THE HARDSHIP IN HISTORY: HOW ONE FORGOTTEN THEATER COULD CHANGE HISTORIC PRESERVATION IN PENNSYLVANIA . . .

BUT FOR BETTER OR FOR WORSE?

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INTRODUCTION

Humankind has been fascinated with the arcane nature of objects from antiquity since well before the twenty-first century.1 This includes historic architecture, with perhaps the prime example being the removal of marble statues and architecture (dubbed “the Elgin Marbles”) from the facades of the Greek Parthenon by Lord Elgin, British ambassador to the Ottoman Empire during the early nineteenth century.2 Rightful ownership, repatriation, and the ethical value of the architecture remain in dispute today.3 Treatment of historic property, like the Marbles, is often a subject of dispute because of the myriad of values and ethical perspectives we associate with it.4 Unsurprisingly, most countries have recognized at least some form of value in their cultural and historic property and have established laws and

* J.D. May 2018. I would like to thank first and foremost my family, who has encouraged and supported me through every step of my education. I would also like to thank all of my professors, instructors, and peers, who have shown me the value in studying and saving history.

1 Mark Lynott, The Development of Ethics in Archaeology, in ETHICAL ISSUES IN ARCHAEOLOGY 17, 17–18 (Larry J. Zimmerman et al. eds., 2003).

2 Id. at 31.


regulations to protect such property within their borders, including the federal United States and her fifty states.

Pennsylvania, estimated to have seen its first meaningful settlement in the mid-to-late 1670s before the coming of William Penn, has enjoyed a rich history as one of the original thirteen colonies, and as home to historic cities like Philadelphia, Pittsburgh, and Harrisburg. Outside of the federal laws that protect its historic resources, Pennsylvania effects much of its preservation through local ordinances and municipal zoning codes. This Note explores how a Commonwealth Court case concerning a dilapidated theatre and its neighboring buildings could change how municipal zoning regulations apply to historic structures targeted for redevelopment.

Part I of this Note discusses the history, philosophy, means, and problems associated with historic preservation. Part II analyzes the interconnection between Pennsylvania’s dimensional zoning laws and historic preservation, and how Garden Theater may change how those zoning laws are applied to the redevelopment of historic properties. Part III considers the implications of the law as applied to Pennsylvania jurisdictions and the arguments and counter arguments that underlie the ruling.

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7 See Phelps, supra note 6, at 130–31.


9 See Phelps, supra note 6, at 113–14 (local preservation ordinances have been widely adopted and are the most effective tool).

10 See, e.g., 53 PA. STAT. § 10910.2 (West 2018); PITTSBURGH, PA, CODE OF ORDINANCES, tit. 11, ch. 1101, § 1101.10.
I. AN OVERVIEW OF HISTORIC PRESERVATION

A. Why Preserve the Past?

For better or for worse, this depends on who you ask. Perhaps two of the most prominent arguments center on the economic value of historic preservation and the value of historic preservation to our present sense of self. Historic preservation has been undoubtedly connected to the economic revival of neighborhoods and cities, and may improve economies of entire regions. Heritage, or cultural tourism, is cited as one of the main economic benefits of historic preservation. In fact, a 2006 study revealed that more than seventy-five percent of adults on vacation visited a historic or cultural site. In contrast, many academics studying historic preservation argue that there are much more complex moral and ethical values at play. The academics’ view can be distinguished from some developers’ perspectives that preservation is merely occurring for “nostalgia,” because academics believe that the cultural and societal values of historic resources “transcend the here and now.” This competing view recognizes that we have a stewardship role over historic resources and are responsible for protecting them for past and future generations.

Other competing interests and values can be seen as intertwined with the previous two views. Preservation of the physical historic components of communities is considered a meaningful and long-lasting approach to preserving that

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12 Lewis, supra note 11, at 289–90.
15 Schoen, supra note 14, at 1363–65.
16 Id. at 1364.
17 See, e.g., Matthes, supra note 13, at 6.
18 Lewis, supra note 11, at 288.
20 Id.
community’s legacy and cultural memories within society. Preservation efforts may also be connected to values of patriotism within communities, such as tracing local history to important nationalistic beginnings or preserving the cultural identity of previous nations. Lastly, scholars and researchers have observed environmental benefits from historic preservation. These benefits include, for example, the preservation of the “embodied energy” in a building through reuse. This ideology suggests that the preservation of historic structures eliminates waste and unnecessary expenditure of new energy and resources needed to demolish and reconstruct a building. Thus, preserving this energy supports efficient and “green” development practices, which prevent costly expenditure of resources on ephemeral uses. Still, the long-term benefits of historic preservation are relatively elusive or undocumented due to its recent birth as a professional field, and the majority of research has only enumerated the benefits as quantifiable market values.

B. A Brief History of Historic Preservation in the United States

The preservation of historic resources and interest in historic property within the United States dates back to the colonial era. As early as 1620, records indicate that pilgrims were digging up Native American grave structures. The initial fascination with historic resources was generally motivated by relic collection, or looting. Unfortunately, this type of behavior continues to this day, and the economic value placed on historic resources drives a competitive economy.

21 Lewis, supra note 11, at 289.
22 Id. at 288.
23 Id. at 290; Schoen, supra note 14, at 1319–20.
24 Lewis, supra note 11, at 290.
25 Id. at 290–91.
26 Id.
29 Id. at 28.
30 See, e.g., Neil Brodie & David Gill, Looting: An International View, in ETHICAL ISSUES IN ARCHAEOLOGY, supra note 1, at 32–33 (explaining that just under 90% of antiquities for sale in Sotheby’s and Christie’s antiquities auctions from 1958–1998 were known for the first time, and only 1–2% had clear provenance from ground to sale).
However, in the mid-nineteenth century, efforts to preserve local or national sites associated with the founding or early history of the United States emerged. One of the first examples is the Mount Vernon Ladies Association’s purchase of George Washington’s former presidential estate for use as a museum. Similar organizations followed suit by purchasing and preserving residences and meeting places connected with the persons who founded the United States and prominent local figures. The focus shifted from placing value on marketable historic talismans to preserving historic structures and architecture for the maintenance of sense of place or historic community context.

These preceding movements focused on the private individual or collective efforts to save historic resources. Government involvement was not far behind. The Supreme Court recognized the legitimacy of regulatory police powers to restrict private uses of land through zoning ordinances in 1926. As early as 1931, states were enacting preservation ordinances, which utilized many of the same elements found in modern zoning laws. Though they functioned as grounds for regulation for nearly two decades without specific constitutional support, the Supreme Court in Berman v. Parker established that aesthetics are a “sufficient basis” for local regulatory action. Years later, the Court grounded historic preservation in the regulatory police powers of the state in the notorious Penn Central decision. There, a fifty-five-story addition atop New York’s iconic Grand Central Station was denied, as the local regulatory body declined to compromise the aesthetic and historic features of the designated landmark. The Court held that the city ordinance could regulate and review development or alterations to preserve historic characteristics of buildings and neighborhoods. These decisions paved the way for historic preservation through regulations and zoning ordinances at the state and local level.

31 Phelps, supra note 6, at 117.
32 Id.
33 Id. at 117–20.
35 Phelps, supra note 6, at 122–23.
36 Id. at 124 (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).
38 Phelps, supra note 6, at 125.
39 See id. at 124–25.
Federal law that specifically addresses historic resources has been fairly limited. The government first moved to protect historic resources with the passage of the Antiquities Act of 1906. The purpose of the act was to preserve historic resources situated on lands owned by the federal government. The act vested the president with the power to set aside portions of land as national monuments, required preservation and proper care of such resources, and authorized the Secretaries of Agriculture, the Interior, and the Army to grant permits for the excavation and research of historic sites. An actor who disturbed such resources on federal land would be subject to criminal penalties. Six decades later, the federal government passed comprehensive legislation recognizing the need for stewardship over all historic resources, not just those situated on federal land. The National Historic Preservation Act of 1966 (NHPA) consists of three major components: (1) the expansion of the National Register of Historic Places (the Register), which recognizes the important history behind listed property through their designation; (2) a review requirement for federal agencies to assess whether any projects will affect historic places; and (3) a requirement that the federal agencies preserve the historic properties to the maximum extent possible. Three years later, Congress passed the National Environmental Policy Act, which incorporated the impact surveys of cultural resources under the NHPA with other mandatory environmental impact surveys.

In between the preceding federal historic preservation laws and the more recent laws that will be discussed, the United States became a member of the United Nations...
Educational, Scientific, and Cultural Organization (UNESCO) in 1972. To date, the United States has submitted and ratified two international conventions from UNESCO: The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970 (Cultural Property Convention) and The Convention for the Protection of World Cultural and Natural Heritage of 1972 (Cultural and Natural Heritage Convention). The Cultural and Natural Heritage Convention plays the more significant role in the historic preservation of structures.

More recently, federal law has shifted away from the aforementioned impact-based review strategies under the NHPA and NEPA. Federal tax law in its current state allows for a twenty percent tax credit for certified rehabilitation of recognized historic structures and a ten percent tax credit for the rehabilitation of non-historic, non-residential buildings built before 1936. Also, the newest federal law addressing historic and cultural preservation, the Native American Graves Protection and Repatriation Act, reverts back to the lingering concern over the looting and destruction of the Native American cultural resources.

While these examples are not necessarily exhaustive, and many federal laws and regulations are implicated in historic preservation, the subject matter of these laws specifically designate them as necessary bodies of historic preservation law. However, not all technically apply to historic structures, as historic preservation law has addressed different concerns over time.

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49 See infra notes 53–59.


C. Current Forms and Methods of Historic Protection of Historic Structures at the International, Federal, and State or Local Levels

To assess the current pulse of historic preservation of historically significant structures in the United States, we must consider all three potential sources of historic preservation law. At an international level, the main source of historic preservation is the Cultural and Natural Heritage Convention, which was ratified by the United States.\(^53\) Upon the ratification and passage of associated legislation, the United States agreed to be bound to the obligations of a UNESCO convention.\(^54\) The Cultural and Natural Heritage Convention focuses on two categories: cultural and natural heritage.\(^55\) It enumerates cultural heritage to include: monuments of outstanding historic, artistic, or scientific value; groups of buildings of outstanding universal historical, artistic, or scientific value; and archaeological sites of outstanding universal historical, aesthetic, ethnological, or anthropological value.\(^56\) UNESCO reviews sites for ten different elements, and any such building or site seeking recognition and protection under UNESCO’s World Heritage List must possess a minimum of six unique elements.\(^57\) Attaining this status is not easy—of 1,052 listed

\(^{53}\) Cultural and Natural Heritage Convention, supra note 48.


\(^{56}\) Id.; Cultural and Natural Heritage Convention, supra note 48, art. 1.

\(^{57}\) Emily Monteith, Comment, Lost in Translation: Discerning the International Equivalent of the National Register of Historic Places, 59 DEPAUL L. REV. 1017, 1022–23 (2010). Selection criteria include: (i) to represent a masterpiece of human creative genius; (ii) to exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (the Committee considers that this criterion should preferably be used in conjunction with other criteria); (vii) to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; (viii) to be outstanding examples representing major stages of earth’s history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or
properties, the United States only possesses twenty-three properties, eleven of which are listed as cultural heritage.\(^5\) Once listed, signatory states are obligated to preserve and restore those resources, resulting in many successful preservation stories.\(^5\)

Federally, the lodestar of historic preservation for buildings and significant architecture is the NHPA.\(^6\) In appraising the three major components of protection outlined in the previous section,\(^6\) the NHPA can be seen as imposing both procedural safeguards and acting as a “planning tool” meant to increase protected properties on the Register over time.\(^6\) Procedurally, federal agencies must undertake impact surveys on historic resources including districts, sites, buildings, objects, or structures, from federal or federally-funded projects.\(^6\) They also must consult with other parties who may have an interest in the historic property like State Historic Preservation Officers (SHPOs), the public, the Advisory Council on Historic Preservation, and Native American tribes.\(^6\) Failure to implement either of these procedural safeguards could result in challenges to permits, which may halt a project until compliance with the procedure is met.\(^6\) The Register is “hugely important” during the required survey period because it is used to determine whether potential sites meet Register criteria or are already identified on the Register.\(^6\) Even if the federal agency initially finds no affected sites, SHPOs retain the right to disagree,


\(\text{\cite{1721}}\) Monteith, supra note 57, at 1019.

\(\text{\cite{1621}}\) Nevitt, supra note 45.

\(\text{\cite{1521}}\) Monteith, supra note 57, at 1019–20; Nevitt, supra note 45, at 398–400.

\(\text{\cite{1421}}\) Monteith, supra note 57, at 1019.

\(\text{\cite{1321}}\) Lewis, supra note 11, at 303.

\(\text{\cite{1221}}\) Id. at 306.

\(\text{\cite{1121}}\) Id. at 302.
which then mandates the federal agency to consider the impact of its undertaking.67 Yet, the NHPA does not require any outcomes, nor does it prevent federal agencies from ultimately undertaking a project that harms a historic resource.68 Additionally, the tax credit program is, monetarily, the largest federal historic preservation program.69 From its inception in 1977 to 2015, the program has invested over seventy-eight billion dollars in rehabilitation involving more than forty-one thousand certified projects—all through incentivizing private landowners to restore their property via tax credits.70

All states have legislation or agencies authorizing historic preservation at the local level.71 Many states have laws implementing the requirements set forth under federal programs like the NHPA.72 Other forms include: typical state-level registers of historic places, state agency stewardship programs, state tax credits, state preservation grants,73 local historic ordinances and zoning codes, preservation easements enforceable by state law,74 and more innovative programs like resident curatorships.75 Almost all states authorize local zoning commissions or boards to implement planning for in-state land use and development; increasingly, historic

67 Id. at 303.
68 Nevitt, supra note 45, at 399.
69 Schoen, supra note 14, at 1340.
73 Pennsylvania offers state preservation grants to non-profits and governments preserving a historic structure. MICHEL R. LEFÈVRE, HISTORIC DISTRICT DESIGNATION IN PENNSYLVANIA 26 (2007).
74 Id.; see Schoen, supra note 14, at 1343–56.
75 Adam Wolkoff, The Risks and Rewards of Resident Curatorships, 38 ENVTL. L. REP. NEWS & ANALYSIS 10316, 10317 (2008) (A resident curatorship is an agreement between an entity who occupies and renovates a historic property in exchange for rent-free tenancy or long-term favorable leases. States benefit from having historic structures renovated at low-cost, while tenants enjoy the benefit of an inexpensive home or business location.). Resident curatorships are still blossoming today, nearly ten years after this article was written. See David Culver & Gina Cook, Fairfax County Will Let You Live in a Historic Home Rent-Free if Renovated, NBC WASHINGTON (Dec. 10, 2017), https://www.nbcwashington.com/news/local/Fairfax-County-Will-Let-You-Live-Historic-Home-Rent-Free-If-You-Pay-Renovations-462911043.html.
preservation is a factor local boards must address to comply with comprehensive state plans.\(^{76}\)

## II. Preservation of Historic Structures in Pennsylvania: The Garden Theater Takes the Stage

### A. Introduction

While all international and federal laws are applicable to projects undertaken by agencies in Pennsylvania, the truth is that local zoning and preservation ordinances stemming from the nebulous state police power recognized in *Euclid* and *Penn Central* lead to the majority of historic preservation of buildings in the United States.\(^{77}\) Pennsylvania is no exception.

There are two types of historic preservation zoning regulations in Pennsylvania.\(^{78}\) One requires agencies to locate and identify historic districts and add them to the National Register or certify them as historic with the Pennsylvania Historical and Museum Commission (PHMC).\(^{79}\) A Historic Architecture Review Board (HARB) regulates everything within the district, from structural deviations to aesthetic facade alterations.\(^{80}\) The other regulation provides the subject matter for the substantive legal challenge at issue in this note. Pennsylvania, like many other states discussed above, passed the Municipal Planning Code (MPC) which allows local agencies to implement local zoning ordinances that protect historic resources.\(^{81}\) The MPC authorizes local zoning ordinances to regulate things like dimension, bulk, maintenance, alteration, and use of buildings within unique zoning districts.\(^{82}\)

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\(^{76}\) Schoen, *supra* note 14, at 1353.


\(^{78}\) LANCASTER COUNTY PLANNING COMMISSION, *HISTORIC PRESERVATION GUIDELINES FOR THE PRESERVATION, PROMOTION AND REGULATION OF HISTORIC RESOURCES* 12 (May 2009) [hereinafter HISTORIC GUIDELINES].


\(^{81}\) *Id.*; Pennsylvania Municipalities Planning Code, 53 P.A. STAT. § 10603(g)(2) (West 2018).

\(^{82}\) Pennsylvania Municipalities Planning Code, 53 P.A. STAT. § 10603(b)(2) (West 2018).
the MPC does not permit regulation for aesthetics unlike preservation ordinances, the local zoning codes still intersect with historic properties and their development by regulating uses and other dimensional aspects.83

B. Act One: The Dilapidated Garden Theatre Block and a Chance for an Encore

Pittsburgh is home to various buildings designed by some of the nation’s most revered architects.84 Situated at the 12 West North Avenue block in the North Side neighborhood of Pittsburgh, the Garden Theater and its accompanying buildings are no different. Funded by vice-president banker David E. Park and designed by architect Thomas H. Scott, the Garden Theater opened to the public in 1915 with a unique Beaux–Arts style facade.85 The Garden Theater shirked change time and time again and remained true to its original design, and while big screen cinemas were playing increasingly suggestive content, the owner, up until his death in 1970, refused to show the film *Frankenstein*.86 It is no surprise that the Library of Congress’ recognition of the theater’s commitment to remain unchanged solidified it as one of the few remaining relics of the American silent movie era.87

If one were to look at the Garden Theater today, however, he or she would see only a shell of the building’s former glory, and the antiquated buildings beside it lie in a similar state of dilapidation. While remaining steadfast to its beginnings in the face of new technology like television and modern cinemas, the theater endured financial difficulty.88 After the owner’s passing in 1970, the Garden Theatre became

84 See, e.g., Mark Houser, Meet the Famous Architect of Pittsburgh’s First Iconic Buildings, PITT. MAG., Sept. 24, 2015 (An interesting overview of some of Pittsburgh’s first and most iconic buildings erected by architect Daniel Burnham and funded by local giants like Andrew Carnegie and Henry Clay Frick. Burnham passed away in 1912 but earned laurels and tribute from President Taft himself.).
86 Potter, *supra* note 85.
87 McNulty, *supra* note 85.
88 Id.
an adult theatre, considered by many to be an unsavory development. However, the shift to adult films at one point increased the average crowd from thirty patrons to three hundred. While the adult film business finally closed in 2007, the Urban Redevelopment Agency (URA), which is tasked with renovating the buildings by the city, was surprised to find much of the original structures and architecture intact.

The URA was created in 1945 to address problems of urban blight. It is statutorily empowered and mandated to engage in conservation, which includes the preservation and renovation of existing buildings. For thirty years, the URA attempted to purchase property on the block, including the Garden Theater. After acquiring the theater, the URA initiated redevelopment of the block and imposed requirements that the building’s facades and architecture be preserved, so as to not entirely change the character of the area. However, since its acquisition in 2007, the URA has had trouble finding viable redevelopment options, evidenced by two failed proposals. This is caused by URA’s preservation requirement for developers, the costs associated with such restoration, and the Pittsburgh zoning code’s dimensional limitations which will be discussed at length in the next section. The saga of the Garden Theater block was saved from the wrecking ball, however, when the URA accepted Trek Development’s proposal in 2014 to turn the buildings around the Garden Theater into multi-story apartments. But, would the zoning code yield safe passage to the redevelopment?

89 Id.
90 Id.
91 Id. (noting the only visible remains of its recent past was a condom machine in the men’s bathroom).
93 Id. §§ 1703(c.3), 1709(b), 1746.1.
94 Brief for Appellant at 21, Demko v. City of Pittsburgh Zoning Board of Adjustment, 646 CD 2016 (June 22, 2016) (SA–000864) [hereinafter Brief for Appellant].
96 Brief for Appellant, supra note 94, at 8.
97 ZBA Decision, supra note 95, at 6.
C. Act Two: Trek’s Relief Lies in Variances from the Zoning Code

Trek, per the URA’s requirement, sought to keep the facades and thirty feet of the historic standing architecture, but intended to build up to eight stories to incorporate over seventy apartment units. Trek reasoned this was necessary to cover historic renovation costs and make the project viable, whereas the other projects in the past were not economically feasible. However, the City of Pittsburgh Zoning Code (Code) did not allow the intended dimensions. The buildings on the block, zoned as Local Neighborhood Commercial (LNC) under the Code’s zoning map, are limited to a maximum height of forty-five feet, three stories, and a floor-area ratio (FAR) of 2:1.

Trek was not without options to move forward with its non-conforming project. While Pennsylvania’s MPC authorized the local zoning regulation of dimensions, it also created an administrative body called the Zoning Hearing Boards, or Zoning Board of Adjusters (ZBA) from which landowners may seek variances to a zoning code’s requirements imposed on their land. Variances are a form of quasi-judicial relief granted by the ZBA, and have been referred to as a “safety valve” for landowners. However, courts have declined to grant variances on a whim. Instead, Pennsylvania’s MPC requires a landowner must suffer an unnecessary

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99 This note focuses only on the dimensional variance issues, not whether or why the Garden Theater buildings were not protected under other portions of the Pittsburgh Zoning Code.

100 Brief for Appellant, supra note 94, at 9.

101 Id.

102 ZBA Decision, supra note 95, at 2.

103 PITTSBURGH, PA, CODE OF ORDINANCES, tit. 9, art. II, ch. 904, § 904.02.C. Floor area ratio is a relationship between the maximum amount of useable area the building has compared to the total area of the lot the building occupies. For example, a building has a 2:1 ratio where the total amount of usable floor area is 40 sq. ft. and the total area of the lot is 20 sq. ft.

104 Zoning Hearing Boards (ZHBs) and Zoning Board of Adjustments (ZBAs) are identical bodies, but municipalities differ in how they are named.


107 Id.
hardship from the zoning regulations before receiving a variance.\textsuperscript{108} To prove the existence of an unnecessary hardship, a landowner must present sufficient evidence of five distinct elements: (1) the unnecessary hardship arises from unique physical conditions of the property; (2) a variance is needed to allow reasonable use of the property; (3) the unnecessary hardship was not self-inflicted; (4) the variance will not alter the essential character of the neighborhood; and (5) the variance is the minimum amount needed to afford relief.\textsuperscript{109}

Pennsylvania also recognizes a distinction between landowners seeking use variances compared to dimensional variances.\textsuperscript{110} In the context of use variances, the unnecessary hardship finding generally requires the difficult showing that the property has no other reasonable use without the variance, or that costs to comply with the code are prohibitive.\textsuperscript{111} Dimensional variances, however, require a lesser quantum of proof in order to establish unnecessary hardship.\textsuperscript{112} Thus, the \textit{Hertzberg} standard from the Pennsylvania Supreme Court case \textit{Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh} applies to grants of dimensional variances throughout Pennsylvania by relaxing the burden of proof on the applicant.\textsuperscript{113} It serves to recognize that dimensional variances are of lesser import than use variances, because where dimensional variances only permit relief from things like height, width, or setback from sidewalk restrictions, use variances seek to permit uses intentionally proscribed under the zoning code.\textsuperscript{114}

Trek requested two variances from the ZBA: a 97-foot, eight-story variance from the 45-foot, three-story permitted height, and a FAR increase from 2:1 to 4.8:1.\textsuperscript{115} The ZBA granted both variances.\textsuperscript{116} However, an objector and local property owner, David Demko, appealed the decision to the Court of Common Pleas, ...
which found for Denko and overturned the ZBA’s decision to grant the variances.\footnote{Demko v. City of Pittsburgh Zoning Bd. of Adjustment, SA 15–000871, 1, 9 (Pa. Ct. Com. Pl. 2016).} The following arguments have been consistent at all stages of the case and are in the Commonwealth Court currently. Regardless of the outcome, the arguments and their implications will have an effect on historic preservation in Pennsylvania.

\section*{D. Act Three: Dueling Arguments over Pennsylvania’s Past\footnote{As stated in the introduction, this note focuses on whether historic preservation can be considered to constitute an unnecessary hardship. While some minimal discussion of the other elements is necessary to cover the party’s arguments, the majority of analysis and application centers on the issue of whether historic preservation can be a hardship to grant a dimensional zoning variance.}}

Trek’s position is that the required historic preservation imposed by the URA creates an unnecessary hardship in complying with the zoning code, because the amount of money needed to fund the project necessitates the construction of more apartment units to pay for the preservation.\footnote{Brief for Appellant, \textit{supra} note 94, at 9.} For the first time, Pennsylvania courts must decide whether the preservation of historic architecture and facades may be found to cause an unnecessary hardship warranting the grant of a dimensional variance from applicable zoning regulations.

Trek’s arguments center primarily on Pennsylvania’s historically expansive treatment of the relaxed \textit{Hertzberg} dimensional variance standard.\footnote{Marshall v. City of Philadelphia, 97 A.3d 323, 330 (Pa. 2014) (stating that the Supreme Court has repeatedly held the “practically valueless” standard of use variances is not applicable to the relaxed \textit{Hertzberg} standard for dimensional variances); Robert Simpson & Joshua S. Mazin, \textit{A Historical Review of the Land Use Jurisprudence of Pennsylvania’s Commonwealth Court}, 20 WIDENER L.J. 59, 78 (2010) (noting that \textit{Hertzberg} standard cases occur frequently and are emblematic of Pennsylvania land use law).} \textit{Hertzberg} attempted to delineate proper factors to consider for the relaxed standard to find unnecessary hardship, such as any economic detriment to the applicant if the variance is denied, financial hardship in bringing the building into strict compliance with the code, and the qualities of the surrounding neighborhood (such as blight).\footnote{Hertzberg v. Zoning Bd., 721 A.2d 43, 50 (Pa. 1998).}

According to Trek, consideration of the costs of preserving a historic building fits logically within \textit{Hertzberg}’s scope of application.\footnote{Brief for Appellant, \textit{supra} note 94, at 14–15.} Pennsylvania case law supports this notion, and the Commonwealth Court should recognize that some
instances of historic preservation of a property may constitute unnecessary hardship to be relieved by the grant of a dimensional variance.  

The mandated historic preservation of the Garden Theater block buildings is arguably factually analogous to Pennsylvania Supreme Court precedent before Hertzberg, the Hertzberg case itself, and subsequent interpretations of the Hertzberg standard. The unifying theme between these cases is a developer seeking a dimensional variance in order to meaningfully redevelop dilapidated older buildings. When Hertzberg officially relaxed the unnecessary hardship standard for all dimensional variances, it drew from the previously recognized proposition that blighted areas, and structures subject to rehabilitation, receive further relaxation of the criteria. The Garden Theater buildings, unfortunately, are in a similar state as those in case law precedent. Their current dilapidation, dated utilities, and years of vacancy, all support granting Trek’s dimensional variances to put the historic structures back to reasonable use while fulfilling the URA’s preservation requirement.

The URA’s statutory ability to conserve historic structures is not the only source validating their preservation requirement of the building’s facades. While never addressed by the Pennsylvania Supreme Court, two Commonwealth Court

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123 I do not suggest this is a blanket application; there must be limitations. For example, a developer who seeks to preserve a two-story home of significant architecture by incorporating its facades into a one-hundred story skyscraper should not be able to support his project merely by choosing to save the historic features.

124 Preceding Hertzberg, see Vitti v. Zoning Bd. of Adjustment, 710 A.2d 653 (Pa. Commw. 1998) (dimensional variances granted where dilapidated and valueless three-story building sat for years, and even though other uses were technically permitted, the court considered vacancy of the building a factor for the variance) and Wagner v. City of Erie Zoning Hearing Bd., 675 A.2d 791 (Pa. Commw. 1996) (dimensional variances granted where building had stood dilapidated for years, costs to comply with code or demolish were prohibitive, and the character of the neighborhood and building type failed to attract another use); Hertzberg, 721 A.2d at 43 (denial of dimensional variance for total square feet needed for a lodging house designation was overturned because of an improperly strict standard, where a dilapidated building which stood vacant for years was suited for the proposed use and would yield substantial demolition costs); post-Hertzberg, see Marshall, 97 A.3d at 323 (dimensional variances granted where a century old school-building in need of repair, while not vacant for long, likely would have stood vacant without the proposed use, and the developer would suffer an economic harm resulting from losing federal funding for the project if the dimensional variances were not granted).

125 Hertzberg, 721 A.2d at 49 (citing Vitti, 710 A.2d at 658).

126 McNulty, supra note 85.

127 See, e.g., Hertzberg, 721 A.2d at 52; Marshall, 97 A.3d at 333.

128 Urban Redevelopment Law, 35 PA. STAT. §§ 1703(c.3), 1709(b), 1746.1 (West 2018).
cases suggest that preventing waste and aesthetic concerns may be sufficient to grant dimensional variances. The landowners sought to construct a smaller tenet house on an old gristmill foundation, which was within the proscribed distance from the stream under the flood regulation. The ZBA granted the variance, holding that the only alternative place to construct the building would destroy a “stand of beautiful mature pine trees,” would cause the historic foundation “to be unused,” and the variance had no detriment to the public welfare. Similarly, in Tidd v. Lower Saucon Twp. Zoning Hearing Bd., landowners sought a dimensional variance from an ordinance which required that land used to corral or pasture horses be one hundred feet from property lines, because the landowner would have to cut down a significant number of trees. The ZBA granted the variance and determined that cutting down the trees would be wasteful and harm the character of the rural area; the Commonwealth Court agreed, holding that the ZBA did not abuse its discretion in finding unnecessary hardship. The Pittsburgh ZBA decision in Demko granting Trek’s variances therefore could be justified in the Commonwealth Court, and subsequent courts, because the historic features of the buildings were necessary to preserve the historic character of the neighborhood. Their demolition would undoubtedly constitute waste and cause the foundations to be destroyed or “be unused,” and the public had overwhelming

130 Holmes, 396 A.2d at 860.
131 Id.
132 Id. at 861.
133 Id.
134 Tidd, 118 A.3d at 4.
135 Id. at 14–15.
136 This area is also home to the Mexican War Street Historic District and the Allegheny Commons Park Historic District. ZBA Decision, supra note 95, at 3.
137 See Holmes, 396 A.2d at 861; Tidd, 118 A.3d at 14–15.
support for preserving the structures while returning the buildings to productive use.  

A final element that the Pennsylvania Supreme Court in Marshall considered was whether, if the dimensional variances were denied, the developer would lose federal funding to renovate the old structure, resulting in his financial detriment. While not completely analogous to the situation in Marshall, the URA received funding to purchase the Garden Theater buildings from the federal Department of Housing and Urban Development’s Community Development Block Grant Program (CDBG), which is funded by taxpayers. Because CDBG is federal funding, entities like the URA must comply with the impact surveys of NHPA. Thus, it could be argued that the URA was properly considering the impact on the historic structures, and the ZBA did not abuse its discretion if the URA decided the historic facades required preservation. Moreover, expenditure of those federal funds, just to demolish the whole block against the overwhelming community opinion, is wasteful and raises ethical concerns.

Demko appealed the ZBA’s decision and the Court of Common Pleas reversed. Appellant Demko’s brief argued that: 1) the historic characteristics of the buildings do not create any unnecessary hardship; 2) if there is any hardship, it is self-inflicted from the preservation requirement because the buildings could simply be torn down; and 3) the variances are not the minimum alteration that would

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138 Brief for Appellant, supra note 94 n.45 (sign in sheets for the public Pittsburgh ZBA hearing indicated sixty-four signatures in favor, with only eight in opposition); Tidd, 118 A.3d at 9 (the Pennsylvania Supreme Court in Marshall placed significant emphasis on overwhelming public support for a variance in determining whether a ZBA abused their discretion).


141 See supra text accompanying note 63.

142 Reply Brief for Appellants, the City of Pittsburgh and the URA, supra note 140; ZBA Decision, supra note 95, at 6–7 (Note: no evidence surrounding the NHPA was admitted into evidence or the record, however.).

143 Though funds may be received for demolition of properties, the overall goal of the CDBG program is to stabilize communities and neighborhoods. Granting funds to URA who, along with the majority of the community, want the buildings preserved, yet requiring the result to be demolition, seems antithetical to the CDBG’s recognized purpose. Community Development Block Grant Program, U.S. DEP’T OF HOUS. AND URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited May 22, 2018).

afford relief because other uses could technically renovate the building in accordance with the forty-five-foot LNC zoning restriction.\textsuperscript{145}

Although there is currently no established precedent on the answer, the Court of Common Pleas and Demko make arguments that are simply not as persuasive as Trek’s position. First, Demko and the Court of Common Pleas give the self-inflicted hardship an overly technical reading, which the ZBA discussed in their decision.\textsuperscript{146} This draconian position turns a blind eye to the URA’s statutory mandate to preserve and restore buildings,\textsuperscript{147} the URA’s potential consideration of any NHPA impacts,\textsuperscript{148} the overwhelming community support,\textsuperscript{149} and the ZBA’s valid consideration of waste and the aesthetics of the character of the neighborhood, especially in the context of dimensional variances under \textit{Hertzberg}.\textsuperscript{150} Thus, the URA is not arbitrarily inflicting the hardship from historic preservation for which dimensional variances are needed to make the project viable. Moreover, while technically other conforming structures could be built on the property, and some even less expensive than one with the required renovations, the Pennsylvania Supreme Court has held that the ZBA’s authority is not restricted to require demolition regardless of financial burden incident thereto, which is what the Court of Common Pleas seemingly suggested.\textsuperscript{151}

Secondly, while Demko and the Court of Common Pleas correctly indicate that unnecessary hardship cannot be proven simply by claiming a proposed project is more lucrative with the dimensional variance than without,\textsuperscript{152} that rule is quite distinguishable from the issue here. In \textit{One Meridian Partners v. ZBA of Philadelphia}, the Commonwealth Court held that a dimensional variance request to construct a building exceeding Philadelphia’s zoning ordinance did not remedy any

\begin{itemize}
\item \textsuperscript{145} ZBA Decision, \textit{supra} note 95, at 5; Brief for Appellant, \textit{supra} note 94, at 20.
\item \textsuperscript{146} ZBA Decision, \textit{supra} note 95, at 6–7; Demko v. City of Pittsburgh Zoning Bd. of Adjustment, SA 15–000871, 1, 5 (Pa. Ct. Com. Pl. 2016) (“If the buildings were demolished, it could easily be developed in accordance with the Code.”).
\item \textsuperscript{147} \textit{See supra} text accompanying notes 92–93.
\item \textsuperscript{148} \textit{See supra} text accompanying notes 139–42.
\item \textsuperscript{149} \textit{See supra} text accompanying note 138.
\item \textsuperscript{150} \textit{See supra} text accompanying notes 124–35.
\item \textsuperscript{151} Marshall v. City of Philadelphia, 97 A.3d 323, 330 (Pa. 2014); \textit{see supra} text accompanying notes 144–45.
\item \textsuperscript{152} ZBA Decision, \textit{supra} note 95, at 6 (citing \textit{One Meridian Partners v. ZBA of Philadelphia}, 867 A.2d 706, 710 (Pa. Commw. Ct. 2005)).
\end{itemize}
unnecessary hardship where the developer simply wanted to build the largest building possible. However, Trek has presented substantial evidence that the dimensional variance is only enough to make the project feasible with preservation requirements, and the ZBA persuasively pointed to the numerous testimonies of architects, and failed renovation proposals, as evidence of the costs.

Thus, it appears that Pennsylvania law is more sympathetic to Trek’s variance requests to save the Garden Theater buildings than leaving the buildings unused or demolished. Though the Court of Common Pleas held otherwise, the fact that the ZBA granted the variances weighs in favor of the variances being upheld, because appellate courts are limited to finding an abuse of discretion, which includes a notable degree of deference given to the ZBA. Regardless of the outcome, this case is an important issue of first impression in Pennsylvania courts and will have a significant effect on historic preservation and local zoning regulations.

III. THE COMMONWEALTH COURT OPINION TWISTS THE PLOT

After months of speculation, the Commonwealth Court issued a decision squarely against public support of the project, which affirmed the Court of Common Pleas decision. Almost immediately in the opinion, the Commonwealth Court signaled that it was unsympathetic to the redevelopment effort where it found that Trek’s assertion was not that the land could not be developed in an economically

153 One Meridian, 867 A.2d at 710.
154 ZBA Decision, supra note 95, at 4–5.
155 Marshall, 97 A.3d at 331 (“an appellate court is limited to determining whether the zoning board committed an abuse of discretion or an error of law in rendering its decision . . .” and “may conclude that the zoning board abused its discretion only if its findings are not supported by substantial evidence, which we have defined as relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached”).
viable way within conformity of the zoning code. Instead, the court categorized the variances as an “increase in non-conformity for economic viability.”

This initial argument over what was originally asked of the Zoning Board results from the issue of URA’s preservation requirement and subsequent claim of hardship being an issue of first impression: whether the URA, as an agency and landowner, could require preservation of existing historic buildings under their enabling statute, which creates an unnecessary hardship entitling the owners or developers to dimensional variances from the zoning code to make the project viable. The Commonwealth Court, as evidenced by their formulation of the issue as Trek seeking to maximize non-conformity to increase economic viability, held that the URA’s authority to preserve the buildings was insufficient to create an unnecessary hardship. Instead, the Court looked for historic preservation mandates in the LNC district of the Zoning Code, as well as any relevant historic building or architecture protection laws. Finding that neither the LNC requires preservation nor that the property is protected by any register, the Court concluded that there lacked “any legal authority requiring [the] buildings be preserved.”

Elsewhere, the Commonwealth Court mainly focused on evidentiary discrepancies. First, the Court held that the only evidence presented on cost was the cost to comply with the URA’s restrictions, not the cost of bringing the property in compliance with the Zoning Code. Thus, the Court found Trek’s financial burden of developing an economically viable project under URA’s requirement was not a

\[157\] Demko, 155 A.3d at 1167.
\[158\] Id. at 1168.
\[159\] Id. at 1170–71; supra notes 144–55. See also Zac Sivertsen, Government Agency’s Preservation Requirement to Redevelop Property It Owned Was Insufficient Hardship for Variance, PA. REAL EST., LAND USE, ZONING, AND MUN. LAW. (Mar. 7, 2017), http://www.pazoninglawyers.com/land-use-and-zoning/government-agencies-preservation-requirement-to-redevelop-property-it-owned-was-insufficient-hardship-for-variance/ (while URA maintained it was complying with its enabling statute, which required it to conserve blighted areas, the court found no legal authority requiring preservation of the buildings).
\[160\] Demko, 155 A.3d at 1170–71.
\[161\] Id. at 1170 & n.15 (finding that the property is not listed on the Pennsylvania Register or National Register of Historic Places).
\[162\] Id. at 1170.
\[163\] Id. at 1169–70 (stating Marshall, Hertzberg, and Tidd, all considered the cost of complying with the relevant zoning code, not landowner requirements).
factor to be considered under the broader *Hertzberg* standard for variances.\textsuperscript{164} Second, the record of testimony relied on by the ZBA and subsequent courts never clearly stated that the URA’s reason to preserve the buildings was based on their enabling statute under the Urban Redevelopment Law.\textsuperscript{165} Without connecting the preservation of the buildings to their statutory power, the language of the provisions does not alone *require* any preservation, and recognizes some instances will require demolition of unsalvageable buildings.\textsuperscript{166}

\textbf{IV. IMPLICATIONS OF THE CASE}

The Commonwealth Court opinion jettisoned judicial deference to a zoning board’s knowledge of local issues when reviewing the unnecessary hardship criterion in the context of historic preservation and zoning variances.\textsuperscript{167} The Pennsylvania Supreme Court has held that reviewing courts should give factual findings of a zoning board supporting the existence of unnecessary hardship significant deference.\textsuperscript{168} Instead, the Commonwealth Court incorporated into its precedent a dissenting opinion suggesting that the court should not merely “rubber stamp” a zoning board’s determination of what is a reasonable use for the property.\textsuperscript{169} However, the Court failed to explain why the ZBA in *Demko* was not afford deferredence under *Marshall*. Presumably, the Court is pointing to their dissatisfaction with evidence presented for the historic preservation requirement constituting an unnecessary hardship.\textsuperscript{170} Interestingly, the Court failed to include Judge Leadbetter’s entire point: rubber stamping zoning board findings of hardship in cases only where minor inconveniences exist should be cautioned against, because the gravamen for a dimensional variance is not satisfied.\textsuperscript{171} However, Judge Leadbetter actually distinguished a finding of minor zoning inconvenience from that of *Marshall*, which deferred to the board’s findings of hardship from a historic, dilapidated non-conforming building, financial burdens in complying with the code, existence of

\begin{itemize}
  \item \textsuperscript{164} *Id.*; *Hertzberg* v. Zoning Bd., 721 A.2d 43, 50 (Pa. 1998).
  \item \textsuperscript{165} See, e.g., *Hertzberg*, 721 A.2d at 52; *Marshall*, 97 A.3d 323, 333 (Pa. 2014).
  \item \textsuperscript{166} *Demko*, 155 A.3d at 1170–71 (citing Section 2 of the URL, 35 P.S. § 1702.1(c)).
  \item \textsuperscript{167} *Id.* at 1171.
  \item \textsuperscript{169} *Demko*, 155 A.3d at 1171 (quoting *Tidd*, 118 A.3d 16 (Leadbetter, J., dissenting)).
  \item \textsuperscript{170} See supra notes 160–66.
  \item \textsuperscript{171} *Tidd*, 118 A.3d 39–40 (Leadbetter, J., dissenting).
\end{itemize}
grant money for the rehabilitation of the building that would be lost if not approved, and had overwhelming community support.\textsuperscript{172} Many of these facts are present in Trek’s variance request, but the Commonwealth Court found them questionably insufficient.\textsuperscript{173}

Importantly, the Court did not hold that historic preservation could never be considered in finding unnecessary hardship for a dimensional variance from the zoning code to save a historic structure. Instead, as discussed above, the two issues the Commonwealth Court found with the variance was that the preservation requirement was not substantiated by any affirmative municipal zoning ordinance, or state or federal law, and that the Zoning Board failed to make findings and elicit evidence of all the elements needed for a variance. For instance, the ZBA only considered the cost of conforming to the URA’s preservation requirement, without considering the cost to bring the property into compliance with the code,\textsuperscript{174} and failed to find specific instances of the project’s benefit to the health and welfare of the community.\textsuperscript{175} This leaves the door open for historic buildings to be preserved where preservation requirements are built into municipal ordinances, mandated by an agency’s statutory authority, or sufficiently present all elements of a variance, including benefits to health and welfare from preservation.

While the opinion does not board up the doors in all cases of historic preservation constituting an unnecessary hardship, the holding has certainly limited the extent of the argument. For example, ordinances which would provide “legal authority”\textsuperscript{176} to require preservation under the Court’s precedent are still lacking in many municipalities.\textsuperscript{177} Even where such ordinances are in effect, a 1998 survey found that 41\% of those ordinances do not mandate preservation of the structures or landmarks without an owner’s consent.\textsuperscript{178} This highlights only one aspect of the

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\textsuperscript{172} Id. (citing Marshall, 97 A.3d 323–33).

\textsuperscript{173} See supra notes 124–26, 136–38, 140–43, and 154.

\textsuperscript{174} Demko, 155 A.3d at 1169–70.

\textsuperscript{175} Id. at 1172. To some, the positive benefits of preserving historic benefits to a community are more clearly palpable than to others. Future cases should clearly express at least some of the arguments addressed here. See supra notes 11–27 and accompanying text.

\textsuperscript{176} Demko, 155 A.3d at 1170.

\textsuperscript{177} ANTHONY ROBINS, THE CASE FOR PRESERVATION EASEMENTS: WHEN MUNICIPAL ORDINANCES FAIL TO PROTECT HISTORIC PROPERTIES (2005).

\textsuperscript{178} Id.
potential ripple effect on historic preservation that the Commonwealth Court failed to consider in its opinion. The subsequent subsections lay out arguments which address why overturning the opinion would promote a more beneficial outcome by: (1) promoting ethical preservation of historic resources; (2) increasing local government’s role in determining important resources to protect; and (3) synthesizing economic stimulation into the final goal of preservation.

A. Granting the Variance Requests Encourages Historic Preservation Where Federal and International Laws Lack Coverage

Federal law regulating historic preservation is limited compared to state law.\textsuperscript{179} The major criticism is that federal law only provides procedural protections for historic preservation efforts under the NHPA.\textsuperscript{180} Moreover, the NHPA and other federal laws are further limited because they only apply to federal projects or federal land, not strictly private undertakings on private lands.\textsuperscript{181} Furthermore, international law has limited protection because it is nonbinding upon the United States unless it is adopted by Congress.\textsuperscript{182} Also, the 1972 Cultural and Natural Heritage UNESCO Convention, the major piece of international law protecting historic structures, is exceptionally hard to satisfy.\textsuperscript{183}

B. State Law Is Historically More Effective in Promoting Historic Preservation

Related to the preceding section, historic preservation efforts at the state level have been by far the most effective approach.\textsuperscript{184} This is likely because local regulations and officials are more tailored to and in touch with their narrower pool of constituents and their respective desires.\textsuperscript{185} As previously recognized, part of this

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{179} Schoen, supra note 14, at 1342; Phelps, supra note 6, at 126–27.
\item\textsuperscript{180} Lewis, supra note 11, at 552.
\item\textsuperscript{181} Phelps, supra note 6, at 126–27.
\item\textsuperscript{182} \textit{See}, e.g., Hingston, supra note 54, at 130–31 (detailing the history of the United States’ debate over adopting the UNESCO Cultural Property Convention as binding law).
\item\textsuperscript{183} \textit{See supra note 57} and accompanying text.
\item\textsuperscript{184} \textit{See supra note 77} and accompanying text.
\item\textsuperscript{185} Schoen, supra note 14, at 1342.
\end{enumerate}
\end{footnotesize}
local regime includes the adoption of municipal zoning laws which have increasingly considered historic preservation in their zoning codes and ordinances.\footnote{Id. at 1353. In 2007, the Pennsylvania Historic Museum Commission noted that there were 71 active historic conservation districts and numerous other applications pending, compared to 45 districts two decades ago. LÉFEVRE, supra note 73, at 4. Still, many other jurisdictions could have historic preservation ordinances without being a designated historic district.}

Granting Trek’s variances based on a finding of unnecessary hardship resulting from historic preservation would increase the effectiveness of these local zoning codes to protect historic resources. It would permit leniency in the zoning codes to allow dimensionally non-conforming structures to lawfully exist in the post-zoning era. This is critical to save important historic architecture, especially considering that some of the oldest local zoning regulations are only a century old.\footnote{Id.} In an urban mecca like New York City, an estimated 17,000 buildings do not conform to the city’s zoning code.\footnote{See, e.g., QuocTrung Bui et al., 40 Percent of the Buildings in Manhattan Could Not Be Built Today, N.Y. TIMES (May 20, 2016), https://www.nytimes.com/interactive/2016/05/19/upshot/fourty-percent-of-manhattans-buildings-could-not-be-built-today.html.} One resident thoughtfully opined “[i]t’s ridiculous that we have these one hundred-year-old buildings that everyone loves, and none of them ‘should’ be the way they are.”\footnote{Id.} One can see how this resonates with the underlying community support of saving the Garden Theater buildings, yet without the variances from the code, their value is compromised by the ease of redevelopment according to the Common Pleas and affirmed by the Commonwealth Court.\footnote{See supra notes 144–45, 157–58.}

Moreover, local municipal regulation within the state has not only been the first body to pass preservation ordinances protecting significant historical resources,\footnote{Francois Quintard-Morenas, Preservation of Historic Properties’ Environs: American and French Approaches, 36 URB. LAW. 137, 144 (2004).} but it also adds a layer of protection that goes beyond state and federal bounds by preventing private landowners in the regulated district from making certain alterations to the structure.\footnote{JAMES A. COON, N.Y. STATE DEP’T OF STATE, LEGAL ASPECTS OF MUNICIPAL HISTORIC PRESERVATION (photo. reprint 2011) (2002).} Properties listed on federal or state registers that are privately owned and have not received funding from state or federal sources are able...
to freely alter their property. In these situations, only local ordinances within a state restricting the private owners’ alteration of a historic property would curtail the alteration or demolition of the property.

Finally, recognizing this novel application of the unnecessary hardship doctrine to historic preservation is perfectly in line with what Justice Brandeis classified as a “happy incident,” where a courageous state may experiment socially and economically without having the unknown effect touch the nation as a whole. Whether the intended effects of the relaxation of the dimensional requirements, to allow for historic preservation of the Garden Theater buildings, actually occur or not, states should be encouraged to experiment with and adapt the law, just as they have all experimented with and adopted historic preservation laws and ordinances.

Recent developments in the interpretation of certain Pennsylvania state constitutional provisions should also be considered with respect to preserving historic resources. Article I § 27 of the Pennsylvania Constitution states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Long debated as to what this provision actually required of the state, Pennsylvania Environmental Defense Foundation v. Commonwealth clarified certain aspects of the amendment. The Court held that the amendment needed no implementing legislation to be effective, contrary to what the Republican Caucus had urged. The third sentence of the amendment created a trust in these resources, for and actionable

\[193 \text{Id.} \]
\[194 \text{Id. at 3.} \]
\[195 \text{Schoen, supra note 14, at 1342 (citing New State Ice v. Leibman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).} \]
\[196 \text{Id. at 1343.} \]
\[197 \text{PA. CONST. art. I § 27 [emphasis added].} \]
\[199 \text{Id. at 936–37.} \]
by the people, to be managed by the state. Thus, governmental bodies must ensure that their actions comport with their role as stewards over the historic values of the state’s environment, and to affirmatively prevent the historic value’s diminishment or waste. While it has not yet been expressly held that historic structures are part of the “historic” value of “the environment,” this is quite a tenable definition.

C. Encouraging Economic Solutions with Conservation Easements Under Acquisition Approach

Outside of garden-variety laws regulating historic resources, an alternate source of preservation is the direct acquisition of properties by a non-profit or conservation-minded buyer through revolving funds. Funding from preservation organizations or governmental entities allows preservationists to acquire historic property which the market has been unwilling to invest in, restore it, and eventually resell the property. The return from the sale is then used to fund other rehabilitation and preservation projects. However, relying on returns is not sustainable in and of itself, and many organizations continuously need outside funding because the costs associated with the rehabilitation often outweigh the marketable end-point value.

More efficient market-based solutions are option agreements between landowners and preservation organizations. There, instead of directly purchasing the property, preservation organizations use their funding to cover an owner’s

200 Id. at 939.
202 PA. CONST. art. I, § 27.
203 Id.
204 Jess R. Phelps, Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement, 34 VA. ENV’T’L L.J. 399, 450–51 (2016) [hereinafter Phelps, Acquisition-Based Strategies].
205 Id.
206 Id. at 452.
207 Id. at 450–51.
208 Id. at 451.
carrying costs and market the property to preservation-minded buyers.209 The eventual sale will be conditioned on the application of a preservation easement, which the landowner must abide by, but nothing prevents an owner from disregarding the easement, and litigation within the judicial process is not always the most efficient solution.210

Trek’s variance requests result from the need to construct a project that is economically viable after consideration of the preservation costs.211 Expanding the unnecessary hardship doctrine to include hardship from preservation allows for a more economic use of the property upon redevelopment. Thus, this holding would incentivize preservation organizations to purchase or market historic property that generally would not possess high market value in its current form, but could be expanded, like the Garden Theater buildings, to include larger, more lucrative projects without applicable dimensional zoning restrictions.212

D. Granting the Variances Would Synthesize Preservation and Economic Development, But Would It Compromise Ethics?

While there is a clear economic benefit to permitting historic renovations that increase building size to cover renovation costs, should we only consider those economic benefits? The truth is, if and when the Garden Theater buildings are ever renovated, what will be preserved is not really what they were. While the outer facades of the buildings may remain the same, an eight-floor apartment building is sure to alter the interior, exterior, and the essence of the original building.213 Though it may return a positive investment, we should not disregard the other values attached to the property that may be eviscerated at the hands of a historic-looking upscale apartment complex.214 Historical value is intertwined with social value and, as previously discussed, the sense of one’s self.215 Choosing to save only one individual

209 Id.
210 Id. at 454 (citing Nancy McLaughlin, Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy, 40 U. RICH. L. REV. 1031, 1055 (2005)).
211 ZBA Decision, supra note 95, at 6.
212 See supra note 164.
213 See supra note 115.
214 See supra note 4 and accompanying text on values attached to historic preservation.
215 Matthes, supra note 13.
characteristic of historical value, while discarding the other complimentary parts of its story, distorts the image and overall historical value of the property.216

Yet, sometimes the moral and ethical compulsion to preserve a structure are not enough. For citizens of the United States, the liberty bells do not ring much louder than at Independence Hall, the birthplace of their nation. For this reason, it may seem shocking that the landmark found itself on the National Trust’s most endangered places for two years in a row.217 However, budget cuts to the National Park Service (who is responsible for maintenance), and legislative failure to pass secure funding for a deteriorating centuries old building, threatened the continued existence of this historic landmark.218 Congress finally inundated the building with the emergency funding it needed, but any long-term funding for renovations is still lacking.219 This situation quite clearly portrays the importance that economic considerations play in preservation: even with a decades long preservation effort, federal protection as an esteemed National Historic Landmark and a site on the National Register of Historic Places, and international recognition as a UNESCO World Heritage Site, the long-term preservation of the site depended not on its symbolism or cultural value, but on funding.220

216 See Casey J. Snyder, From the Trenches: Farms Forts and Penn State’s Commitment to Preserving Local History, TOWN & GOWN MAG. (July 30, 2016), http://www.statecollege.com/news/Snap-shot/from-the-trenches-farms-forts-and-penn-states-commitment-to-local-history,1464910/. After working as an archaeologist before law school, I authored this piece for a local magazine about my experiences and perspectives on recovering artifacts, which is analogous to a historic preservation situation.


218 Id. at 700.

219 Id.

220 Id. at 701.
In this case, the Garden Theater buildings should be rehabilitated. The community support and lack of all other preservation options persuade this answer. Yet, Pennsylvania ZBAs and developers should be sensitive of extending a future positive ruling too far. The preservation of historical resources, just like the mere claim of financial hurt from dimensional restrictions, should not give developers a “carte blanche” right to any dimensional variance. They should attempt to save as much character of the past structure as possible in the development of the new structure.

V. Conclusion

The URA and Trek have understandably decided not to pursue the lengthy appeal process from the Commonwealth Court. The appeal from the Court of Common Pleas already took nearly a year. Even if the buildings must be destroyed simply for the sake of picking up the pieces and moving on with productive redevelopment of the land, the state, its judiciary and citizens, and developers within the community should all reflect on the lessons this unfortunate case imparts upon us.

Many historic structures are simply not covered by federal or state registers, or are left unprotected under local preservation ordinances. The public may even

221 ZBA Decision, supra note 95, at 6 (citing One Meridian Partners v. ZBA of Philadelphia, 867 A.2d 706, 710 (Pa. Commw. Ct. 2005)).

222 See supra notes 213–16.

223 Mark Belko, No Appeal for Garden Theater Block Redevelopment Effort, PITT. POST-GAZETTE, Mar. 12, 2017.


225 Belko, supra note 223 (as one city councilman stated, “[f]rom the residents I’ve heard from, they say just tear it down. They’d rather see some development happen.” A board member of the URA conveyed that the “level of frustration is so high right now” from those in the significant majority who supported the project).

disagree about how adequately historic structures are protected, if at all, under these ordinances.\footnote{227 See, e.g., David Erickson, \textit{Structural engineer disputes Bozeman developer’s claims about Missoula Mercantile}, \textit{RAVALLI REPUBLIC} (Mar. 12, 2016), http://ravallirepublic.com/news/article_c262777e-6454-551a-9271-cd0bfecf00db.html.} By granting Trek’s dimensional variances for the Garden Theater buildings, Pennsylvania’s judicial system could have given proponents of historic resources that are not significant enough for a federal or state register designation, and are unprotected by local historic preservation ordinances, one more avenue of preservation through relaxing the zoning requirements during renovation and redevelopment of the structure.\footnote{228 See \textit{ZBA Decision}, supra note 95, at 6–7.} It would empower the local administrative body, with superior “expertise in and knowledge of local conditions,” to respond to public input and relax the zoning code where circumstances so require.\footnote{229 Marshall v. City of Philadelphia, 97 A.3d 323, 333 (Pa. 2014). See also \textit{Tidd v. Lower Saucon Twp. Zoning Hearing Bd.}, 118 A.3d 1, 9 (Pa. Commw. Ct. 2015).} With the amount of community support and an economically feasible plan in place, the preservation project was the most ethical outcome, even factoring in real-world funding considerations, because not everything can be saved.\footnote{230 See Guest, supra note 217, at 700. The words of Gifford Pinchot that were echoed by other environmental scholars like Aldo Leopold come to mind when arguing for expanding historic protection whenever possible: these resources should be conserved under the “doctrine of ‘highest use.’” Aldo Leopold, \textit{The Wilderness and Its Place in Forest Recreational Policy}, \textit{in THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD} 78 (Susan L. Flader & J. Baird Callicott eds., 1991). It was their philosophy, which can be credited with ushering in sustainable federal resource conservation in the early 20th century, that natural resources should be utilized in the “greatest good to the greatest number”. \textit{Id.} This principle can be applied to historic resources. The character and history of these buildings living on through preservation, when feasible, provides the greatest good to local communities, sightseers, minorities, religions, scholars—in essence, society at large.} The Commonwealth Court failed to consider this, and now proponents of effecting historic preservation in redevelopment efforts must battle against the shield of judicial precedent.\footnote{231 Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting that while \textit{stare decisis} is usually the best policy, it is not an “inexorable command”).} Yet, overturning or overcoming the ruling at the Commonwealth Court level is attainable with the right case,\footnote{232 See supra notes 166–77 and accompanying text.} and serves a noble purpose: it would allow redevelopment efforts of a historic structure to err on the side of posterity and pay homage to
previous generations and their heritage, functioning like a physician’s Hippocratic Oath: do no harm.\textsuperscript{233}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{trek_proposed_development.png}
\caption{A concept image of Trek’s proposed development which includes the preservation of the historic facades.\textsuperscript{234}}
\end{figure}

\textsuperscript{233} Striner, \textit{supra} note 19, at 12.