes. To this end, this Section lays out three particularly promising tools: (1) preservation easements; (2) voluntary historic districts; and (3) revolving funds.

#### A. Preservation Easements

One clear alternative is for preservationists to increase their reliance on preservation easements—including utilizing easements to provide for communal protection to assemblages of historic properties, rather than just individual resources.<sup>173</sup> Preservation easements, when properly drafted and enforced, can protect the exterior façades of historic properties in a manner directly comparable to the protections provided by local regulatory ordinances.<sup>174</sup> As a non-regulatory mechanism, however, preservation easements can be utilized outside of existing LHD boundaries and can allow preservation-easement-holding organizations to secure meaningful protection of both individual historic structures and groupings of contiguous properties.<sup>175</sup>

Preservation easements are voluntary agreements negotiated between a homeowner and a preservation organization whereby the homeowner transfers a perpetual non-possessory interest to the preservation organization to secure its perpetual protection.<sup>176</sup> Through this agreement, homeowners cede certain rights to modify their property, and will need to seek approval before carrying out work on any protected features as defined by the terms of the agreement.<sup>177</sup> To utilize the traditional “bundle of sticks” property metaphor, owners give up a few of their sticks—namely, the ability to demolish or insensitively alter their property—to the preservation organization, which ensures the long-term preservation of the resource.<sup>178</sup>

---

173. See, e.g., Wendy Nicholas, *Collaborating to Save Whole Places*, FORUM J., Fall 2010, at 7, 9 (discussing the need for preservation organizations to expand their range of preservation tools).

174. See ELIZABETH BYERS & KARIN M. POINTE, *THE CONSERVATION HANDBOOK* 219–20 (2d ed. 2005) (explaining the protective scope of easements and the ability of this mechanism to provide strong protection for historic resources).

175. See Thompson M. Mayes & Ross M. Bradford, *Combining Preservation and Conservation Values: Six Illustrative Examples*, FORUM J., Fall 2010, at 24, 24–26 (demonstrating the versatility of preservation easement).

176. *What is a Preservation Easement?*, NAT'L TRUST FOR HIST. PRESERVATION (Feb. 20, 2008), <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/easements-faq/what-is-an-easement.html> (explaining preservation easements generally).

177. Martha W. Jordan, *Repairing Façade Easements: Is this the Gift that Launched a Thousand Deductions?*, 22 AKRON TAX J. 101, 110 (2007).

178. Jessica O. Lippman, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

This agreement is typically of perpetual duration to provide long-term protection of the historic resource, but even shorter-term easements can be negotiated and secured depending on the objectives of the parties.<sup>179</sup> To enforce the easement, the easement-holder will typically perform annual monitoring of the site to ensure that its terms have not been violated, and will also commit to enforcing its terms against any violations, including taking legal action if necessary.<sup>180</sup> Along with this donated property interest, the donor typically provides a monetary donation to cover the easement-holding organization's costs of carrying out its monitoring and enforcement responsibilities.<sup>181</sup> To put this another way, a preservation easement can be thought of as creating its own private LHD for a single protected resource by providing for a monitoring agency, a scope of protections, and a review process for evaluating work falling within the terms of the agreement. Despite this general definition, preservation easements are a flexible tool and can be tailored to protect those attributes of an historic property that make the property significant.<sup>182</sup>

The creative use of preservation easements can accomplish many of the goals that LHDs currently seek to achieve. Commissions and preservation groups have utilized easements for decades to obtain design control of historic properties outside of districts, or augment the protection of particularly significant properties already within existing districts (for example, securing interior protections on a property already subject to external controls through an LHD).<sup>183</sup> Given this background, preservation easements are typically thought of as tools to protect individual properties, but this does not necessarily have to be the case.<sup>184</sup> The following examples demonstrate three instances in which easements obtained positive results outside of the LHD framework: (1) negotiating a group easement; (2) conducting a campaign to promote the protection of historic properties

---

179. BYERS & POINTE, *supra* note 174, at 223.

180. *Id.* at 145.

181. NAT'L TRUST FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 1, 39 (2008) (explaining that stewardship endowments are intended "to cover expenses relating to the monitoring and enforcing of easements over time").

182. Paul Edmondson, Nat'l Trust for Historic Pres., *Conservation Easements: The Urban Experience—Historic Properties and Preservation*, in CONSERVATION AND PRESERVATION EASEMENTS AND COMMUNITY STEWARDSHIP ENTITIES: PRINCIPLES, DRAFTING PRACTICES, AND PRACTICAL REALITIES 203, 204 (ALI-ABA Course of Study, Mar. 7, 2008) (explaining the variations in easements and the impacts these variations have on the scope and strengths of this protective tool).

183. For example, LHDs typically only afford exterior protection. *See, e.g.*, Robert W. Mallard, *Avoiding the "Disneyland Façade" The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures*, 8 WIDENER L. SYMP. J. 323, 323–24 (2002) (explaining the lack of internal regulation of historic properties and the need for further action).

184. *See* Phelps, *supra* note 94, (discussing the potential for easements to expand beyond the protection of individual properties).

within a targeted geographic area; and (3) relying on exactions or grant funding to provide leverage to secure easement donations.

### 1. Negotiating Group Easements

Preservation easements can be negotiated to protect larger groups of properties if there are willing donors.<sup>185</sup> For example, in North Colebrook, Connecticut, Historic New England negotiated this type of easement on a number of historic properties.<sup>186</sup> In 1981, Nancy Phelps Blum donated an easement to Historic New England that protected three related properties: a late-eighteenth-century inn erected by Captain Arah Phelps; a Greek Revival house (1832) built by his son, General Edward A. Phelps; and a Gothic Revival cottage (1862) also built by General Phelps.<sup>187</sup> Mrs. Blum was concerned about protecting her family's historic footprint in the area, and was already seeing developmental pressures negatively changing the area.<sup>188</sup> Under the terms of this agreement, easements protected all three properties and thirty acres of farmland.<sup>189</sup>

This "collective easement" concept demonstrates the potential for using easements in a more holistic fashion to protect larger neighborhoods—particularly related properties under common ownership—but this could also be extended to properties held by multiple owners. Thus, if a neighborhood group wants to work together to protect its community, but cannot get sufficient traction to create an actual LHD, this group could donate an easement to a preservation group, ensuring that these properties remain intact for their mutual benefit. This collective action may benefit the donors, as an easement-holder may be willing to consider a reduced endowment contribution because the costs associated with a group of properties would be lower than those of single properties—which is not an inconsequential factor in facilitating this donation.

### 2. Developing a Program to Promote Targeted Easement Donations

Another possible approach for utilizing easements to secure protection for properties outside of LHDs is launching a formal initiative to protect

---

185. See Mayes & Bradford, *supra* note 176, at 24–25 (discussing the collective efforts of the Trust for Public Land, Maine Preservation, and a number of other groups to protect 1,700 acres of land and highly intact Shaker community).

186. Society for the Pres. of New England Antiquities, *Stewardship Agreement Signed in Connecticut*, SPNEA NEWS, Fall 1982/Winter 1983, at 1.

187. *Id.*

188. *Id.*

189. *Id.*

related properties. Ipswich, Massachusetts demonstrated the viability of this model by developing a formal program to encourage targeted donations of a number of highly significant, early First Period properties.<sup>190</sup> In the late 1970s, the Ipswich Historical Commission began exploring models to protect a large number of historic properties—mostly early residential properties of pre-1720s-period construction.<sup>191</sup> The Commission sought to protect both interior and exterior elements of these resources without utilizing the LHD model.<sup>192</sup> Thus, the Commission decided to explore methods for obtaining less than fee interests in the designated properties, and easements were selected as the best method to accomplish these goals.<sup>193</sup>

After beginning its campaign, the Commission approached property owners. The effort was originally couched as a collective exercise in protection—a veritable quid pro quo to preserve the overall setting and cluster of highly historic properties.<sup>194</sup> In short, by restricting your property, others similarly restrict their properties, providing—in the Holmesian phrase—“an average reciprocity of advantage.” Sixteen owners donated restrictions relatively quickly.<sup>195</sup> Some limited funds had been set aside to compensate owners (a nominal amount per property of approximately \$1,000) but half of the homeowners did not even claim this amount, recognizing the collective benefit and value associated with this effort.<sup>196</sup> In the Commission’s summary, its assessment of the final result was as follows: “Were there any difficulties in the negotiations? Surprisingly few. Three fine houses which the Commission would have liked were refused to them, probably because of the owner’s distrust of any restrictions. Otherwise, there was ready understanding and acceptance of the Agreement provisions.”<sup>197</sup> The Ipswich Historical Commission has been monitoring these properties over the past four decades, and has demonstrated the effectiveness of this type of model to protect thematic or targeted groupings

---

190. IPSWICH HISTORICAL COMM’N, SOMETHING TO PRESERVE 17–21 (1975); *see also* ABBOTT L. CUMMINGS, THE FRAMED HOUSES OF MASSACHUSETTS BAY 1625–1725 2 (1979) (citing the importance of Ipswich in preserving the largest concentration of very early houses—from the first century of settlement); *Guide to First Period Architecture in the Essex National Heritage Area*, ESSEX NAT’L HERITAGE AREA, <http://essexheritage.org/firstperiod/> (last visited Nov. 13, 2012) (defining and explaining this term and period of architecture).

191. IPSWICH HISTORICAL COMM’N, *supra* note 191, 25–27, 46–84.

192. *Id.* at 25–26.

193. *Id.* at 26.

194. *Id.* at 25–26.

195. *Id.*

196. *Id.* (recognizing that the “aim of the Project was not to embalm, but to encourage and ensure the harmonious use of each dwelling, thereby fortifying its durability and increasing its value”).

197. *Id.* at 26–27.

of properties through an organized campaign, particularly if some compensation can be offered to targeted property owners.

### 3. Exacted or Grant-Conditioned Easements

Beyond relying on easements to secure collective preservation of larger groups of properties, there are several mechanisms that can help commissions to secure easements on properties that would otherwise fall outside of any form of regulatory control. In this regard, exacted easements or easements obtained as a condition of grant funding present real opportunities.<sup>198</sup>

#### a. Exacted Easements

Exacted easements are obtained through regulatory processes, but outside of the LHD framework—namely through the planning and zoning process.<sup>199</sup> The classic example of an exacted easement relates to the grant of an easement as a condition of project approval.<sup>200</sup> For example, a developer comes to the town planning office seeking permission to subdivide an historic farm into multiple lots.<sup>201</sup> This application for subdivision clearly creates leverage for the town to gain some advantage or accommodation in exchange for green-lighting the larger project.<sup>202</sup> If the town's ordinances allow this subdivision, dividing the farm into smaller units would unfortunately be impossible, unless preservationists could raise large amounts of capital to purchase the development rights.<sup>203</sup> Thus, if approval of the project is inevitable—or not particularly objectionable—the planning or zoning commission or governing authority could approve the application, but condition its approval on the developer retaining the farm buildings on one parcel within the overall subdivision and require that the developer donate an easement on these buildings to the town's historical commission.<sup>204</sup> In a more urban setting, a similar agreement could be made if a developer seeks to add on to an historic property and requires approval

---

198. MICHAEL STEINITZ, MASSACHUSETTS: A CASE STUDY-COMMENTS ON TRENDS IN PRESERVATION EASEMENTS SINCE 2003 3–4 (Oct. 20, 2011).

199. Lippman, *supra* note 179, at 294–95.

200. *Id.* at 294.

201. STEINITZ, *supra* note 198, at 3–4.

202. *Id.*

203. See, e.g., Johanna Seltz, *Milton Ponders Bidders' Ideas for Poor Farm*, BOS. GLOBE, Mar. 31, 2011, [http://www.boston.com/news/local/articles/2011/03/31/milton\\_ponders\\_5\\_options\\_for\\_poor\\_farm\\_land/](http://www.boston.com/news/local/articles/2011/03/31/milton_ponders_5_options_for_poor_farm_land/) (discussing proposals for the future of the 34 acre former town poor farm and efforts to raise substantial funds to purchase the property and preserve it as open space).

204. STEINITZ, *supra* note 199, at 4–5.

of the planning and zoning boards—which could condition the approval on the grant of an easement on the building’s historic façade.<sup>205</sup>

#### b. Grant-Funded Easements

Grant funding often provides groups leverage to the extent that the funding covers the implementation of such an initiative.<sup>206</sup> If a jurisdiction or commission can finance the preservation work, a condition of the grant could easily require the recipient to donate an easement to the town’s historic commission.<sup>207</sup> This is a perfectly reasonable request. If the town or group is going to make a significant investment in restoration work on a private residence, then it should be able to ensure that its investment has lasting value, and that the restored property will not be demolished.

Overall, jurisdictions take a variety of approaches when it comes to conditioning grant funds. For example, the Massachusetts Preservation Project Fund generally requires an easement for a term of years—based upon the dollar amount of the grant—to secure its investment.<sup>208</sup> Depending on the amount of the grant, some jurisdictions require perpetual easements in conjunction with the grant.<sup>209</sup>

In the end, preservation easements present an opportunity for preservationists to secure many of their objectives. Preservation easements can be utilized to protect larger areas than this mechanism is given credit for. Preservation easements can also be obtained through many leverage points that even communities lacking formal LHD authority may already have in place through zoning or grant funding. The ability of easements to protect wider areas and to take advantage of these alternative leverage points make grant-funded easements a critical means for preservationists to make progress—in a non-regulatory format—towards securing the future of many significant historic buildings and neighborhoods.

---

205. *Id.* at 5.

206. *Id.* at 2.

207. *See, e.g.*, William Francis Galvin, *Massachusetts Preservation Projects Fund*, MASSACHUSETTS SECRETARY OF STATE, <http://www.sec.state.ma.us/mhc/mhcmppf/mppfidx.htm> (last visited Nov. 13, 2012) (requiring grant of preservation easement in exchange for state grants ranging from \$5,000 to \$100,000).

208. *Id.* (explaining that a perpetual restriction must accompany development projects and easements for terms of years must follow a pre-development project).

209. *Id.*

*B. Voluntary Local Historic Districts*

If a local historic district is not politically feasible, voluntary historic districts are an option—though not an optimal one—worth exploring, either to expand protections to towns lacking existing LHDs or to introduce this regulatory construct to new potential audiences within a community with existing districts.<sup>210</sup> While voluntary historic districts resemble their mandatory brethren, these districts are only binding upon homeowners who decide to join or consent to the district, thus subjecting their property to the applicable design review standards.<sup>211</sup> This obviously is not a perfect solution as the whole point of historic districts is that the restrictions mutually bind and benefit residents of an entire area—and thus help to promote shared values and relative stability—rather than having an adverse impact on any owners in isolation.<sup>212</sup> In short, homeowners may be giving up some individual rights to modify their property, but this “loss” is offset by the benefits obtained, because these restrictions similarly bind neighboring owners.<sup>213</sup> These districts face a classic free-rider problem and, ironically, typically bind only those who already have a preservation ethic or ethos, and would not be likely to carry out destructive work in the first place, leaving the most vulnerable properties still at risk.<sup>214</sup>

Despite these drawbacks, voluntary historic districts are still valuable in that they provide for some form of regional planning and help to inform

---

210. See MILLER, *supra* note 12, at 9 (explaining the differences in district authority between various LHDs). Relatedly, if a district is looking for a “district-lite” approach that still takes on some regulatory characteristics, neighborhood conservation districts could also be explored. For an introduction to this tool, see JULIA MILLER, PROTECTING OLDER NEIGHBORHOODS THROUGH CONSERVATION DISTRICT PROGRAMS 2–5 (2004); see also Rebecca Lubens & Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs*, 21 PRES. L. REP. 1001, 1001 (2002) (discussing the importance of conservation districts as “an alternative mechanism for protecting older, residential neighborhoods that may not qualify for historic district status”). A number of neighborhoods in Cambridge, Massachusetts have adopted this form of neighborhood control with great success. See *Historic Districts and Neighborhood Conservation Districts in Cambridge, MA*, CAMBRIDGE HIST. COMMISSION, <http://www2.cambridgema.gov/historic/districts.html> (last visited Nov. 13, 2012) (defining neighborhood conservation district (NCD) and highlighting Cambridge, Massachusetts’s successful NCDs).

211. See MILLER, *supra* note 12, at 29; *but see* Op. Mich. Att’y Gen. 6919 (1996) (explaining that under Michigan law an LHD requiring owner consent in order to be bound is not valid indicating that some forms of voluntary LHDs may not be possible in all jurisdictions).

212. TYLER ET AL., *supra* note 151, at 162–63 (discussing the role played by the Lower Downtown District in Denver, Colorado in promoting these objectives).

213. See Duerksen, *supra* note 4, at 33–34 (discussing this mutual benefit arrangement and rationale for regulatory preservation).

214. See ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 311 (2005) (explaining this free rider problem in the context of residential improvement districts).

discussion as to future development within the area.<sup>215</sup> This is a meaningful accomplishment, as this recognition and status can be critical to drawing attention to the preservation needs of a community.<sup>216</sup> Perhaps most importantly, voluntary historic districts are easier to enact.<sup>217</sup>

An example of a voluntary historic district is in Warren, Rhode Island. Warren implemented a voluntary historic district in 1999, and illustrates how this type of apparatus can operate in a climate hostile to more restrictive regulatory controls.<sup>218</sup> In Warren, residents strongly opposed initial efforts to enact a binding LHD, arguing that it unfairly impacted their private property rights or was going to cost homeowners money to maintain their properties up to the levels required under an LHD ordinance.<sup>219</sup> In 1994, efforts to locate a Walgreens on the town's main street, which would have involved the demolition of every building on the impacted block, led to the first serious discussion regarding local preservation controls.<sup>220</sup> Recognizing the challenges that establishing a traditional LHD posed, but also recognizing the need for some form of protection for the town's historic properties, the town appointed a study committee to review alternative options for obtaining some form of positive outcome that would allow a balance between these competing ideals. Warren's residents were looking to find a compromise between preservation concerns and objections to binding regulations.<sup>221</sup> At the end of a lengthy study, the committee recommended that the town adopt a voluntary historic preservation ordinance.<sup>222</sup>

Under Warren's voluntary historic preservation ordinance, homeowners of properties more than 100 years old can elect to opt-in to the district and thereby agree to abide by its regulations with regard to proposed work on their homes.<sup>223</sup> In exchange for joining the district, the town provides real estate tax credits covering up to twenty percent of the cost of

---

215. Sarah N. Conde, *Striking a Match in the Historic District: Opposition to Historic Preservation and Responsive Community Building* 6–8, (Georgetown Law: The Scholarly Commons, Working Paper No. 24, 2007), available at [http://scholarship.law.georgetown.edu/hpps\\_papers/24](http://scholarship.law.georgetown.edu/hpps_papers/24).

216. TYLER ET AL., *supra* note 151, at 163–64 (discussing the role that district recognition or status played in encouraging the redevelopment and renaissance of Lowell, Massachusetts).

217. Conde, *supra* note 220, at 26–28.

218. *Id.* at 26. See also *WVHDC Program Overview*, WARREN, RHODE ISLAND, <http://www.townofwarren-ri.gov/townboardsaz/historicpreservation.html> (last visited Nov. 13, 2012) (providing answers to basic questions regarding the Program).

219. ROGER WILLIAMS UNIV., HISTORIC PRESERVATION PLAN FOR THE TOWN OF WARREN, RHODE ISLAND 37 (2011).

220. *Id.* at 36.

221. Conde, *supra* note 220, at 27.

222. *Id.* at 26.

223. *Id.*

exterior restoration and a waiver of all construction permitting fees.<sup>224</sup> Under Rhode Island law, an additional state tax credit of twenty percent is available to defer the costs of exterior restoration on private residences; commercial properties may potentially receive even greater incentives.<sup>225</sup>

Overall, the reception of the program—at least locally—has been almost entirely positive. “[W]e have not heard of any negative feedback regarding the program,” Vice-Chair [of the Historic District Commission] Edward Therberge noted. “And the Town Council always speaks favorably about the program and [the] committee.”<sup>226</sup> During the first four years of the program (1999–2004), thirty-six houses participated—involving \$355,000 in restoration work and a corresponding \$61,000 in local tax credits issued.<sup>227</sup> Tying financial incentives to rehabilitation work within the district appears to have been an effective decision, as it had its desired effect in requiring homeowners to think about the impact of their actions before modifying an historic façade—this has ostensibly provided a sufficient incentive for owners to subject their properties to the district’s controls and design standards.

Despite the relative success of Warren’s program, unavoidable drawbacks remain.<sup>228</sup> Within Warren’s voluntary district, there have already been unfortunate changes to several properties, “including the addition of a second floor to a one floor Cape Cod style home, installation of a mansard roof to a three story mixed-use residential/commercial property, and the complete transformation of a residential property beginning with cosmetic changes and culminating with structural rot.”<sup>229</sup> Additionally, “[s]ome properties more than a century old have been demolished, their owners not having joined the Voluntary District.”<sup>230</sup> Moreover, the Warren Voluntary District model is so limited that it appears a homeowner could seek the benefit of the tax credit for exterior renovation work, complete the work, and then sell to a developer who could then demolish the property—completely devaluing the town’s investment in the property.

At the end of the day, a voluntary district remains only a partial or temporary solution—a stopgap or compromise to local political pressures that can provide limited protections to the willing—but this form will ultimately not prevent significant losses of historic fabric or, in some

---

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 27–28.

instances, the loss of entire groups of houses depending upon local development pressures. These districts may, however, provide a gateway for introducing historic district regulation to a new area as part of a strategy of eventually converting the district to a more binding form.

*C. A Substitute for Demolition Delay: Creative Use of Revolving Funds*

Often, preservationists' best tool is time, which can provide the opportunity to present meaningful alternatives to a developer or property owner to demonstrate that the structure slated for demolition can be saved—or to offer an alternative to insensitively proposed work.<sup>231</sup> Recognizing the value of this “cooling off” or “breathing” period, local preservationists have implemented demolition delay ordinances in a number of locations to supplement their district laws by providing this time period through regulatory means.<sup>232</sup> A “demolition delay” requires any developer seeking to demolish a designated historic property to wait a set period of time before the demolition can occur.<sup>233</sup> Provisions vary as far as which properties are subject to this delay period (whether properties listed on the National Register of Historic Places, State Register of Historic Places, or the more expansive state inventory of historic resources) but typically these provisions cover a significant number of historic properties.<sup>234</sup> Depending upon the community, these provisions could require a week-long delay or up to a year-long delay, which provides developers every incentive to come to some mutually agreeable compromise with preservation concerns to avoid the costs associated with the full delay period.<sup>235</sup> Overall, these

---

231. Cape Cod Comm'n, *Demolition Delays*, <http://www.capecodcommission.org/index.php?id=110&maincatid=5> (last visited Nov. 13, 2012) (detailing several demolition delay success stories on Cape Cod); JULIA H. MILLER, PROTECTING POTENTIAL LANDMARKS THROUGH DEMOLITION REVIEW 1, 1 (2006) (discussing the loss of several historic buildings in Baton Rouge, which led to the adoption of the city's demolition delay ordinance); see also *Pansini Custom Design Assocs. LLC v. Ocean City*, 969 A.2d 1163, 1165 (N.J. Super. Ct. App. Div. 2009) (discussing Ocean City's demolition delay ordinance, which required that the designated property be offered for sale at fair market value—which allowed a preservation group to raise the funds to purchase the threatened resource).

232. Evan Allen, *Demolition Delay Law*, BOSTON.COM (Aug. 21, 2011), [http://www.boston.com/yourtown/belmont/articles/2011/08/21/demolition\\_delay\\_law/](http://www.boston.com/yourtown/belmont/articles/2011/08/21/demolition_delay_law/) (discussing the need for such a mechanism and how it could have been utilized to help save the threatened Thomas Clarke House (c.1760)).

233. MILLER, *supra* note 237, at 1 (defining demolition delay ordinances).

234. *Id.* at 2–3 (exploring or enumerating those properties typically covered by these ordinances); see also SKELLY, *supra* note 154, at 49 (explaining the three principal types of demolition delay ordinances: (1) age (applicable to properties built before a certain construction date); (2) categorical (applicable to all properties on various historic registers—including the National Register, the state inventory, etc.); and (3) fixed list (applicable to all properties selected for its application)).

235. SKELLY, *supra* note 154, at 49–52 (listing Massachusetts communities with demolition delay provisions—ranging from fourteen days in Chelmsford and Tyngsboro to twelve months in a number of

provisions largely came about to avoid midnight demolitions that occurred without any notice to the general public, eliminating any opportunity for meaningful dialogue.<sup>236</sup> This delay provides preservationists with a powerful tool to impact proposed projects, including providing a negotiating chip and a chance to rally a constituency in support of saving a threatened resource.<sup>237</sup>

Unsurprisingly, given the power of this tool, demolition delay has come under attack in recent years for imposing a burden on property owners, adding unnecessary delay to development proposals, and frustrating or blocking “improvement” or “progress.”<sup>238</sup> In this regard, the arguments against demolition delay have largely mirrored those made in opposition to LHDs, and have similarly succeeded in reducing the number of communities enacting this form of regulation.<sup>239</sup> Even when a demolition delay is contemplated, these same arguments are occasionally effective in reducing the scope of demolition delay ordinances, reducing the period of the delay or reducing the numbers of historic structures that fall under its regulatory scope.<sup>240</sup>

One potential substitute for demolition delay—although a less effective substitute in some ways—is the revolving fund.<sup>241</sup> Within the preservation context, a revolving fund is typically a pool of money set aside by a preservation entity to purchase dilapidated historic properties, rehabilitate these structures, and then resell them to private owners with the proceeds of

---

communities across the state); *see also e.g.*, Jeff Byles, *Rising Up Against Teardowns*, N.Y. TIMES, July 14, 2006, <http://www.nytimes.com/2006/07/14/nyregion/nyregionspecial2/16Rteardown.html> (detailing the role Norwalk, CT’s demolition delay ordinance played in halting the demolition of four historic properties by encouraging a sale to a sympathetic purchaser and, in another instance, allowing preservationists time to offer an alternative to a developer—which incorporated the historic structures into an overall development plan).

236. SKELLY, *supra* note 154, at 49–52 (discussing demolition delay ordinances and relaying the reasons that these ordinances were passed in various communities, including the story of Lynn, Massachusetts’s efforts to pass a demolition delay ordinance that failed multiple times and was only enacted after the loss of the community’s last Stick Style building).

237. *See, e.g.*, *A History of the Coolidge Corner Theatre: 1933–present*, COOLIDGE.ORG, <http://www.coolidge.org/slideshow?nqid=12> (last visited Nov. 13, 2012) (detailing the role demolition delay played in preserving the historic 1906 theater in Brookline by allowing preservationists time to set up a 501(c)(3) to purchase and operate the theater for the benefit of the local community).

238. *See* Shawn Regan, *Haverhill Council Kills Demolition Delay Proposal*, EAGLE TRIB., Mar. 19, 2008, at A2 (explaining the debate centered on the failed campaign to implement a demolition delay ordinance in Haverhill, Massachusetts).

239. *See* Brenda Buote, *Town to Vote on Bylaw Change*, BOS. GLOBE, Apr. 21, 2011, at GN1 (explaining the motivations behind Reading, Massachusetts’s efforts to weaken its demolition delay ordinance in order to spur development within the community).

240. *Id.*

241. *See* LYN H. MORARITY, PRESERVATION REVOLVING FUNDS (1993).

these sales “revolving” back to the organization to fund the next project.<sup>242</sup> In recent years, however, preservationists have used revolving funds in new ways to obtain a measure of breathing space for threatened properties and to lock down these properties until they can locate a preservation-minded buyer, or find an alternative solution for the property.<sup>243</sup> A revolving fund works as follows: a preservation entity secures capital and then utilizes it to purchase options on threatened historic properties rather than fee interests.<sup>244</sup> These options allow the preservation entity to obtain a measure of control over the properties, forestall adverse consequences, and seek out preservation-minded buyers to purchase and agree to rehabilitate the properties.<sup>245</sup> If it can locate such a buyer, the preservation group exercises its option and purchases the property subject to a rehabilitation agreement—and typically an exterior easement—to secure the entity’s investment in the property.<sup>246</sup>

Groups have already demonstrated that this type of program can be an effective tool for gaining control of and preserving historic properties.<sup>247</sup> The Preservation Trust of Vermont recently created a program specifically utilizing this tool and acquired options on several properties, including the Watershed Tavern (c.1885) in Brandon, Vermont, and the Molloy-Delano House (c.1820) in Essex, Vermont.<sup>248</sup> Both properties are located in communities that lack demolition delay ordinances—thus, independent action was the only solution for obtaining space and room for dialogue and maneuvering.<sup>249</sup> The Molloy-Delano House is perhaps most instructive. This Federal-era house, featuring a somewhat unusual arcaded recessed front porch with five arched openings, is located in the Butler’s Corners settlement in the Town of Essex, Vermont.<sup>250</sup> The house itself was constructed at a crossroads within the greater community, and served as an important local landmark.<sup>251</sup> In recent years, the house has been neglected

---

242. J. Myrick Howard, *Revolving Funds in the Vanguard of the Preservation Movement*, 11 N.C. CENT. L. REV. 256, 256 (1980). For examples of highly effective traditional revolving funds, see *Preservation Easements*, HIST. BOSTON INCORPORATED, <http://historicboston.org/info/easements/index.html> (last visited Nov. 13, 2012); PROVIDENCE REVOLVING FUND, [www.revolvingfund.org](http://www.revolvingfund.org) (last visited Nov. 13, 2012).

243. See *Preservation Trust Establishes Revolving Fund*, THE PRES. TRUST OF VERMONT, <http://www.ptvermont.org/revolving/revolving.php> (last visited Nov. 13, 2012) (explaining their establishment of a revolving fund to purchase options on threatened properties).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

and suffered substantial decay.<sup>252</sup> By the 2000s, a developer had purchased the house, which had been occasionally threatened with demolition.<sup>253</sup> In late 2011, the Preservation Trust of Vermont stepped in and secured an option from the developer that—if exercised—would preserve the property. Currently, the Preservation Trust of Vermont is marketing the property and is offering the house at \$29,500.<sup>254</sup> If a buyer comes forward, the Preservation Trust of Vermont will then exercise its option, purchase the house, and convey it to the buyer—subject to an exterior façade easement and a rehabilitation agreement, requiring certain repairs or rehabilitation work to occur within a given period.<sup>255</sup>

Overall, this model demonstrates a viable alternative to the classic demolition delay ordinance. While it clearly is less effective, as it requires a seller who is willing to consider preservation as an option, it also carries the additional complication of requiring the preservation organization to actually risk capital. If an option is purchased and a willing buyer cannot be located, the capital risked to secure the option could be lost. This is a relatively small investment, normally a fraction of the purchase price, and if the property is closely assessed for risk factors (such as potential for resale, market factors, and the feasibility of rehabilitation) the relative risk taken on by a preservation group can be mitigated.

#### CONCLUSION

The fact that communities are increasingly unwilling to support the adoption of LHDs does not mean that such efforts should be abandoned. When enacted, these ordinances offer the most meaningful protection for neighborhoods and will continue to do so in the areas where their implementation can be secured. These districts clearly promote multiple values—from preserving historic fabric to protecting investment, and perhaps most importantly, enhancing a community’s sense of place.

In facing this “new reality,” preservationists need to be pragmatic and recognize that an LHD may not always be a possible mechanism to protect even a significant area—particularly as a first step. Alternative mechanisms can provide some room for agile preservation groups to maneuver, and provide some degree of protection for threatened structures or neighborhoods. These alternatives may not be complete substitutes for the LHD paradigm that the preservation community has become accustomed to

---

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

and become comfortable working within, but they do provide some options for achieving positive preservation outcomes. In sum, alternatives to regulatory control require preservationists to think in new ways and to be more strategic and thoughtful in determining and assessing their objectives. However, learning how to work within this “post-regulatory environment”—which is hostile to LHDs—is essential if preservationists are to continue to build upon their successful efforts over the past century and a half to preserve and protect our nation’s cultural heritage.