Renewed Energy: Sustainable Historic Assets as Keystones in Urban Center Revitalization

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**Articles**

**RENEWED ENERGY: SUSTAINABLE HISTORIC ASSETS AS KEYSTONES IN URBAN CENTER REVITALIZATION**

*Michael N. Widener*

I. INTRODUCTION

This tale of historic proportionality begins with an illustrative “numerator,” second-generation First Baptist Church (“First BC”). Located at 302 West Monroe Street in Phoenix, Arizona, the church was built in 1929 and expanded in 1948. Local architects Fitzhugh & Byron prepared working drawings and supervised initial construction, but First BC was designed mainly by George Merrill, an architect of the American Baptist Home Mission Society in New York. Designed primarily in Italian Gothic style, the church includes Moderne and other

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2 First Baptist Church (Addition to); Third Avenue at Monroe; 1948, ARIZ. MEMORY PROJECT, http://azmemory.azlibrary.gov/cdm/ref/collection/pmhbd/id/353 (last visited Sept. 26, 2014). The Arizona Memory Project website has sixteen sheets of digitized blueprint drawings of the addition. *See id.* While these drawings were prepared in connection with an addition, they contain details of the front elevation, front window, and main entry of the church structure. *See id.*

3 *See NOMINATION FORM, supra* note 1. The first floor’s plan for the church is shown on the last page of the nomination form. *Id.*

4 *Id.*


architectural movement elements, incorporating an auditorium with a stage. Its congregation relocated six miles north during 1968. First BC was placed on the federal National Register of Historic Places (“NRHP”) on February 8, 1982.

Thirty years after its historic designation, First BC is a useless ruin. In its present disrepair, First BC is not preserved, unless “preservation” means leaving the main structure windowless and vulnerable to nature, while accessible to determined thieves, vandals, and graffiti artists, along with the occasional tourist. Owned today by the Housing Opportunity Center, an Arizona non-profit, this church is a poster child for “landmarking” without forethought, promoting urban blight through the ravages of vandalism, arson, and squatting. In our secular society, unless the NRHP listing is removed or First BC is adaptively repurposed or

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6 See id. At the time of the placement of First BC on the register, its owner was H.A.V.C. Partnership. See id. This partnership consisted of a Phoenix Suns’s professional basketball player and several Arizona real property developers. See CERTIFICATE OF GENERAL PARTNERSHIP AND FICTITIOUS NAME OF H.A.V.C. PARTNERSHIP, RECORDS OF MARICOPA COUNTY, ARIZ. (1980), available at http://156.42.40.50/UnOfficialDocs2/pdf/19800106325.pdf.

7 Id. See Nomination Form, supra note 1.


9 See Pela, supra note 4.

10 The building has no roof atop about 75% of its span, and the windows, including a “rose”-style stained glass window that would have been located on the second story level, are missing from their frames. See id.; see also FLICKR, supra note 5. The church interior was gutted by fire in January, 1984. See Hanson v. Commercial Union Ins. Co., 723 P.2d 101, 102 (Ariz. App. 1986). The fire damage to the roof over the original sanctuary was not repaired, nor its roof replaced, in the past thirty years. See Pela, supra note 4. Video of the property’s interior is connected to a story by Brandon Hamilton, Architects draft ideas to renovate 1929 Phoenix First Baptist Church, ABC 15 ARIZONA (Jan. 4, 2014, 10:11 AM), http://www.abc15.com/news/region-phoenix-metro/central-phoenix/architects-draft-ideas-to-renovate-1929-phoenix-first-baptist-church.


demolished soon, this 20,000 square foot,\textsuperscript{13} four story main building with a seven story bell tower,\textsuperscript{14} situated on 20,625 square feet of land,\textsuperscript{15} faces vacancy and continued dilapidation into the twenty-second century.

First BC has little present utility and few future prospects in its current condition; the main structure continues to buckle. Such neglect desecrates the church and its designation as a heritage property.\textsuperscript{16} The property is marooned; the current expense of major renovation for a purposeful use cannot be borne by a non-profit without a bequest from a naive donor cherishing a damaged relic. It has scant potential as church, its condition aside, because increasingly fewer young Americans are “churched.”\textsuperscript{17} There is no reliable marketing evidence that renters desire to occupy a building for housing or commercial purposes because it looks like a former church.

When historic preservation of vacant buildings lacks any “repurposed implementation strategy,” a doom similar to First BC awaits designated properties.\textsuperscript{18} This paper addresses the duality of development

\begin{脚notesize}
\footnote{See NOMINATION FORM, supra note 1.}
\footnote{Id.}
\footnote{Forthrightly, persons affiliated with First BC’s owner have contemplated its potential future uses, including housing; but happy thoughts (i.e. “[i]t’s one of the great undeveloped treasures of Downtown”; see id.; or “the ruins give off a romantic and charming vibe making the future still very bright,” see Hamilton, supra note 10) do not a strategy for sustainable utility create. See Editorial Staff, supra note 12, at 28 (internal quotation marks omitted). The proposed use in the Phoenix Magazine article duplicates existing entertainment venues located within blocks of First BC. See id. But the proposed use is not achievable on a cost-effectiveness basis without philanthropic support measured in the hundreds of thousands of dollars, merely to shore up the structure from the ravages of neglect. Maintenance work in the First BC interior began during the first week of November, 2014, for a rumored opening as a garden and “events venue” in 2015. See Nadine Arroyo Rodriguez, Did You Know: Historic Church Under Renovation for 2015, 91.5 KJZZ (Aug. 8, 2014), http://kjzz.org/content/40795/did-you-know-historic-church-under-renovation-2015.}
\footnote{Government agencies themselves are miscreants in the preservation department. See, e.g., Ashley Southall, V.A. Is Faulted over Landmarks’ Condition, N.Y. TIMES, Nov. 8, 2013, at A22, available at http://www.nytimes.com/2013/11/08/us/va-is-faulted-over-deterioration-of-landmarks.html?_r=0. Readers should not infer the author’s singular dislike of one property type as historic assets. In the same year First BC was NRHP-listed, the San Marcos Hotel in downtown Chandler, Arizona, received like designation. See Weldon B. Johnson, ‘Jewel in the Desert’ Glittering Again in Downtown Chandler, ARIZ. REPUBLIC (Jan. 5, 2014, 8:35 AM), http://www.azcentral.com/community/chandler/articles/20140105chandler-san-marcos-hotel-anniversary.html. This landmark property remained boarded up between 1980 and 1987 because its owners were unable to raise funds to renovate and operate the hotel. See id. Just}
\end{脚notesize}
objectives balanced with the protection of historic assets in delivering high-quality built environments, along with meeting seemingly disparate goals of enhancing community sustainability while maintaining iconic urban places. As the fiftieth anniversary of the National Historic Preservation Act (“NHPA”) approaches in 2016, \(^{19}\) I propose better integration of preserving structural historical assets with the host planet. This paper argues that historic preservation must do far more than “preserve visual treasures.” Failure to accommodate both preservation virtues dooms neglected historic properties to “structural relics” status, awaiting demolition while locals, aware of their dilapidation, stay clear. \(^{20}\) Preservationists in the private and public sectors must frame preservation strategies, joining the past, present, and future of municipal development and infusing sustainability into designated properties. Historic assets that have transcended their original purposes can be useful and sustainable. \(^{21}\)

lately has the hotel’s fortunes improved. See id.

Historic notoriety promises nothing for an asset’s utility in urban revitalization, and bad planning is seldom affected by an asset’s original use or its owners’ good intentions. San Antonio’s S.H. Kress & Co. department store, built in 1938, is a fixture on the city’s vaunted, historic Houston Street; this building was vacant between the early 1990s and late 2010, when one restaurant occupied the ground floor of this 168,000 square foot building. See Benjamin Olivo, Plans, no details, for Kress building, THE DOWNTOWN BLOG (Feb. 26, 2010), http://blog.mysanantonio.com/downtown/2010/02/plans-no-details-for-kress-building/; see also Federal Realty Begins Restoration of Historic Kress Building and Welcomes Texas de Brazil to Houston Street, PR NEWSWIRE (May 10, 2010), http://www.prnewswire.com/news-releases/federal-realty-begins-restoration-of-historic-kress-building-and-welcomes-texas-de-brazil-to-houston-street-93266799.html.


\(^{20}\) Protracted vacancies in all types of buildings contribute to urban blight, regardless of their owners’ best intentions. Yet attempts at private citizen intervention to curb blight lead to controversy and litigation arising from trespass and vandalism. See, e.g., Kris Maher, Foes of Urban Blight Take Aim at Landlords, WALL ST. J., Jan. 3, 2014, http://online.wsj.com/articles/SB100014240527023034606405797928510595796766 (describing community endeavors to “call out” abandoned building owners using social media and to create public art on abandoned buildings, as well as noting owner backlash in Baltimore).

\(^{21}\) In the private sector, there has been some movement to seek some common ground between preservationists and “green building” advocates, groups at cross-purposes until recently. See JEAN CARROON, SUSTAINABLE PRESERVATION: GREENING EXISTING BUILDINGS 55 (2010). In 2006, at the National Preservation Conference in Pittsburgh, hosted by the National Trust for Historic Preservation, a summit of professionals in preservation and green building communities attempted to formulate common goals for greening historic properties. See Kim A. O’Connell, Finding Common Ground, TRADITIONAL BUILDING (June 2007), http://www.traditional-building.com/Previous-Issues-07/JuneFeature07.htm. The major stumbling block today is that assessment guidelines for LEED certification contemplate new construction, leaving just 11 of 69 points specifically applying to adaptive reuse of buildings. See id. Failure to consider the unique characteristics of historic structures continues to be a
Repurposing these parcels triggers improvements to the quality of neighborhood life, while modestly satisfying those who feel a need to control inauthentic uses of heritage tracts. Historic preservation today must contribute to urban centers’ livability. Sustainability is aided when preservationists partner with promoters of sustainability and economic development revitalization initiatives in central business districts.\textsuperscript{22}

Some critics opine that America’s major cities already have designated most of the extant significant historic buildings of the twentieth century and prior, so city landmarks commissions today endeavor to save from destruction far fewer genuinely precious buildings and other structures, along with putative heritage-worthy districts.\textsuperscript{23} Celebrated urban geographer Jane Jacobs would disagree vigorously that designation of old buildings wastes these resources.\textsuperscript{24} Jacobs believed that to withstand urban self-destruction, a supply of diversified, lively, and economically viable neighborhoods or enclaves must increase incrementally to meet continuously growing demand.\textsuperscript{25} Therefore, a wholly-sufficient reason for ongoing preservation action is to “zone for diversity,” curbing redundancy of the most profitable (hence, duplicated) uses that are diminishing neighborhoods’ curb appeal.\textsuperscript{26} Channeling Jacobs’s views, perhaps, groups continue efforts to save historic properties in urban areas, including through crowd-sourcing preservation initiatives.\textsuperscript{27} No matter one’s justifications for landmark listing, however, source of discord between the two camps. See id. For more information regarding the LEED, see generally U.S. GREEN BLDG. COUNCIL, GREEN BUILDING RATING SYSTEM: FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS (LEED-NC) (2002), available at http://www.usgbc.org/Docs/LEEDdocs/LEED_RS_v2-1.pdf.


\textsuperscript{23} See CIVICVISIONS LP, supra note 22, at 19–21.


\textsuperscript{25} See id. at 255–56.

\textsuperscript{26} Id. at 252–53.

\textsuperscript{27} See PARTNERS IN PRESERVATION, http://partnersinpreservation.com/ (last visited Sept. 26, 2014). Each year, Partners in Preservation nominates historic and cultural monuments from a pool of applicants in a major United States city or metro area and asks the public to vote on finalists to receive corporate rehabilitation funding. See FAQ, PARTNERS IN PRESERVATION, http://partnersinpreservation.com/faq/#.VCh-UlfdUXU (last visited Sept. 26, 2014). In 2012, Partners in Preservation selected 40 sites in New York City, ranging from the
for many owners of “dated” buildings, historic designation is “more curse than blessing,” due to the regulatory implications of listing.28 Historic designation of entire enclaves increasingly impacts densification of urban cores by constructing new and taller development.29 To some degree, this unproductively exploits the nation’s landmarks-designation laws30 with devastating economic, social, and environmental impacts because of slowing necessary densification, development of urban cores,31 and accompanying business expansion and job growth.

Describing how preservation proceeds along a more enlightened path, this paper proceeds as follows. In Part II, I summarize the roles of governments (at all levels) and private parties in employing “historic places” registers. In Part III, I trace briefly the evolution of preservationist philosophies and their lingering impacts on development trends in urban cores, as well as how urban planning specialists assess effects upon urban growth of registering properties on historic lists.32 Part IV argues for the utility of adaptive reuse through repurposing designated buildings without stripping their historic essences. In Part V, I illustrate an adaptive reuse model that allows urban centers to redeploy historic assets in establishing livable mixed-use urban villages. Part VI


30 A COUNTRY OF CITIES, supra note 28, at 139, 143.

31 See id. at 143, 145.

argues for new paradigms of urban historic preservation in which benchmarks of success in sustainability and utility become vital metrics in heritage conservation. This paper concludes by advocating new methods for resonating historic preservation with urban-center economic growth and community sustainability goals.

II. PRESERVATION REGISTRY PROGRAMS AFFECTING URBAN HISTORIC PROPERTIES

A. Federal Engagement in Historic Preservation

The United States first enacted legislative protections to preserve historical and cultural resources more than a century ago.\textsuperscript{33} The Antiquities Act, passed in 1906,\textsuperscript{34} prohibited the unlicensed appropriation, excavation, injury, or destruction of any historic or prehistoric ruin, monument, or object of antiquity belonging to the federal government or controlled by the United States without the federal government’s permission.\textsuperscript{35} In 1935, Congress enacted the Historic Sites, Buildings, and Antiquities Act,\textsuperscript{36} legislation declaring that historic preservation was a national priority.\textsuperscript{37} This Act provided the federal government with limited ability to preserve buildings and historic sites of “national significance.”\textsuperscript{38} In 1966, Congress passed the National Historic Preservation Act (“NHPA”).\textsuperscript{39} Of preservation laws currently in force, the NHPA’s Section 106 process provides the most extensive federal protection for qualified cultural and historic resources.\textsuperscript{40}

The NHPA declares that “the historical and cultural foundations of the United States should be preserved as a living part of our community life and development in order to give a sense of orientation to the

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{37} See \textsc{John J. Cullinane, Maintaining and Repairing Old and Historic Buildings} 50 (2013).
\textsuperscript{38} 36 C.F.R. § 60.1(b)(2) (2015).
American people . . .” The NHPA established the NRHP, which lists resources, including buildings, structures, districts, and other objects, “significant in American history, architecture, archaeology, engineering, and culture.” The NRHP theoretically intends to be a “planning tool” to identify properties significant enough to warrant consideration in federal decision-making about future development.

The process for identifying eligible properties and listing them on the NRHP is governed by federal regulations defining types of properties eligible for listing, including individual buildings, other structures, and entire “districts” of property. A property eligible for listing on the NRHP hypothetically must affect the American people in ways rendering it as a resource above similar other properties deserving federal protection. The eligibility process follows an inquiry into whether the property has inherent historical and cultural significance:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in [the properties] . . . that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
(b) that are associated with the lives of persons significant in our past; or
(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
(d) that have yielded, or may be likely to yield, information important in prehistory or history.

The NRHP is a broadly inclusive inventory of properties maintained by the National Park Service, meeting eligibility requirements of significance and property type. Historic preservation

41 National Historic Preservation Act § 1(b).
43 36 C.F.R. § 60.2(a) (2015).
44 See id.
46 Id.
47 See id.
49 36 C.F.R. § 60.6 (2015).
50 Doreen M. Pulley & Elwin C. Robison, Emergency Repairs for Historic Façades, in
officers at the state, tribal, and sometimes local government levels conduct research to identify and nominate properties to the NRHP based on the criteria set forth in the NHPA and Park Service regulations. In the case of First BC, Janus Associates, a private firm, was contracted by H.A.V.C. to prepare the NRHP nomination form. Disturbingly, in the present day, Janus architects in 1982 described First BC’s physical condition as “excellent.”

B. State and Local Engagement in Historic Preservation

Engaging Historic Preservation Officers at the state level in NHPA activities spawned growth of state and local laws and regulations governing protection, if not preservation, of additional historic assets. The states comprising the thirteen original colonies were among early promoters of such legislation: Massachusetts passed conservation restriction legislation in 1969, followed by Connecticut in 1971. The Uniform Conservation Easement Act (“UCEA”), drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1981, provides a framework for many states’ conservation easement legislation. The UCEA expressly

BUILDING FACADE MAINTENANCE, REPAIR, AND INSPECTION 91, 98 (Jeffrey L. Erdly & Thomas A. Schwartz eds., 2004). A not well-understood fact: this listing is an honorary status with only federal tax credit “leverage” over the private owner’s decisions regarding whether and how to preserve, rehabilitate, or renovate a listed property at the federal level. Id. The listing status of a building may be revoked if inappropriate alterations are implemented. Id. Except for the private owner’s federal (and perhaps state) tax credit jeopardy, de-listing of a property has little impact on the owner beyond the “loss of face” in the historic preservation community. See id. Demolition of the improvements, however, may trigger local inputs and decision-making. See Fowler, supra note 40, at 44; see also Akram Ijla et al., Historic Designation and the Rebuilding of Neighborhoods: New Evidence of the Value of an Old Policy Tool, 4 J. URBANISM 263, 265 (2011). NHPA is “invoked” for protection of historic assets through Section 106 of that Act only if federal undertakings involve NRHP listed or eligible properties. See Sherry Hutt et al., CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 6 (2004); Fowler, supra note 40, at 45–46.

51 Hutt et al., supra note 50, at 6–7.
52 See NOMINATION FORM, supra note 1.
53 Id.
54 See Fowler, supra note 40, at 42–43.
55 See MASS. GEN. LAWS ANN. ch. 184, § 31 (West 2003).
provides that conservation easements may be modified by their holders (grantees) or terminated by mutual agreement of the parties, and otherwise provide for easement administration. All fifty states provide preservation services arising directly from federal preservation programs authorized under the National Historic Preservation Act (“NHPA”), such as nomination of properties for inclusion in the NRHP, consultation with federal agencies regarding actions affecting properties listed (or eligible for listing) in the NRHP, and review of applications for federal rehabilitation tax credits and associated benefits.

States foster the protection of historic properties through their own laws and programs by maintaining state registers, appropriating funds to preserve public buildings, protecting private properties from potentially harmful governmental actions, and authorizing adoption of local preservation ordinances, easement programs, and rehabilitation tax incentive programs. The State Historic Preservation Office (“SHPO”) is the key agency responsible for identifying and protecting historic and

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\(^{59}\) See Fowler, supra note 40, at 48, 61. These credits are described in the Economic Recovery Tax Act of 1981, which generally replaced the rehabilitation tax incentives under earlier laws, beginning January 1, 1982, with a 25% investment tax credit for rehabilitations of historic commercial, industrial, and residential buildings. See 36 C.F.R. § 60.2 (2015); see also Treas. Reg. § 1.48-12 (2012). This can be combined with a fifteen-year cost recovery period for the adjusted basis of the historic building. 36 C.F.R. § 60.2 (2015). These opportunities are codified in the Internal Revenue Code. See, e.g., I.R.C. §§ 38, 280B (2012).

\(^{60}\) For example, in the State of California, designation occurs through the California Register of Historical Resources (CRHR), which is maintained by the State Historical Resources Commission. See California Register, CAL. STATE PARKS, http://ohp.parks.ca.gov/?page_id=21238 (last visited Sept. 27, 2014). California also has a roster of “California Historical Landmarks” and “Points of Historical Interest.” See California Historical Landmarks, CAL. STATE PARKS, http://ohp.parks.ca.gov/?page_id=21387 (last visited Sept. 27, 2014); see also California Points of Historical Interest, CAL. STATE PARKS, http://ohp.parks.ca.gov/?page_id=21750 (last visited Sept. 27, 2014); CAL. PUB. RES. CODE § 21084–21084.1 (West 2014). In the State of Arizona, the State Historic Preservation Officer maintains an Arizona Register of Historic Places under legislation passed in 1974. See ARIZ. STATE PARKS, FINAL ARIZONIA STATE HISTORIC PRESERVATION PLAN UPDATE 81 (2009), available at http://azstateparks.com/SHPO/downloads/SHPO_Plan_2009_Final.pdf. From its inception, the Arizona Register’s listing was conceived as a lower-status designation, suited for properties having less historic significance than those on the NRHP. See id.

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cultural resources in the United States. Because it intersects nearly every heritage preservation program in the United States, whether governmental or private action is involved, a SHPO often is the agency that individuals, organizations, or government officials with preservation issues are most likely to encounter.

In addition, nearly all states have enacted laws providing local governments with authority to adopt and implement similar ordinances. Some local governments have successfully relied on broad grants of authority to enact preservation ordinances; the initial ordinance of this kind was adopted in Charleston, South Carolina, in 1931. Other so-called “Dillon Rule” states, such as the Commonwealth of Virginia, where a local jurisdiction’s authority must be express, require detailed authority to be provided. Illustrations of such explicit enabling laws are those of Indiana, Maryland, and North Carolina.

On the local level, municipalities or counties establish historic preservation officers and, frequently, commissions that recommend to the community’s legislative body the listing of a property or district upon a municipal roster of “landmarks,” “historic sites,” or the like. For example, in New York City, buildings are identified for their special character and worthiness for preservation by the eleven-member

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62 See id. at 82–87.
63 See id. at 83.
67 See Local Government Authority, NAT’L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority (last visited Sept. 27, 2014). Most non-home rule states (39 of them) apply the principle known as “Dillon’s Rule” to determine the bounds of a municipal government’s legal authority; in those jurisdictions, municipalities must ask permission of the state or commonwealth legislature to pass local legislation. See id. By contrast, in home rule states, an amendment to the state constitution grants cities, municipalities, and/or counties the ability to pass laws to govern themselves as they see fit (so long as they obey the state and federal constitutions).
68 See IND. CODE ANN. §§ 36-7-11-1–36-7-11-22 (LexisNexis 2009).
71 See McLamb, supra note 64, at 468–69 (discussing the role of state historic preservation officers in local matters).
Landmarks Preservation Commission. Their uniqueness and worthiness for preservation are confirmed for listing, or rejected, by the City Council. In addition, some historic preservation is incorporated into municipal codes as a form of zoning overlay district or adaptive reuse ordinance, which is the case, for example, in Los Angeles and Phoenix.

Local designation typically mandates that an owner obtain a "certificate of appropriateness" or a demolition permit from a locally appointed body when removing portions of a structure, or making alterations or additions to the designated asset. Often, specific guidelines specify what is permitted in modifying a structure's exterior design, construction materials, paint colors and shapes, styles and locations of windows, doors, external lighting fixtures, and barricades like fences and walls. In some cities, designation requires that specific levels of maintenance and restoration be performed at the owner's expense. Local review of proposed changes (including review of the owner's wholesale demolition of the property improvements) by persons acquainted with the neighborhood environment deters disruption of the local community's historic fabric. Therefore, local designation carries the greatest potential for historic assets' protection.
C. The Nature of Preservation Restrictive Covenants/Easements

A basic approach to thinking about historic preservation restrictions is to view them as negative easements. In effect, instruments documenting negative easements contain the landowner’s promises to not exercise certain property rights otherwise available because of the landowner’s conveyance of those rights to another party, whether it be a government agency or a non-governmental organization like a “land trust.”

Two primary types of negative easements are the façade easement and the conservation easement. In the case of the former, the owner is prohibited from demolishing or altering the exterior of an historic building without the easement grantee’s prior consent. This easement does not affect the owner’s use of the building or, usually, the owner’s prerogatives where the interior is concerned. A property’s placement on the NRHP ensures that the National Park Service will have, for so long as a property is on the register, a façade easement. In a typical conservation easement, the historic property owner agrees to both limit the use of the property and preserve a structure’s outward appearance. Conservation easements typically are subject to some negotiation; while all development is not prohibited, development that would alter the character of the property’s historic context is limited. Sometimes, a conservation easement is used merely for preserving a private property’s open space along roadways or in cluster developments.

In summary, the private landowner does not part with ownership rights but creates in the “dominant estate,” however defined in the

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82 Id. at 248.
83 Id.
84 Id. The logic of this type of easement is simple; historic (due to age) residences built without kitchens or lavatories seldom would appear on registers if their owners were relegated to use of “out buildings” in the colder climates or seasons for ablutions, food preparation, and other bodily functions.
86 See Kepple, 141 Conn. App. at 248.
87 See id. at 249.
88 Id.
instrument, a privilege to enjoy or restrict that owner’s use of its property, which becomes the “servient estate” under the instrument.\textsuperscript{89} Of course, lasting in perpetuity, such easement’s benefits and burdens pass with any conveyance affecting the servient or the dominant property, whatever the case may be.\textsuperscript{90}

Notably, no federal, state, or local law or regulation categorically prohibits demolishing heritage resources.\textsuperscript{91} Prohibiting demolition altogether without the property owner’s prior consent constitutes either ultra vires action by the government or a regulatory taking requiring just compensation—although cases invalidating historical preservation regulations are fewer since the U.S. Supreme Court in 1978 decided \textit{Penn Central}.\textsuperscript{92} Communities deal with demolition in many instances, however, by requiring the owner of the historically-designated property to obtain a demolition permit, following one or more public hearings in which advocacy frequently affords opposing viewpoints on the salvage potential of the project.\textsuperscript{93}

\section*{III. Preservation Philosophies’ Impacts on Historic Assets’ Usage in American Urban Centers}

Having described the basic tools of historic preservation, I now summarize preservation advocates’ philosophies throughout our nation’s history. Several land use scholars have identified three phases of preservation thought and action in American life: monumentalism, aestheticism, and revitalization. Professor Carol Rose was among the first to detail the three phases (or primary preservation philosophies) in a 1981 article entitled \textit{Preservation and Community: New Directions in the Law of Historic Preservation}.\textsuperscript{94}

\textsuperscript{89} See id.
\textsuperscript{90} Kepple, 141 Conn. App. at 249–50.
\textsuperscript{94} See generally Carol M. Rose, \textit{Preservation and Community: New Directions in the Law of Historic Preservation}, 33 \textit{STAN. L. REV.} 473 (1980). Professor Rose’s third phase is somewhat different than that identified here; hers identifies the virtue of assessing a building’s, structure’s, or district’s importance to the community. See id. at 490–91. Thus, the
A. Monumentalists’ Era

Monumentalists, early advocates of preserving historic assets, have been labeled collectively as persons exhibiting an “elite assertiveness of a class- and ethnicity-based traditionalism.” Monumentalists, who focused on sites associated with the Founding Fathers, worked primarily to save opulent mansions that had once housed the rich and powerful. Monumentalists themselves were usually part of the upper-class, having the leisure to pursue preservation, whereas members of the working-class had more immediate concerns. Later, monumentalists cautioned against the prospect of historic buildings “passing into the hands of improper people,” typically immigrants. In this manner, the mission of preservation arose for “informing foreigners and less enlightened natives as to American traditions and values,” a view sometimes described as nativism.

Because individual buildings were historical documents, monumentalists believed they had the power, as heritage buildings’ observers, to order our knowledge of our past. By controlling which historic structures were preserved and how they were presented to the public, monumentalists consolidated their own elite status and identity. This phenomenon occurred singularly in the South in the 1930s, where preservation focused upon the confederate states’ past and their elite.

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central direction of this last phase is community building, in which the larger perspective is that of community needs. See id. This author’s defined third philosophy presumes urban revitalization is the more consequential perspective; in downtown redevelopment, as a function of sustainability and economic empowerment, effective but thoughtful adaptive reuse is the primary community need in management of historic assets. See id. at 512–17.

96 Holleran, supra note 95, at 9.
97 Id. at 235 (footnote omitted; internal quotation marks omitted).
98 Id. at 234 (internal quotation marks omitted). Professor Carol Rose prefers to characterize this attitude of preservation as “inspiration,” a way of fostering a sense of community. See Rose, supra note 94, at 481–82.
99 See Holleran, supra note 95, at 8–9.
100 See id. at 9.
101 See Briann Greenfield, Marketing the Past: Historic Preservation in Providence, Rhode Island, in Giving Preservation a History: Histories of Historic Preservation in the United States 117, 118 (Max Page & Randall Mason eds., 2004); see also Holleran, supra note 95, at 266.
Farther north, the New York City Landmarks Preservation Commission had designated one-hundred thirteen buildings by the 1970s, and one-hundred five of these structures had been built by—and for—the wealthy.\textsuperscript{103}

B. Aestheticists’ Ascent

Aestheticists originally followed Charles Mulford Robinson, who wrote that the first preservation priority was to save what is good and take “no account of either sentiment or history, only of [structural] aesthetics . . . .”\textsuperscript{104} Aligned with the City Beautiful movement beginning in the 1890s, which advocated expression of a city’s enduring civic and cultural structure by preserving landmarks,\textsuperscript{105} Aestheticists created preservation commissions in government bureaucracies across the country that, even today, decide primarily on aesthetic grounds\textsuperscript{106} whether property owners will be allowed to modify protected historic structures.\textsuperscript{107} Proposed modifications to an historic neighborhood were (and still today, in many communities, can be) halted, either fairly or unfairly, by invoking preservation’s legal protections.\textsuperscript{108} One former chair of the New York City Landmarks Preservation Commission complained about a “‘growing tendency to use designation for purposes outside the law . . . [such as] to maintain the status quo, [or] to prevent development . . . .’”\textsuperscript{109}

\textsuperscript{103} Henry G. Cisneros, Preserving Everybody’s History, in CITYSCAPE 85, 85 (1996).
\textsuperscript{104} HOLLERAN, supra note 95, at 162 (internal quotation marks omitted). This otherwise became understood to be preservation (and architectural control) for architectural merit alone. See Rose, supra note 94, at 484.
\textsuperscript{105} HOLLERAN, supra note 95, at 161–63; WITOLD RYBCZYNISKI, CITY LIFE: URBAN EXPECTATIONS IN A NEW WORLD 136–48 (1995).
\textsuperscript{106} See, e.g., Constance Epton Beaumont, Making Design Review Boards Work, ARCHITECTURAL REC. 34 (1992) (discussing how a design review board makes its decisions based on how well proposed changes “will harmonize with . . . existing architecture”).
\textsuperscript{107} See JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 9 (1997).
\textsuperscript{108} The “hammer” possessed by such review agencies is that if a contractor or developer’s project is denied as “certified rehabilitation,” preservation tax credits are not available; in some cases, exploiting those tax credits is the owner’s sine qua non for undertaking such projects. See 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. ENVTL. L. 315, 331 (2009).
\textsuperscript{109} JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 30 (1989) (citation omitted); see Kenneth T. Jackson, Op-Ed., Gotham’s Towering
With the passage of the NHPA, federal policy makers clearly chose the pathway of aestheticism in providing governmental protections by expanding the National Register of Historic Places (“NRHP”) and creating a review process for federal actions affecting historic properties.\footnote{See Schneider, supra note 95, at 261. This is the notorious “Section 106” consultation process. See GrizCulturalHeritage, NHPA Section 106 Process.mov, YOUTUBE (May 17, 2012), https://www.youtube.com/watch?v=UxJJ6MyMQeg. This movie takes the viewer on a tour of the step-by-step process of assessing the consultation required under federal engagement with heritage resources. See also HUTT ET AL., supra note 50, at 6.} The NHPA concurrently required federal agencies to make use of historic buildings to “the maximum extent feasible,”\footnote{16 U.S.C. § 470h-2 (2012).} foreshadowing William Sumner Appleton’s adaptive reuse initiatives.\footnote{See infra Part C.} But incremental ascent of a revitalization philosophy has not muted aestheticists. Midtown Manhattan preservationists, among other stakeholders,\footnote{The other camps argued that (a) Midtown East already was overdeveloped, and (b) the mass transit system already was overtaxed. See Jackson, supra note 109.} caused former Mayor Michael Bloomberg’s office to withdraw, on November 12, 2013, its “East Midtown Rezoning” plan to rezone a seventy-three block swath of east midtown.\footnote{See Charles V. Bagli, End of Proposal to Raise Skyline on the East Side, N.Y. TIMES, Nov. 13, 2013, at A1, available at http://www.nytimes.com/2013/11/13/nyregion/support-evaporates-for-bloombergs-plan-to-rezone-east-side.html; Gus Delaporte, Zoned Out: Midtown East Rezoning Put on Hold, COMMERCIAL OBSERVER (Dec. 17, 2013, 1:00 PM), http://commercialobserver.com/2013/12/zoned-out-midtown-east-rezoning-put-on-hold/; Daniel Geiger, Midtown East Rezoning’s Denise May Be Short-Lived, CRAIN’S NEW YORK BUS. (Nov. 12, 2013, 5:32 PM), http://www.crainsnewyork.com/article/20131112/REAL_ESTATE/131119961##.} That rezoning plan was “designed to spur the construction of a new generation of bigger, state-of-the-art skyscrapers and in the process to raise hundreds of millions of dollars for transit improvements in the [same Midtown] area.”\footnote{Geiger, supra note 114.} Preservationist stakeholders argued that destroying “architectural gems” in the Grand Central neighborhood and others in East Manhattan would result from the plan’s adoption.\footnote{Id.} The City’s Municipal Art Society and the New York Landmarks Conservancy

\textit{Ambitions}, N.Y. TIMES, Aug. 30, 2013, at A19, available at http://www.nytimes.com/2013/08/30/opinion/gothams-towering-ambitions.html (stating that the landmark designation’s goal “seems to be to preserve anything that will maintain the streetscape, whether or not the individual structures have significance. Entire blocks are frozen on the logic that the first buildings ever put there are also the best that could ever be imagined there”).
submitted to the city’s Landmarks Preservation and Planning Commissions a list of seventeen buildings in Midtown East needing protection from redevelopment.\textsuperscript{117} The fallout for availability, both of office inventory for growth among the city’s commercial tenants and for transit improvements and pedestrian plazas, is palpable.\textsuperscript{118} Some version of the rezoning plan may be revived during Mayor de Blasio’s administration,\textsuperscript{119} should revitalizationists convince the City Council to use the city’s heritage assets in both a sustainable and responsible way.

\subsection*{C. The Rise of Revitalization’s Preservationists}

William Sumner Appleton focused on the aesthetic nature of historic neighborhoods and is considered the guiding figure of revitalizationists.\textsuperscript{120} He did not, however, “make common cause with neighborhood preservationists” in the sense of fighting development for the principal purpose to elevate nativism or beauty as an ideal.\textsuperscript{121} Later revitalizationists expanded his approach to encompass “preservation of the city itself—its mix of economic uses, varied physical and social fabrics and human scale.”\textsuperscript{122} In other words, most such preservationists view designation of landmarks as a major catalyst for urban renewal characterized as revitalization.\textsuperscript{123}

The federal government adapted this school of thought into its urban planning initiatives. “The Neighborhood Redevelopment Program in the 1960s encouraged local authorities to rehabilitate older buildings instead of replacing them.”\textsuperscript{124} In the 1970s, programs like Urban Homesteading and Neighborhood Housing Services directly linked preservation with low-income housing, intending to stem the worst

\begin{footnotes}
\footnotetext{117}{Delaporte, supra note 114.}
\footnotetext{118}{See Bagli, supra note 114; Geiger, supra note 114.}
\footnotetext{119}{See Delaporte, supra note 114; Geiger, supra note 114.}
\footnotetext{120}{See Michael Holleran, Roots in Boston, Branches in Planning and Parks, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES, supra note 102, at 55, 67–69.}
\footnotetext{121}{Id. at 69.}
\footnotetext{122}{ROBERTA BRANDES GRATZ, THE LIVING CITY: HOW AMERICA’S CITIES ARE BEING REVITALIZED BY THINKING SMALL IN A BIG WAY 248 (1994).}
\footnotetext{123}{See Judy Mattivi Morley, Making History, Historic Preservation and Civic Identity in Denver, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES, supra note 102, at 211, 211–12; see also Schneider, supra note 95, at 261.}
\footnotetext{124}{Schneider, supra note 95, at 261.}
\end{footnotes}
results of gentrification. Executive Order 13006 directed federal agencies to locate low-income housing in downtowns and to give highest priority to occupying historic districts. The revitalizationists’ goal in preservation is to transform a symbol of decline of America’s cities—decaying buildings—into valued assets that can spark neighborhood revitalization.

Revitalizationists allied themselves with New Urbanism planners and other environmentalists, especially in the 1990s, and today engage in sustainable development, shedding their earlier tendencies to affirm anglo-saxon predominance or embrace architectural glory for its own sake. Rehabilitation of existing buildings conserves the built environment instead of consuming increasingly scarce natural resources for new construction. Furthermore, rehabilitation work reduces the heavy burden on landfills imposed by demolition and construction detritus.

Revitalizationists generally try to leverage preservation as a tool to help expand economic opportunities in targeted areas. The Boston Chamber of Commerce first recognized the financial benefits of preservation more than seventy-five years ago. Today, revitalizationists engage in economic development at unprecedented levels, most notably through the National Trust’s National Main Street Center (“Main Street”). Main Street is a national consulting operation that coaches communities in reviving their downtown areas. In its

125 See id. at 266–72. These abuses center upon driving out long-term residents from what had been low-income neighborhoods before rents and purchase prices spike following concerted efforts to rehabilitate dilapidated tenements. See, e.g., David B. Fein, Historic Districts: Preserving City Neighborhoods for the Privileged, 60 N.Y.U. L. REV. 64, 80–81 (1985).
127 See Schneider, supra note 95, at 262.
128 See Holleran, supra note 120, at 70.
129 See Holleran, supra note 95, at 236; see also Congress4NewUrbanism, CNU 20–New Urbanism and Historic Preservation: Collaboration Strategies,YouTube (May 29, 2012), http://www.youtube.com/watch?v=ghc0BqkrSKo.
132 See Ijla et al., supra note 50, at 267, 279.
133 See Holleran, supra note 95, at 241.
134 See Main Street Consulting Services, NAT’L MAIN STREET CENTER,
thirty-two-year history, Main Street has worked with more than 1,500 communities to produce a net total of 109,664 new businesses and more than 473,000 net new jobs. According to their data, every public dollar spent on Main Street programs has generated $18 in private new investment; these programs in total have generated almost $55 billion in reinvestment.

D. Influences of These Movements

These three movement philosophies rationalize community tendencies to “save local history at all costs,” assess the realistic functionality of proposed preservation assets before landmark designation, or repurpose assets while maintaining essential façade features of currently-designated sites. In the case of First BC, the aestheticists’ view prevailed, since the church’s nomination occurred nearly three years before the fire ravaged its interior. Fifteen years lapsed between the First BC congregation’s departure and the church campus’s placement on the NRHP. Meanwhile, additional churches in downtown Phoenix, bereft of neighborhood environments, lost attendance and financial contributors. It became progressively less likely that First BC would experience a church revival; and its interior architecture was too distinctively identified with worship functions to be well-suited for an alternative use in its interior configuration, other than, perhaps, as a museum, library branch, or archive. Since the standard for NRHP designation today is not functionality, however, First BC’s


136 See Main Street Reinvestment Statistics, supra note 135.

137 See Pela, supra note 4.

138 See id.

façade easement stymies contemporary refurbishment, removing it from the inventory of sites that could better be developed for greater livability in Phoenix’s urban core. This property’s treatment confirms NHPA’s critics’ assertion that merely connecting a historical narrative to a surviving building should not justify preservation designation.140

Edward Glaeser argues that the correct, although delicate, balance between protecting architectural treasures and increasing density for city growth, along with competitiveness, is meant to allow as much new development as possible in areas where rebuilding is permitted, even if it is immediately adjacent to the most important and exemplary architectural treasures.141 Carol Rose identifies community building as the essential rationale for preservation, which establishes a framework in which dwellers have a shared community experience.142 J. Peter Byrne argues that preservation affords personal freedom; in walkable, authentic neighborhoods built to human scale (including historic districts), the individual feels “removed from the demanding structures of bureaucratic worklife,”143 government controls, and modern consumption pressures, giving rise to one’s personal identity.144

Still, the issue of preservation as an impediment to urban-center functionality transcends land inventory availability, density-anchorage, community-building, or personal development agendas, giving way to essential forward-looking municipal planning. Challenges in restoring buildings after being damaged, such as buildings worn by the elements or the mere passage of time, cause ruin and disuse of designated structures, fostering blight. Design and construction issues arise from the very nature of materials, scale, and methods of construction. This is

140 See, e.g., U-Haul Co. of E. Mo., Inc. v. City of St. Louis, 855 S.W.2d 424, 428 (Mo. App. 1993) (observing that the current use of the structure, not its obsolete former use, must be evaluated by historic preservation regulators, remarking that regulatory purview does not include preventing effective use of the property that, denied, might result in the property’s deterioration or ruin, concluding: “If the public weal demands preservation because of architectural significance irrespective of cost the power of eminent domain is available”). Edward Glaeser’s argument, too, is economic—that unrestricted preservation (among other factors) inhibits building heights to the point of decreasing available housing stock, rendering city dwelling unaffordable except to the wealthy, in turn adversely affecting community diversity and vitality. Glaeser, supra note 32, at 11–12, 261.
141 See Glaeser, supra note 32, at 157, 262–64.
142 See Rose, supra note 94, at 488–94.
143 J. Peter Byrne, The Rebirth of the Neighborhood, 40 FORDHAM URB. L.J. 1595, 1602 (2013).
144 See id. at 1602–05.
apparent when today’s materials are no longer compatible with those incorporated in a structure’s original construction or when the original materials’ products violate contemporary performance standards, such as those associated with energy conservation and other sustainability elements. Simply summarized, changing use standards render some types of building forms, floor heights, and column grids incongruent with contemporary construction methods, condemning such features to defy restoration efforts. Because restoration to an original condition is virtually impossible for some historic assets, assessment of their adaptive reuse potential prior to their protected designation is sound land use planning. Designating properties for preservation without serious forward planning is not virtuous or sustainable behavior; it aids neither neighborhood dwellers, developers, nor urban center individuals. Governments and preservation stakeholders should not succor first-stage thinking in heritage protection.

**IV. ADAPTIVE REUSE AND ITS SUSTAINABILITY IMPLICATIONS IN URBAN CENTERS**

Adaptive reuse occurs when old property is refurbished in a way that changes its use, often triggering new regulatory conditions. The consumption of land and raw materials, including non-renewable resources, is diminished when adaptive reuse is substituted for

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145 See CIVICVISIONS LP, supra note 22, at Executive Summary. This phenomenon is known as “inherent vice” issues. Id. While one may hope that modern technology will afford a solution eventually to the challenges of incompatibility, it’s likely that more resources will be poured into coding to create high-definition three-dimensional images of the probable appearance of an historic site than to train craftsmen to build eighteenth century door frames or to sculpt gargoyles.

146 See THOMAS SOWELL, APPLIED ECONOMICS: THINKING BEYOND STAGE ONE 6–14 (rev. ed., enlarged ed. 2009). Stage one thought considers the immediate results of an action without determining what happens next, over a period of years—other than in terms of political fallout prior to the politician’s next election campaign. See id. The desire to “do something” to save an old building without any end-game assessment of its future function or sustainability may be temporarily satisfying, but ultimately underserves the community. Cf. id. at 7–14.

147 See, e.g., ST. PETERSBURG, FLA., CODE § 16.30.020 (1992) (“Adaptive Reuse of Historic Buildings Overlay”). The purpose of the section is to “encourage the retention and productive reuse of structures that have historic, architectural, or cultural value to the City instead of seeing their underutilization or demolition because their original use has become functionally obsolete.” Id. at §16.30.020.1.
demolition or full remodeling of an existing structure.\textsuperscript{148} Demolition is unneeded if an older building can cost-effectively be adapted to current uses and an energy-efficient status, which promotes sustainability.\textsuperscript{149}

A majority of buildings ultimately outlive their original purposes, due to obsolescence or redundancy, when a change in demand for their brand of utility occurs.\textsuperscript{150} But adaptive reuse conserves resources by using sustainable construction practices, which reduces greenhouse gas emissions and other environmental waste in this era of global climate change.\textsuperscript{151} Many historic buildings enjoy two advantages in advancing preservation initiatives. First, they are in relatively accessible locations in central city areas, inducing greater heritage tourism.\textsuperscript{152} Historic

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

[1] the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and

[2] the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

\textsuperscript{148} Kuntz, supra note 108, at 329–30.

\textsuperscript{149} Donald F. Fournier & Karen Zimnicki, Eng’r Research & Dev. Ctr., ERDC/CERL TR-04-7, Integrating Sustainable Design Principles Into the Adaptive Reuse of Historical Properties 1 (2004), available at http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA431746. This work gives specific guidelines to help integrate concepts of sustainable development into the adaptive reuse of historical buildings in a way that enhances the built environment while preserving the nation’s cultural endowment.


\textsuperscript{152} See, e.g., Xiaobo Su, Heritage Production and Urban Locational Policy in Lijiang, China, 35.6 Int’l J. Urb. & Regional Res. 1118, 1118-19 (2011) (acknowledging the “centrality of heritage to urban regeneration and economic restricting in Western cities,” a form of “boosterism” in municipal entrepreneurship); Maria Panaritis, App idea considered to make Center City tourism easier, PHILLY.COM (Nov. 2, 2014), http://articles.philly.com/2014-11-02/news/56391263_1_visit-philadelphia-drexel-university-benjamin-franklin-museum (discussing how smartphone application enables visitors in walking distance to navigate to heritage sites). The locations that heritage tourists visit in downtowns (including their routes
properties tend to be inherently sustainable as a function merely of location. Since many of them were built either in communities before automobile ownership became widespread or where mass transit use was commonplace, their locations inherently are pedestrian- and transit-oriented. These assets’ preservation complements mass transit systems within cities’ central business districts, including inducing tourist use of transit opportunities.

Second, prior to sophisticated heating and cooling systems, these structures were built with intimate knowledge of climate conditions by local builders from locally-sourced materials. As a matter of design, therefore, they feature environmentally-sensitive characteristics. Here, historic preservation in itself becomes an act of sustainability, albeit not of optimizing sustainable practices. Other attributes of historic assets are less salutary, however, in communities where population density targets are still beyond reach. Especially in growing cities, tension persists between preservation interests and densification. Where central city neighborhoods are not developed at the density that city planners and managers seek, historic designation of structures or districts reduces the supply of land for more efficient development,

between historic sites and retailing opportunities) yields important data for promoting city core revitalization. See, e.g., Astrid D.A.M. Kemperman et al., Tourist Shopping Behavior in a Historic Downtown Area, 30 Tourism Mgmt. 208 (2009) (describing and predicting tourist shoppers’ route choice behavior in a downtown area).

154 See Ijla et al., supra note 50, at 263.
155 Id.
157 See Langston, supra note 151, at 4; see also Kuntz, supra note 108, at 329–30. As Ms. Kuntz notes, because of the waste from building debris and new construction’s energy consumption, restoring an old building virtually always is a more efficient use of resources. Id.
158 See, e.g., ALLISON & PETERS, supra note 156, at 175 (stating that the Green Building Council must take an active approach to incorporate historic preservation into its policy for federal funding and the LEED point system to achieve “true sustainability”); see also Kuntz, supra note 108, at 330 (providing shortcomings that include inefficient windows and insulation that result in air leaks that lead to high utility consumption, as well as dated heating and cooling equipment that compromise thermal performance).
159 Ijla et al., supra note 50, at 266.
supplanting parcels that lend themselves ideally to mixed use or transit-oriented projects.\textsuperscript{160} From the growth perspective, historic designation of property effectively “down-zones” the historic assets’ parcels and impacts denser zoning that might ideally implement uses on immediately adjoining lots.\textsuperscript{161}

V. ILLUSTRATING THE SUSTAINABILITY POTENTIAL OF REPURPOSING HISTORIC PROPERTY ASSETS

Will Bruder, a renowned Phoenix-based architect, and Robert Pela, a local theater critic, journalist, and art gallery owner, participated in a panel discussion during Phoenix Urban Design Week in 2013\textsuperscript{162} on prescriptions for Phoenix’s full-blown downtown\textsuperscript{163} resurgence. Bruder identified the key to creating a “20-minute city” downtown as adding dense and affordable housing, and replacing auto-centricity with walkability in scalable pedestrian environments.\textsuperscript{164} “Dense,” to Bruder, meant primarily congregated developments of attached housing stock, built vertically to a significant height, like the Roosevelt Point Apartments development at the northern perimeter of downtown Phoenix.\textsuperscript{165} Pela added two ingredients chronically lacking in Phoenix’s downtown and impairing its livability: pedestrian access to necessaries (primarily, groceries) and schools.\textsuperscript{166} Pela’s view is that the “creative class” (Richard Florida’s now shopworn term for young professionals and technologically cognoscenti who self-identify as connoisseurs of upmarket urban living\textsuperscript{167}) would not locate downtown if they could not

\textsuperscript{160} See id.

\textsuperscript{161} Id.


\textsuperscript{163} The author’s contrived Phoenix downtown’s boundaries are Margaret T. Hance Park’s alignment on the North, Jackson Street on the South, 3rd Avenue on the West, and two-hundred fifty feet east of the eastern right of way of 7th Street on the East.


\textsuperscript{166} Id.

\textsuperscript{167} See, e.g., RICHARD FLORIDA, WHO’S YOUR CITY? HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE 117–19 (2008), (describing urban clusters with high “location quotients” as a metric demonstrating significant
purchase essential goods affordably and send their children to school in safe, academically-respectable institutions.\textsuperscript{168}

Downtown Phoenix has not housed a supermarket in recent memory. The marginal “groceries” business in this urban core has been dominated by one enterprise, Circle K Corp., with its limited inventories of staples, since the mid-1950s.\textsuperscript{169} The conventional wisdom of supermarket chains’ new store development is grounded in rigid demographic fundamentals.\textsuperscript{170} rooftops and houses under construction (at the time of the analysis), family average incomes, and grocery expenditures numbers trigger vertical development of a supermarket. “Premature” opening of a supermarket without sufficient middle class households within a prescribed radius is forbidden. While residents believe that downtown retail necessaries must address demand to spur downtown Phoenix population growth, supermarkets proceed under another “order of business.”

Chain-store, mega-market shopping as the primary venue to buy one’s necessaries is a fairly recent concept. In old European cities, even in the most capitalistic among them, “supermarkets” still tend to be located at the edges of town.\textsuperscript{171} In contrast, on traditional “high streets,”

\textsuperscript{168}“place satisfaction”\textsuperscript{)}. Historic assets in Europe are seen as soft locational factors in attracting knowledge-based industries and qualified and creative workforces. See EUROPEAN UNION, LEIPZIG CHARTER ON SUSTAINABLE EUROPEAN CITIES 3 (Final Draft 2007), available at http://ec.europa.eu/regional_policy/archive/themes/urban/leipzig_charter.pdf; see also Byrne, supra note 144, at 1604.

\textsuperscript{169}See Widener, supra note 165.


\textsuperscript{172}See ANDREW SETH & GEOFFREY RANDALL, THE GROCERS: THE RISE AND RISE OF
supermarkets are bulked-up neighborhood grocers by American superstore standards.\textsuperscript{172} A 15 to 20,000 square foot marketplace would compete successfully in numerous major European cities’ central business districts.\textsuperscript{173} A trend away from American hypermarket or superstore retailing is evident, however, from Safeway’s and Wal-Mart’s implementation of small-format grocery stores in Arizona and California.\textsuperscript{174} In Phoenix’s downtown, a grocer of that scale might become a gathering place of sorts, serving the community fellowship purpose that churches traditionally held in congested residential city cores.

The opportunity to repurpose First BC lies in its immediate context. The property lies only four city blocks from the closest light rail stations.\textsuperscript{175} Across from the church is a 1,700-stall, Adams Street city-owned parking garage. Two blocks from the church, to the south, at the 305 Building on West Washington Street, is a 1,340-stall, city-owned parking garage. A downtown Valley Metro bus traverses Van Buren Street on the north side of the church, and a portion of that bus route is only a quarter mile from Phoenix’s downtown bus terminal. The mass and vehicular transportation opportunities in the area of First BC abound; coordinated planning between the owners of First BC and the city to implement a marketplace could resolve the “groceries dilemma” for Phoenix’s downtown core. The optimal sustainability solution, in short, is to repurpose the property, establishing a marketplace inside First

\begin{thebibliography}{9}
\item[173] Sainsbury’s Supermarkets in high streets are approximately 18,000 square feet. Cf. Harry Wallop & Graham Ruddick, \textit{Could Supermarkets’ Race for Shop Space Backfire?}, \textit{Telegraph} (Jan. 28, 2012), http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9046596/Could-supermarkets-race-for-shop-space-backfire.html. In addition, there is evidence that far smaller grocers can survive in city centers, even integrating with historic American buildings. See, e.g., Rhonda Phillips et al., \textit{Sustainable Communities: Creating a Durable Local Economy} 222–50 (Earthscan Tools for Community Planning Ser., 2013) (describing a Burlington, Vermont, Co-Op City Market experience).
\item[175] See Google Earth, http://www.google.com/earth/ (last visited Sept. 26, 2014) (searching for “302 W Monroe St, Phoenix, AZ”)
\end{thebibliography}
Whether interior details of the church are preserved as design amenities is an issue for Phoenix’s Historic Preservation Commission, but even if the SHPO determined that essential interior architectural features could not be modified, pop-up retail shops inside the structure remain a possibility. These shops, although small and temporary, can build trade and synergy by prolonged consumer exposure. Pop-up retail allows a company to affordably create a unique environment, engaging its customers while generating an ambience of relevance and interactivity—precisely the sort of neighborhood vitality envisioned.

No doubt some will conjure, completing this sentence, Jesus cleansing the temple of money changers, as described in the Holy Bible. Mark 11:15–19 & 27-33 (King James); Matthew 21:12–17 & 23–27 (King James); Luke 19:45–48, 20:1–8 (King James). Since the Middle Ages, a town’s major cathedral has functioned as a kind of marketplace, with different commercial activities centered on the different portals, particularly during the regular fairs. Textiles were sold around the north transept, while meat, vegetable, and fuel sellers congregated around the south porch. See Otto von Simson, The Gothic Cathedral: Origins of Gothic Architecture and the Medieval Concept of Order 167 (Princeton Univ. Press, 3d ed. 1988) (1956). Money-changers (critical when each town or region used its own currency) had banques near the west portals and also in the nave itself. See id. Wine sellers plied their trade in the nave, although occasional 13th-century ordinances survive which record them being temporarily banished to the crypt to minimize disturbances. See id. If there are no longer to be sacred ceremonies inside First BC, does it matter whether the marketplace operates inside or immediately outside the doorways of the structure?


by Jane Jacobs. In communities like Birmingham, Alabama, pop-up retail opportunities are a staple, joining businesses and the community, and energizing downtown street life in the bargain. Birmingham calls its retailing initiative, one element of its twenty-four-hour mixed-use district, “The Street Life Project.”

First BC offers both a wind-break and a defined space that is attractive to consumers due to the interior architectural uniqueness on its first floor. A project within this space defines adaptive reuse. If First BC’s roof remains open to the elements, the interior space may be occupied by roofed temporary structures, such as in ISO containers modified for sales space. If these temporary structures have locking windows and doors, merchandise security concerns are well mitigated. Since the greenest building is one already erected, First BC’s interior marketplace is inherently sustainable. More sustainable still, travelers moving by a variety of modes can be accommodated in this location. Phoenix can open the public employee garages to use by the general public’s motorized vehicles during evening hours and on weekends when competition for stalls is nil. The location of the marketplace is no more than a twenty minute walk from many portions of Phoenix’s downtown residential structures. Security risks seem minimal with

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179 See JACOBS, supra note 24.
181 See Wong, supra note 178, at 85–86. See also ULRICH KNAACK ET AL., PREFABRICATED SYSTEMS 64–72 (Principles of Construction Ser., 2012); ROBERT KRONENBURG, PORTABLE ARCHITECTURE: DESIGN AND TECHNOLOGY 44–51 (2008); Emilie Raguso, First Shipping Container ‘Village’ Headed to Berkeley, BERKLEYSIDE (Nov. 8, 2013, 9:00 AM), http://www.berkeleyside.com/2013/11/08/first-shipping-container-village-headed-to-berkeley/. In the event readers wonder how such temporary buildings might get through the door to the interior, ISOs can be (and typically are) lowered by cranes onto the floor of the structure—in this case through the compromised roof’s opening—without threatening the condition of First BC’s remaining roof or doors.
182 See Emily Badger, Why the Most Environmental Building is the Building We’ve Already Built, ATLANTIC CITIES (Jan. 24, 2012), http://www.theatlanticcities.com/housing/2012/01/why-most-environmental-building-weve-already-built/1016/. The point of the expression, since existing structures have “embodied energy,” is that the carbon investment in constructing a new building is much higher (since its materials have to be manufactured and shipped to the site), making it more sustainable to retrofit an existing structure. See Sarah B. Schindler, Following Industry’s LEED: Municipal Adoption of Private Green Building Standards, 62 FLA. L. REV. 285, 349 (2010). In fact, the greenest building is the existing structure equipped with carbon-neutral technology, rendering the structure a “net-generator” of renewable energy.
locking retail pods, but occupancy charges collected from merchants occupying pop-up shops could pay sentries securing the interior against historic “souvenir” opportunists.

In addition to sustainability advantages, public exposure, as opposed to exclusion, creates potential to secure the church building’s future. By keeping First BC boarded-up and fenced off, the public is blind to its architecturally-worthy elements, since individuals prefer avoiding a depressing streetscape like that presented today. Opening the site to public visitation for secular functions opens linkages to opinion makers, the business community, government officials, and everyday citizens. Opening First BC for temporary operations alone could catalyze initiatives by the business community (in the form of partnerships involving contractors or trade organizations via private grant funding), the Phoenix government (in the form of community grants or proposed tax-increment financing), and possibly crowd-funding,\(^\text{183}\) enabling joint risk-taking in long-term adaptive reuse and structural restoration of the interior. First BC as a marketplace reinforces the artist-studio and the pedestrian open-house atmosphere the city endorses through its downtown zoning code.\(^\text{184}\) The Downtown Phoenix Arts Coalition has joined forces with city government to promote an increase in authentic street life, boutique amenities, and pedestrian-friendly access ways in the downtown core.\(^\text{185}\) These dimensions of livability may result (subject to overcoming structural integrity limitations from neglect) in eventual repurposing of First BC for a mixed-use project that might feature live-work spaces on upper floors or a café in the bell tower with views of downtown.

Development like this proposed adaptive reuse of First BC fuses Jane Jacobs’s emphasis on neighborhood variety and Professor Rose’s entreaties for community-building with Professor Glaeser’s “competitiveness imperative” justifying urban core density increases. More persons will frequent downtowns featuring distinctive shopping environments, particularly in repurposed buildings with unique


architecture or décor. Such place-making increases residential density by tapping into pent-up demand for convenience living and the urban central ("heart of the city") lifestyle.¹⁸⁶

VI. ELEVATED STANDARDS AND ACTIONS FOR PRESERVING SUSTAINING LEGACIES

A. Imbedding Sustainability Objectives in Historic Designation Application Processes

If adaptive reuse of an historic property is not intuitive, even less so is seeking a property’s membership in an historic listing without any implementation strategy. A solution to such “stage one” planning is for future historic preservation to borrow from American trademark registration and mark-maintenance processes. Simplified, a federal trademark registration lasts for a ten-year term, with ten-year renewal terms.¹⁸⁷ Between the fifth and sixth year after the date of the mark’s initial registration, however, the owner of the trademark (or a successor, if it has been sold following registration) must file an affidavit avowing continuous use of the mark.¹⁸⁸ If that affidavit is not filed, the mark’s registration is canceled.¹⁸⁹ This sanction curbs persons tempted to register a mark merely to deprive others of its use.¹⁹⁰ The regulatory premise is that the trademark owner must employ the mark in commerce.

¹⁸⁶ See URB. LAND INST. (SING.) AND CENTRE FOR LIVABLE CITIES, 10 PRINCIPLES FOR LIVABLE HIGH-DENSITY CITIES: LESSONS FROM SINGAPORE 8, 48–9, 56–61 (2013), available at http://www develand.org/wp-content/uploads/ULI-Documents/10PrinciplesSingapore.pdf (describing relieving density with variety [including in building heights] and promoting innovative and nonconventional solutions to space shortages). See also J. Peter Byrne, supra note 144, at 1604 (describing how preservation stimulates demand for urban living via enabling “easy, spontaneous access among the creative class”).


¹⁸⁸ This is the so-called “Section 8 affidavit.” See id. at 92–93.

¹⁸⁹ Indeed, a trademark can be continued on the federal register even when not used, if the registrant shows “special circumstances that would justify nonuse.” Id. at 97. But, to describe more diverts the reader from the main point: that property rights and privileges generally are granted to those for purposes of affirmative exploitation, not to thwart the efforts of others in the marketplace.

¹⁹⁰ In addition, a registrant is eligible to file an incontestability affidavit (also known as a Section 15 affidavit) after the registered mark has been in continuous use in commerce for at least five consecutive years after the date of registration, though it need not be the five-year period just following registration. See id. at 93–94.
or lose control of its distinctive identification power. 191

Similarly, tomorrow’s preservation advocate’s initial application for landmark designation for property ought to be accompanied by a supplement known as a Restoration and Use Strategy and Timetable—for shorthand, here, a “RUST.” 192 The initial designation application must explain, in addition to the data currently collected to evaluate the gravitas of the nominated-as-historic property, sections describing:

(a) Means of implementation for any use (whether short- or long-term) proposed to be made of the property, including the target audience/clients for the proposed use, with market and demographic studies or public surveys supporting the viability of the continuing or proposed use; 193

(b) Sustainability aspects of the property to be listed, including energy efficiencies achievable from the existing structure and rehabilitation aspects of the project that will increase efficiencies in utility usage and carbon footprint reduction;

(c) The source(s) of funds to implement the proposed use(s) and sustainability elements; 194

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191 See BOUCHOUX, supra note 187, at 97 (describing why a trademark must be used and what is considered use).

192 A timetable, while a part of the overall strategy, is called out separately in the acronym because it is the most critical element of the strategy, especially in this “Age of Immediacy,” the present time defined by one journalist as “an impatient age of social media and instant communication.” David Bauder, Age of Immediacy Slowed by Results, DENVER POST (Nov. 7, 2012, 12:01:00 AM), http://www.denverpost.com/ci_21944489/age-immediacy-slowed-by-results.

193 It is expected that most of the applicants will respond either by addressing the existing use (if the building or other structure is occupied) or, if unoccupied at the application date, that it will become a “monument” or “museum.” This response ought to be viewed with some skepticism, although this paper does not advocate the disqualification of a property merely due to this proposed use. It is a fact, however, that except in regard to iconic historic properties, especially those away from densely populated areas, museums are experiencing attendance declines, boding ill for their financial support, in turn boding ill for their maintenance needed for preservation. See, e.g., J. Freedom du Lac, Struggling to Attract Visitors, Historic Houses May Face Day of Reckoning, WASH. POST, Dec. 22, 2012, available at http://www.washingtonpost.com/local/struggling-to-attract-visitors-historic-houses-may-face-day-of-reckoning/2012/12/22/34911666-4b93-11e2-a6a6-aabac85e8036_story.html; see also Field Horne, Op-Ed., No Need to Turn All Historic Structures into Museums, SCHENECTADY GAZETTE, Aug. 30, 2005, available at http://groups.yahoo.com/ne Commodities/GROUPS/NYSCHIST/ conversations/topics/136.

194 Bodies seeking non-profit (e.g., 501(c)) tax-exempt status are required by the Internal Revenue Service to project a three-year budget on Form 1023, Part IX. See INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1023, PART IX 12–14 (June 2006), available at http://www.irs.gov/pub/irs-pdf/i1023.pdf. Many non-profit applicants have not existed three years at the date of their applications, and the Service knows that. Thus, the Service’s requirement either is a complete waste of everyone’s time, or subtly invites the enterprise’s
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(d) The budget for implementation, including anticipated revenues from visitation or use fees associated with interacting with the historic property; and

(e) A five-year timetable targeting when (1) the “street smart” aspect of the property will be fully implemented and (2) the proposed initial use will be implemented.

The advocate’s recitation as to these RUST elements should be scored, and the score should be reported in a widely-distributed publication making the rounds of historic preservation advocacy groups and involved governmental officialdom, encouraging strategic planning in preservation circles. This metric and method should be standard protocol among designation bodies at each level of government described in Part III, motivating such “best practices” for careful designation of structures, districts, and other historic assets, in equal measure, as to their inherent cultural or historical significance. Indeed, a uniform application packet should be devised for nationwide use in initial designation and in maintaining the designation status.

The applicant’s advocate must update the RUST every five years for up to two cycles of additional reporting, including revising, on each occasion, the five-year implementation timetable, unless implementation of a use first has occurred, in which event any applicable timetable for repurposing any affected historic building or structure should be submitted. If the RUST “plan” cannot be implemented after three reporting cycles, the asset’s designation as historic property should terminate. Perhaps a historic designator could grant the advocate one final chance to submit a RUST modification, but only if it substantially revises the nomination-expressed use, indicating repurposing of the organizers to contemplate if it will survive that long, inviting, in turn, thoughts on how to sustain a doubtlessly worthy purpose.

By “street smart,” I mean augmenting the exterior appearance and physical security of the historic assets, specifically landscaping, exterior securing of portals (doors and windows), and maintenance of exterior walls and doors to support, not reduce, the aesthetic of the surrounding neighborhood. Chain link fences with razor wire or boarded-up portals, used as a primary means of securing a site or building and ignoring the aesthetic impact of these “features,” ought to earn zero points in the assessment.

property for a viable use. This “overhaul” plan would need to identify a five-year timetable during which repurposing will occur, along with its implementation budget. Upon the lapse of that “reset” five-year period, the historic designation attaching to the asset would terminate if the repurposed site is not open to the public. Fifteen years to make a historically-designated property useful and sustainable is not medieval, considering that crowdfunding, crowdsourcing, and abundant free consultation for reuse of abandoned buildings and sites exist. Sensible conclusions by the landmark-designating body must include that the listed historic asset is not sufficiently significant or unique to merit landmark status, may be beyond rescue for any utility, or simply is not a point of civic pride according to resident and philanthropy perceptions.

B. Restoring Historic Assets Harmoniously with Sustainability Needs

Historic preservation regulations for multiple story buildings must permit solar technology installations on rooftops and, where invisible, other portions of structures. Façade easements are purposeful for a viewer of walls and visible roof edges of an historic building. Façade easements should never address aerial views of a property; few persons fly slowly over designated parcels to observe the rooftops of these buildings and they cannot see rooftops more than one story high. Tall buildings burden the power grid more than single story structures, so they should offset that burden in a relatively unobtrusive manner by employing solar collector technologies. Conserving non-renewable resources is as meritorious a virtue as is conserving historic assets and little is lost by permitting taller historic assets to self-heat and cool if the basic appearance of the façade from the ground is not compromised. In

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199 See, e.g., Kuntz, supra note 108, at 334–35 (stating how Washington State located solar panels on the roof of its capitol building’s fifth floor, maintaining the beauty of the exterior). In the same vein, the owners of historically designated assets ought to be permitted to resurface facades with coatings that do not detract architecturally and contain nanoparticles that absorb and transfer solar energy for heating and cooling purposes. See, e.g., Timon Singh, Rice University’s Carbon Nanotube Paint Turns Any Surface into a Solar
this matter of solar self-sufficiency, California’s Solar Rights Act offers a suitable rule: if proposed community restrictions increase the cost of an HVAC system or decrease its potential performance, prohibiting solar energy systems for historic structures ought to be repudiated as unreasonable, so long as the collectors are mounted to match the roof slope and do not rise more than a few inches from the roof’s surface. For the future, exterior coatings with solar collection properties (such as imbedded nanocrystals) that do not impact (to the average observer) the appearance of the historic features should be considered as well, as should solar shingles made to resemble the building’s theme.

Self-heating and cooling are imperatives in historic assets’ sustainability, because modern technologies offer the only sensible ways


See CAL. HEALTH & SAFETY CODE § 17959.1 (West 2009); see also CAL. GOV’T CODE §§ 65850.5(a), 6647301, & 66475.3 (West 2008) (Section 65850.5(a) stating, in relevant part, that “[i]t is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems”). Essentially any requirement that solar system panels be invisible to persons atop a building or flying overhead will be unreasonable under this scheme, although a requirement that they be invisible to persons upon the ground peering at the roof’s visible edges seems reasonable.


See, e.g., Singh, supra note 199; Gemeda Beker, NREL Uses Corning’s Flexible Willow Glass to Develop Cheap, Efficient Solar Shingles, INHABITAT (Aug. 9, 2013, 2:00 PM), http://inhabitat.com/nrel-uses-flexible-corning-willow-glass-to-develop-cheap-efficient-solar-shingles/ (“new [Corning] Willow Glass solar cells are flexible, thin, and durable enough to be installed directly on rooftops as solar shingles.”). But see NAT’L ALLIANCE OF PRES. COMM’NS, SAMPLE GUIDELINES FOR SOLAR SYSTEMS IN HISTORIC DISTRICTS 4 (2009) (“Solar shingles laminates, glazing, or similar materials should not replace original or historic materials;” no explanation for this outright discouragement, however, is offered).
to control costly and unwanted air exchange through window frames. General economic polemics on preserving original windows versus replacing them with efficient but inauthentic windows achieve little, mainly because it is seldom that one knows in advance how the quality and ultimate appearance of replacement window materials, proposed by the historic asset’s owner, will affect the designated asset.\footnote{See Jennie G. Alkire, Replacement Windows in Historic Houses: A Study of the College Hill Historic District in Greensboro, North Carolina 2 (Dec. 1, 2008) (unpublished M.S. thesis, Univ. of N.C. at Greensboro); see generally ERIN MUSIOL ET AL., AM. PLANNING ASS’N, SOLAR BRIEFING PAPERS NO. 5: BALANCING SOLAR ENERGY USE WITH POTENTIAL COMPETING INTERESTS 1–5 (2012) available at https://www.planning.org/research/solar/briefingpapers/pdf/potentialcompetinginterests.pdf. Fundamentally, even with computer simulation, no one accurately can predict how the public will perceive new windows as an authentic replication of original historic building fenestration.}

Original fenestration, though not usually a majority of an entire wall’s fabric, contributes significantly to the historic building’s authenticity. From the perspective of those interested in energy efficiency, however, those windows are not suitable.\footnote{See Musiol & Kooles, supra note 205, at 1–2.} Thus, realizing energy savings through windowpane and sash replacement presents a nightmare for local preservation commissions compared to the low visual impact of solar technology rooftop- or ground-mounted installations on ordinary vertical improvements. The optimal approach to maintaining respect for the historic context while achieving sustainability can be found in those simple design guidelines for historic properties promulgated by the City of Richmond, Virginia: solar panel rooftop placement should (a) not require removing historic roofing material visible from the public right of way, (b) be minimally visible (though it need not be “invisible”) from that right of way,\footnote{Design Guidelines for Solar Installations, NAT’L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/sustainable-communities/buildings/solar-panels/design-guidelines-for-solar.html (last visited Sept. 30, 2014) (“[W]ith the visibility of . . . solar panels . . . minimized to the greatest extent possible.”).} (c) not alter roofing configurations like dormers and chimneys, and (d) be installed by a method that is “reversible.”\footnote{See DEPT OF PLANNING, & DEV. REVIEW, OLD & HISTORIC DISTRICTS OF RICHMOND, VIRGINIA: HANDBOOK AND DESIGN REVIEW GUIDELINES 56 (2011), available at http://www.richmond.gov/CommissionArchitecturalReview/documents/Old_Historic_Dis.pdf.}

C. Adaptively Reusing Historic Assets in Physical Crisis

Preservation ordinances must not so hobble attempts at reuse or
redevelopment of historic assets so as to eliminate all incentives to proceed when it is evident that there is no future in preserving an unused, dilapidated landmark. Zoning code changes, such as adopting a Planned Unit Development (“PUD”), overlay, or similar mixed-use zoning designation for an historic asset’s lot, should induce redevelopment and reuse that allow for productive repurposing while celebrating a landmark’s few remaining unique structural qualities.\(^{209}\) An illustration is located two blocks south of First BC. Initially constructed in 1920 and rebuilt in 1928 of concrete and hollow tile, the J.M. Walker Building, designed by architect Lee Fitzhugh,\(^{210}\) was Phoenix’s best Neo-Classic Revival Style structure downtown. It was listed on the NRHP in 1985.\(^{211}\) J.C. Penney initially occupied it for a department store until 1926, when it vacated the site for a newer, two story structure.\(^{212}\) The building was remodeled for occupancy by The Central Arizona Light & Power Company, the leading electric utility in the state, until the 1940s; afterward, it was used as a furniture store and a labor union office.\(^{213}\)

\(^{209}\) See, e.g., ST. PETERSBURG, FLA., CODE § 16.30.020 (1992) (providing an overlay district); GREENWICH, CONN., MUN. CODE § 6-109 (1988) (establishing an overlay zone encouraging the adaptive re-use of buildings of historic value and seeking input from the city’s Historic District Commission on appropriate changes to properties in this overlay district; it does not establish an historic district). The city of Chandler, Arizona, aided by a consultant, is reviewing city zoning and development area plans policies to create an adaptive building reuse program, aiding developers and other owners to “quickly and cost-effectively transform buildings” into commercial uses. See Michelle Mitchell, Chandler Hires Consultant to Help Find New Uses for Aging Buildings, ARIZ. REPUBLIC (Feb. 24, 2014, 1:06 PM), http://www.azcentral.com/community/chandler/articles/20140214chandler-hires-consultant-help-find-new-uses-old-buildings.html.


\(^{212}\) See JUNIOR LEAGUE OF PHOENIX, INC., HISTORIC PHOENIX COMMERCIAL PROPERTIES SURVEY AND NOMINATION TO THE NATIONAL REGISTER OF HISTORIC PLACES 56 (1984).

1959, the city purchased the Walker building but made no public use of it.\textsuperscript{214} It now houses a sandwich shop on its first floor and the local American Institute of Architects chapter office on its second floor.\textsuperscript{215} For repurposing the building in 2001, the columnar portions of the façade were retained, although the roof above the façade was replaced together with the walls, which now are glass panels.\textsuperscript{216} The original structure is well-modified: “Stately Corinthian pilasters greet the traffic of Washington Street, framed by intricate cornice brackets with carefully carved dentils—details so precise in Neo-Colonial-style buildings.”\textsuperscript{217} What remains of the columns and the filigree work in the alabaster reminds the viewer that the Walker building once was grand, a statement of monumental architecture. Refurbishing the building affords the public a glimpse of lost craftsmanship, an unlikely opportunity had the building not been repurposed. Well-maintained and frequently patronized, the Walker Building today makes a qualitatively different contribution to downtown’s livability from First BC’s legacy to date. Which structure addresses a subconscious need for sustainable memories?

A designated property in crisis must be released from the NRHP or other registry to permit refurbishment to proceed, unless an overlay district or zoning adjustment process allows restoration and repurposing. In the case of federal designation, a new registry category called “heritage repurposed” would be appropriate. To attain this new status, the preservation proposal must be certified in three related respects. First, a qualified consultant must certify that the improvements have insufficient structural integrity to maintain its original façades at a commercially reasonable cost.\textsuperscript{218} Second, the owner must certify that there are no ready, commercially reasonable funding sources available

\textsuperscript{214} See id.
\textsuperscript{218} Cf. ST. PETERSBURG, FLA., CODE § 16.30.020 (1992) (taking into account the cost of exterior alterations for conversions in an overlay district).
for restoration, and minimal public demand exists to maintain the property with its original structural façades. The third certification offers a plan for (a) adaptive reuse of the structures, (b) preservation of some unique character by rescuing intact those features that capture the historical architectural statement or essential heritage elements, and (c) a timetable within which work will be done to save these elements. If the registry keepers find these certifications sufficient, there is no reason to penalize the owner by denying him or her all tax credits, such as accelerated depreciation, resulting from genuine efforts to preserve historic assets in crisis—so long as an adaptive reuse is implemented by a deadline evidencing good faith intentions to retain structures instead of tax benefits.

For adaptive reuse of debilitated historic assets to thrive, zoning code changes must liberalize required minimum setbacks, maximum lot coverage, and minimum parking requirements, so long as, in the latter case, transit nodes are nearby (e.g., the J.M. Walker building lot contains no on-premises parking). Cities can promote incentives in reuse projects’ plans review stage, such as by adopting the International Existing Building Code (“IEBC”) or providing for fast-track permitting. The IEBC allows developers who reuse a building to be subject to existing building codes of an earlier time, rather than those codes in effect for new construction. With sensible policies in place, the marketplace will decide what merits adaptive reuse investment.

D. Acknowledging Preservation as Part of a Sustainable City Development Strategy

Scant room in local government growth policies endorsing livability and sustainability exists for a mindset that historic assets’ preservation must operate independently from community planning and

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219 Cf. id. at § 16.30.020.
220 Cf. id. at §16.30.020.5B (requiring a certain amount of parking that will not harm the historic resource, and allowing parking alternatives so as to protect the actual historic property).
222 See id. at vii.
zoning. Ireland’s Department of Arts, Heritage and the Gaeltacht has summarized this well:

[T]he protection and forward management of the architectural heritage of an area should not be seen just as an end in itself. It should also be viewed as a foundation for giving a truly distinctive sense of place and identity to our cities, towns and villages. . . . [S]uccessful development plan policies for the built heritage are those which have been integrated into the broader planning context and sustainable development of an area.

Modern municipal planning requires heritage preservation to be integrated into an organic system of managed growth, as it has been in the European Union since the Venice Charter of 1964. While the adaptive reuse of truly historic buildings is vital to cultural and environmental improvement, “existing building stock alone can never [sufficiently] accommodate . . . needs of the evolving business or [residence markets], particularly in light of rapid technological and social shifts.” Targeted new development, especially in a critical mass of density, “remains critical to the rebirth of neighborhoods and the vitality of urban economies.” American central business districts nationwide, typically, are architectural “anachronisms” in need of revitalization through adaptive reuse. Office spaces constructed after World War II are now substandard, featuring “low ceilings, byzantine structural grids, and wasteful [HVAC] systems” that are energy-

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226 DEP’T OF ARTS, HERITAGE & THE GAELTACHT, supra note 224, at 2–3.


228 Id.

229 A COUNTRY OF CITIES, supra note 28, at 137.

230 Id.

231 Id.
inefficient and offer evidence of "‘sick building’ syndrome.” Public policy encouraging redevelopment of this building stock is critically important if American cities will remain competitive. Enlightened, adaptive reuse policy statements affecting historic assets’ treatment must clarify each urban area’s comprehensive (or general) planning goals. For example, the City of Melbourne, Victoria, has committed in its “Heritage Strategy 2013” to endorse adaptive reuse to maximize heritage districts’ and historic properties’ potential. This commitment imbeds repurposing old structures as a keystone component of an overarching sustainable development strategy. A central feature in Melbourne’s action plan is incorporating principles for “adaptation, re-use and creative interpretation” in the “review of heritage assets in high-growth and urban renewal neighborhoods as well as in the mixed use areas of the city.” Consideration of appropriate principles is a “first priority action” in that city’s implementation plan for its heritage strategy. It should have like priority in America’s cities.

231 Id; see also JAGIT SINGH, The Built Environment of Fungi and the Development, in BUILDING MYCOLOGY: MANAGEMENT OF DECAY AND HEALTH IN BUILDINGS 1, 1 (Dr. Jagjit Singh & Jagjit Singh eds., 1994); Langston, supra note 151, at 2–3 (cataloging types of obsolescence).

232 See ALLISON & PETERS, supra note 156, at 175 (arguing that LEED standards should be adjusted to replace the current point system, with one considering a building’s embodied energy, to encourage more preservation of existing older buildings). Allison and Peters observe that sustainable communities advocates’ goals are directly in line with the goals of many historic preservationists, but that sustainable communities groups focus on new green architectural practices and technologies in building new buildings instead of retrofitting historic assets. See id. at 166–67.

233 Reference Action 2.8 of the Implementation Plan regarding principles for “adaptation, re-use and creative interpretation” in updating policies for management of historic assets in the City, which action will commence in 2014. CITY OF MELBOURNE, MELBOURNE HERITAGE STRATEGY 2013, at 5, 18, 28 (2013), available at http://www.melbourne.vic.gov.au/BuildingandPlanning/Planning/heritageplanning/Pages/HeritageStrategy.aspx. This heritage plan acknowledges that “recent adaptation and reuse of commercial buildings reflects the changing economic structure of the city.” Id. at 12.

234 Id. at 5.

235 Id. at 18. The “creative interpretation” concept is described in Stephen Brown et al., Heritage as Springboard for Creative Enterprise 861 (2011) (unpublished paper, ICOMOS Gen. Assembly, Paris, France), available at http://openarchive.icomos.org/1300/1/IV-2-Article10_Brown_Snelgrove_Veale.pdf (“[S]ignificant heritage places . . . can be developed and presented to satisfy conservation objectives, to shape new forms of cultural identity and stimulate economic growth.”). The notion, overall, is to “relinquish our privileged role as experts to one of brokerage; facilitating linkages with creative industries” and acknowledging that heritage can deliver economically beneficial outcomes in addition to worthy preservation goals. See id. at 869.

236 See CITY OF MELBOURNE, supra note 233, at 28.
E. Enabling Public-Private Partnerships under Redevelopment Agreements

First BC has no champion in the public sector, unless one applauds the City of Phoenix for refraining from ordering its demolition. No argument is advanced here that taxpayer dollars ought to be expended for resurrecting a ruin, unless an old property, by acclamation, is deemed a truly remarkable expression of American culture or is iconic in some other respect. In adaptive reuse circles, more concentration should be focused on partnering with the private sector to restore historic structures to enhance community growth and sustainability. Concerns that the development community will exploit circumstances of financial shortfall can be mitigated by pairing up commercial developers with non-profits such as the Treasury Historical Association, organized to restore “architecturally significant” spaces with special resonance to its members. Federal government agencies endorse adaptive reuse of buildings for private purposes; under Executive Order 13006, federal agencies emphasize reuse of city-center historic buildings, while Executive Order 13287 mandates federal government agencies’


238 See U.S. GEN. SERVS. ADMIN., PUB. BLDS. SERV., HELD IN PUBLIC TRUST: PBS STRATEGY FOR USING HISTORIC BUILDINGS 26 (1999), available at http://www.gsa.gov/graphics/pbs/HIPT.pdf. The PBS has undertaken “to work hand-in-hand with organizations and agencies across the country to ensure livable communities . . . . and to “use historic buildings imaginatively and sensibly . . . to ensure that historic buildings remain a vital part of our inventory and day to day business.” Id. at 1.

partnering with the private sector in repurposing historic properties to promote local economic development and enhanced productive use of public building stock.  

“Land use development agreements create public-private partnerships, causing particular parcels of land to be placed in service in some manner,” generally benefitting the community while potentially profiting a private person though development fees or rent and other revenue generation. In many jurisdictions, development agreements themselves become ordinances and, therefore, their provisions supersede existing use regulations in the city’s zoning code or bylaws to the extent of any inconsistency. Development agreements address concerns among developers, citizens, and city governments about the potentially adverse impacts of projects to be constructed.  

In 2014, Bangor, Maine signed a development agreement with Bangor Housing Development Corporation (“BHDC”) to re-develop the city-owned portion of the historic Freese Building for commercial space on the first floor, and middle income apartments on the second and third

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240 See Exec. Order No. 13,287, 68 Fed. Reg. 10,635 (Mar. 3, 2003) (stating agencies shall examine “policies, procedures, and capabilities to ensure that its actions encourage, support, and foster public-private initiatives and investment in the use, reuse, and rehabilitation of historic properties, to the extent such support is not inconsistent with other provisions of law . . . .” The underlying purpose is to promote “local economic development and vitality through the use of historic properties in a manner that contributes to the long-term preservation and productive use of those properties.”); see also U.S. GEN. SERVS. ADMIN., supra note 239, at 18–19.


243 See INSTITUTE FOR LOCAL SELF GOV’T, supra note 242, at 11.

244 Id.

245 See id. at 28.
floors. Freese’s opened on Bangor’s Main Street in 1892 and expanded until it became the largest department store in Maine. Once referred to as “Fifth Avenue in Maine,” Freese’s closed in 1985. Today, the Freese building holds seventy-three residential units and the Maine Discovery Museum. The development agreement requires BHDC to invest a minimum of one million dollars in construction costs, agree to a construction progress schedule, and install all needed equipment and furnishings in the newly-developed commercial space.

The forthcoming improvements demonstrate opportunities for increased urban center livability when communities like Bangor take proactive and collaborative approaches to redeveloping their historic downtown assets.

Development agreements may grant a non-profit, independent, historic preservation advocate certain “watchdog” prerogatives, such as the right to inspect redevelopment progress of a designated asset and to enforce (similar to enforcement of a conservation easement’s covenants) a developer’s covenants addressing the maintenance of certain historic architectural features of a project. Development agreements containing reasonably strict enforcement provisions and affirmative developer


248 Downtown History, supra note 247; see also Nick McCrea, 3 floors of Bangor’s Freese’s building to be converted into apartments, commercial space, BDN MAINE BUS. BLOG (Sept. 14, 2014, 6:17 AM), https://bangordailynews.com/2014/09/14/business/3-floors-of-bangors-former-freeses-department-store-to-be-converted-into-apartments-commercial-space/ (discussing how project that began construction on September 9, 2014, will feature first floor storefronts along Water Street, while second and third floors will be converted into ten apartment units).

249 Id.

250 Id.

251 Id.
commitments to maintain iconic or historical elements of edifices may mitigate preservation advocates’ doubts about public body-monitoring of the work of the redevelopment’s private parties.

VII. CHARGE TO PRESERVATIONISTS AND URBAN CENTER STAKEHOLDERS

As an urban regeneration tool, historic designation requires relatively little initial public investment, while affording some protection from detrimental changes to landmark assets, incrementally achieving “variety,” place-making, or other community objectives. But designation of an historic asset for preservation cures few urban center revitalization challenges, nor shelters communities from unintended and negative consequences like increased blight and delayed urban transit synergies. Preservation demands more than protection of landmarks; in urban cores, it must take into account the larger significance of community cohesion and livability for all citizens.

Consequently, impassioned advocates for historic preservation cannot merely cause registration of a property and then witness, as a bystander, the fate of an historic edifice or district subjected to the treacheries of economic and social trends. Stewardship issues will continue without new obligations for advocates and improved development opportunities for sensitive and sustainable projects embedded in landmark-designation processes nationwide. Without such constraints and opportunities, more listed structures in urban centers ultimately will be lost because they are simply too decrepit or, in

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252 See Ijla et al., supra note 50, at 279.
251 Id. at 278.
254 Indeed, some argue that planners and city officials, current members of society, lack the acumen to know what projects will be lasting and timeless, and, hence, worthy of designating for preservation. Schindler, supra note 223, at 515–16.
256 See Tyler Tully, Attacking Urban Decay: Take Back Neglected Property, THE RIVARD REPORT (July 25, 2013, 5:00 PM), http://therivardreport.com/attacking-urban-decay-take-back-neglected-property/ (proposal to allow development of vacant lots or neglected improved parcels within San Antonio’s historic neighborhoods, that are not similarly maintained and have real property tax arrearages, by city confiscation in satisfaction of those arrearages).
hindsight, too marginal historically or too cost-ineffective to rehabilitate. A community’s livability is diminished when historic properties or sites are desecrated through fire or flood, lack of proper conservation techniques, or simply are neglected. Ruined landmarks pose health and safety hazards for urban centers, contributing nothing to their revitalization. Nor does a mothballed historic building or site advantage a community where an asset lingers, is poorly-utilized, or is altogether abandoned. These problems are magnified in communities becoming shrinking cities, coping with persistent population outmigration coupled with loss of the employment base that spurred the original growth.

Some believe that all true landmark-worthy sites not previously destroyed have already been listed. See, e.g., CIVICVISIONS LP, supra note 22, at Executive Summary. Since time and architectural styles are not “frozen,” this is a logical fallacy; post-modern architectural period structures are now old enough to be considered for historic designation. See TEDx Talks, Historical Preservation—A Radical Conservative Liberal Concept: Wayne Wood at TEDxRiversideAvondale, YOUTUBE (Jan. 22, 2013), https://www.youtube.com/watch?v=DBS-sL7YZdo; Nat’l Bldg. Museum, D.C. Modern Preservation, YOUTUBE (Nov. 7, 2012), https://www.youtube.com/watch?v=6YgfvFA295g.

Aikins, supra note 91, at 19. This fate awaits City Methodist Church (1925) in the downtown historic district of Gary, Indiana. Abandoned for decades since its congregation left in 1975, and now owned by the City of Gary, most of the church is about to be razed except for a few dramatic architectural features to be stabilized. Joseph S. Pete, 89-year-old Gary church turns into ruin gardens, WASH. TIMES, Dec. 6, 2014, available at http://www.washingtontimes.com/news/2014/dec/6/89-year-old-gary-church-turns-into-ruin-gardens/. The church site will be converted into a “ruins garden,” a public park hosting weddings, arts performances, and other special events. Id. This outcome, while arguably superior to no repurposing, was pragmatic, since prior owners (including Indiana University-Northwest) did not pursue its redevelopment, and its roof entirely collapsed in 2010, dooming restoration of the improvements. See City United Methodist Church of Gary, Indiana, SOMETIMES INTERESTING BLOG (June 16, 2013), http://sometimes-interesting.com/2013/06/16/city-united-methodist-church-of-gary-indiana/.

See Schindler, supra note 223, at 497 (describing the perception that buildings in disrepair create perception that the community is dangerous, resulting in “people being less comfortable, staying inside, and disconnecting from their neighbors”).

Mothballing is discussed by the National Park Service in its Preservation Brief 31. See generally SHARON C. PARK, NAT’L PARK SERV., PRESERVATION BRIEFS 31: MOTHBALLING HISTORIC BUILDINGS (1993), available at http://www.nps.gov/tps/How-TO-PRESERVE/briefs/31-mothballing.htm#mothballing. The author states: “The steps discussed in this Brief can protect buildings for periods of up to ten years,” illustrating that the National Park Service recognizes the obvious fact that a “vacant historic building cannot survive indefinitely in a boarded-up condition . . . .” Id. at 1. The Park Service does not counsel on the fates of buildings mothballed longer than a decade, a lacunae that also should be addressed in a revised series of regulations, for the benefit of structures like First BC.

See Catherine J. LaCroix, Urban Agriculture and Other Green Uses: Remaking the Shrinking City, 42 URB. LAW. 225, 227–30 (2010); see generally Emilie C. Evans, Historic
“Demolition by neglect,” where combined poor initial planning and subsequent inaction compromise historical significance of assets and revitalization of their neighborhoods, is not community-building. Episodes of underutilized or marginally-maintained historic assets will be diminished by thoughtful preliminary utility and sustainability analyses in initial designation-advocacy processes. Project objectives must be documented reflectively in the listing-application phase to maximize long-term project utility and advocate support for an asset’s or district’s sustainability. Demanding ongoing accountability from stewards of historic assets, whether NGOs, governmental entities, or private owners, for their current and future conditions promotes adaptive reuse, enhancing urban center quality of life.


36 Aikins, supra note 91, at 23–24. By this phrase, I intend “neglect” not just of the historic asset but also of the sustainability and urban renewal frames—in combination, diminishing livability.