

THE HARDSHIP IN HISTORY: HOW ONE
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BUT FOR BETTER OR FOR WORSE?

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THE HARDSHIP IN HISTORY: HOW ONE FORGOTTEN THEATER COULD CHANGE HISTORIC PRESERVATION IN *PENNSYLVANIA* . . . BUT FOR BETTER OR FOR WORSE?

Casey J. Snyder*

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.

³ Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, *N.Y. TIMES* (May 14, 2015), <https://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html>.

⁴ Karin J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 1, 1–2 (Phyllis Mauch Messenger ed., 2d ed. 1999). Examples include: values of preservation, conservation, education, cultural significance, political significance, indigenous significance, economic benefit, future generational use, and more. *Id.* at 1.

regulations to protect such property within their borders,⁵ including the federal United States⁶ and her fifty states.⁷

Pennsylvania, estimated to have seen its first meaningful settlement in the mid-to-late 1670s before the coming of William Penn,⁸ 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 ordinances⁹ and municipal zoning codes.¹⁰ 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.

⁵ Ellen Herscher, *International Control Efforts: Are There Any Good Solutions?*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 117, 118 (Phyllis Mauch Messenger ed., 2d ed. 1999).

⁶ See National Historic Preservation Act of 1966, 54 U.S.C. § 300101 (2012); Jess R. Phelps, *Moving Beyond Preservation Paralysis? Evaluating Post-Regulatory Alternatives for Twenty-First Century Preservation*, 37 VT. L. REV. 113, 125–30 (2012) (discussing the National Environmental Policy Act's requirement that federal agencies consider a project's impacts on cultural resources, 42 U.S.C. §§ 4321–4327 (2012)).

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

⁸ Wayland Fuller Dunaway, *English Settlers in Pennsylvania*, 52 PA. MAG. OF HIST. & BIOGRAPHY, no. 1, at 317, 321–22 (Oct. 1928).

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.¹¹ Perhaps two of the most prominent arguments center on the economic value of historic preservation¹² and the value of historic preservation to our present sense of self.¹³ Historic preservation has been undoubtedly connected to the economic revival of neighborhoods and cities, and may improve economies of entire regions.¹⁴ Heritage, or cultural tourism, is cited as one of the main economic benefits of historic preservation.¹⁵ In fact, a 2006 study revealed that more than seventy-five percent of adults on vacation visited a historic or cultural site.¹⁶ In contrast, many academics studying historic preservation argue that there are much more complex moral and ethical values at play.¹⁷ The academics' view can be distinguished from some developers' perspectives that preservation is merely occurring for "nostalgia,"¹⁸ because academics believe that the cultural and societal values of historic resources "transcend the here and now."¹⁹ This competing view recognizes that we have a stewardship role over historic resources and are responsible for protecting them for past and future generations.²⁰

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

¹¹ See Warren, *supra* note 4; David A. Lewis, *Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy*, 22 N.Y.U. ENVTL. L.J. 274, 287–88 (2015).

¹² Lewis, *supra* note 11, at 289–90.

¹³ Erich Hatala Matthes, *The Ethics of Historic Preservation*, 11 PHIL. COMPASS, 786, 792 (2016).

¹⁴ Lewis, *supra* note 11, at n.38 (gathering studies finding favorable economic growth from historic preservation); Rebecca S. Schoen, Note, *Confronting the Appalachian Breakdown: Historic Preservation Law in Appalachia and the Potential Benefits of Historic Preservation for Rural Communities*, 110 W. VA. L. REV. 1303, 1363–68 (2008).

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.

¹⁹ Richard Striner, *Historic Preservation and the Challenge of Ethical Coherence*, in LECTURES PRESENTED AT THE ANNUAL MEETING OF THE NATIONAL COUNCIL FOR PRESERVATION EDUCATION 1, 6 (Oct. 23, 1993).

²⁰ *Id.*

community's legacy and cultural memories within society.²¹ 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.²² Lastly, scholars and researchers have observed environmental benefits from historic preservation.²³ These benefits include, for example, the preservation of the "embodied energy" in a building through reuse.²⁴ 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.²⁵ Thus, preserving this energy supports efficient and "green" development practices, which prevent costly expenditure of resources on ephemeral uses.²⁶ 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.²⁷

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.²⁸ The initial fascination with historic resources was generally motivated by relic collection, or looting.²⁹ Unfortunately, this type of behavior continues to this day, and the economic value placed on historic resources drives a competitive economy.³⁰

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.*

²⁷ Schoen, *supra* note 14, at 1319–20.

²⁸ Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 27, 27–28 (Phyllis Mauch Messenger ed., 2d ed. 1999).

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.³¹ 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.³² 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.³³

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 1926.³⁴ As early as 1931, states were enacting preservation ordinances, which utilized many of the same elements found in modern zoning laws.³⁵ 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.³⁶ 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.³⁷ The Court held that the city ordinance could regulate and review development or alterations to preserve historic characteristics of buildings and neighborhoods.³⁸ These decisions paved the way for historic preservation through regulations and zoning ordinances at the state and local level.³⁹

³¹ Phelps, *supra* note 6, at 117.

³² *Id.*

³³ *Id.* at 117–20.

³⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396–97 (1926).

³⁵ Phelps, *supra* note 6, at 122–23.

³⁶ *Id.* at 124 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

³⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 116–19 (1978).

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 1906.⁴⁰ The purpose of the act was to preserve historic resources situated on lands owned by the federal government.⁴¹ 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.⁴² An actor who disturbed such resources on federal land would be subject to criminal penalties.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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

⁴⁰ See 16 U.S.C.A. §§ 431–33 (2012).

⁴¹ See *id.* § 431.

⁴² *Id.* §§ 431–32.

⁴³ *Id.* § 433.

⁴⁴ See Schoen, *supra* note 14, at 1324 (finding the “policy espoused” within the NHPA was a cooperative partnership between the federal government, and any state or local government, private individual, or tribe, to encourage preservation of historic resources and heritage); 54 U.S.C. § 300101 (2012).

⁴⁵ Schoen, *supra* note 14, at 1324–25. Note that the Register was actually first created in 1935 by the Historic Properties Act, but was significantly expanded under the NHPA. Mark P. Nevitt, *The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?*, 32 BERKLEY J. INT’L L. 388, 399 (2014).

⁴⁶ National Environmental Policy Act, 42 U.S.C. §§ 4321–4327 (1969); Phelps, *supra* note 6, at 126.

Educational, Scientific, and Cultural Organization (UNESCO) in 1972.⁴⁷ 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).⁴⁸ The Cultural and Natural Heritage Convention plays the more significant role in the historic preservation of structures.⁴⁹

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 1936.⁵⁰ 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.⁵¹

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.⁵²

⁴⁷ Martiza F. Bolano, Note, *International Art Theft Disputes: Harmonizing Common Law Principles With Article 7(b) of the UNESCO Convention*, 15 FORDHAM INT'L L.J. 129, 133 (1991).

⁴⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231; Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter Cultural and Natural Heritage Convention].

⁴⁹ See *infra* notes 53–59.

⁵⁰ Schoen, *supra* note 14, at 1342; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C.); 26 U.S.C. § 47 (2017).

⁵¹ The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (West Supp. 1991); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act Background and Legislative History*, in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 125, 125 (Devon A. Mihesuah ed., 2000).

⁵² Compare NAGPRA, 25 U.S.C. §§ 3001–3013, with Schoen, *supra* note 14, at 1341.

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.

⁵⁴ See, e.g., Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 129, 130 (Phyllis Mauch Messenger ed., 2d ed. 1999); Herscher, *supra* note 5, at 117.

⁵⁵ Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 *VILL. SPORTS & ENT. L.J.* 31, 43 (1998).

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.⁵⁸ Once listed, signatory states are obligated to preserve and restore those resources, resulting in many successful preservation stories.⁵⁹

Federally, the lodestar of historic preservation for buildings and significant architecture is the NHPA.⁶⁰ In appraising the three major components of protection outlined in the previous section,⁶¹ 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.⁶² Procedurally, federal agencies must undertake impact surveys on historic resources including districts, sites, buildings, objects, or structures, from federal or federally-funded projects.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ Even if the federal agency initially finds no affected sites, SHPOs retain the right to disagree,

physiographic features; (ix) to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation. World Heritage Centre, *The Criteria for Selection*, <http://whc.unesco.org/en/criteria> (last visited May 22, 2018).

⁵⁸ World Heritage Centre, *World Heritage List*, <http://whc.unesco.org/en/list/&order=country#alphaU> (last visited May 22, 2018).

⁵⁹ Monteith, *supra* note 57; World Heritage Centre, *Success Stories*, <http://whc.unesco.org/en/107/> (last visited May 22, 2018).

⁶⁰ Monteith, *supra* note 57, at 1019.

⁶¹ Nevitt, *supra* note 45.

⁶² Monteith, *supra* note 57, at 1019–20; Nevitt, *supra* note 45, at 398–400.

⁶³ Monteith, *supra* note 57, at 1019.

⁶⁴ Lewis, *supra* note 11, at 303.

⁶⁵ *Id.* at 306.

⁶⁶ *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.

⁷⁰ NATIONAL PARK TECHNICAL PRESERVATION SERVICES, U.S. DEPT. OF THE INTERIOR, FEDERAL TAX INCENTIVES FOR REHABILITATING HISTORIC BUILDINGS: STATISTICAL REPORT AND ANALYSIS FOR FISCAL YEAR 2015 (2016).

⁷¹ Frank B. Gilbert, *Landmarks and City Hall: How Historic Preservation Contributes to Municipal Government*, 11 J. NAT. RESOURCES & ENVTL. L. 211, 212 (1996); Schoen, *supra* note 14, at 1343.

⁷² *State Preservation Laws*, NAT. TR. FOR HISTORIC PRES., <http://forum.savingplaces.org/learn/fundamentals/preservation-law/state-laws> (last visited May 22, 2018).

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 While

⁷⁶ Schoen, *supra* note 14, at 1353.

⁷⁷ See Kristan E. Curry, *Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation*, 11 J. NAT. RESOURCES & ENVTL. L. 229, 237 (1996); Phelps, *supra* note 6, at 113–14.

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

⁷⁹ *Id.*; Historic District Act of 1961, Pub. L. No. 282, No. 167, *as amended*, 53 PA. STAT. §§ 8001–8006 (West 2018).

⁸⁰ HISTORIC GUIDELINES, *supra* note 78. See *City of Pittsburgh v. Weinberg*, 676 A.2d 207, 208 (Pa. 1996).

⁸¹ *Id.*; Pennsylvania Municipalities Planning Code, 53 PA. STAT. § 10603(g)(2) (West 2018).

⁸² Pennsylvania Municipalities Planning Code, 53 PA. 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

⁸³ SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 209–10 (2014).

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.).

⁸⁵ Bryan Kreft, *Garden Theatre*, CINEMA TREASURES, <http://cinematreasures.org/theaters/2655> (last visited Mar. 3 2017); Chris Potter, *What is the History of the Garden Theater on the North Side?*, PITT. CITY PAPER (May 10, 2007), <http://www.pghcitypaper.com/pittsburgh/what-is-the-history-of-the-garden-theater-on-the-north-side/Content?oid=1338406>; Timothy McNulty, *Former North Side Porn Theater Awaits Restoration as Possible Arts Space*, PITT. POST-GAZETTE (May 18, 2007, 2:00 PM), <http://www.post-gazette.com/ae/theater-dance/2007/05/18/Former-North-Side-porn-theater-awaits-restoration-as-a-possible-arts-space/stories/200705180355>.

⁸⁶ Potter, *supra* note 85.

⁸⁷ McNulty, *supra* note 85.

⁸⁸ *Id.*

an adult theatre, considered by many to be an unsavory development.⁸⁹ However, the shift to adult films at one point increased the average crowd from thirty patrons to three hundred.⁹⁰ 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.⁹¹

The URA was created in 1945 to address problems of urban blight.⁹² It is statutorily empowered and mandated to engage in conservation, which includes the preservation and renovation of existing buildings.⁹³ For thirty years, the URA attempted to purchase property on the block, including the Garden Theater.⁹⁴ 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.⁹⁵ However, since its acquisition in 2007, the URA has had trouble finding viable redevelopment options, evidenced by two failed proposals.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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).

⁹² Urban Redevelopment Law, 35 PA. STAT. §§ 1701–1719.2 (West 2018).

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].

⁹⁵ City of Pittsburgh Zoning Board of Adjustment, Decision of Case 216 of 2015, at 2 (Oct. 8, 2015), <http://www.alleghenycitycentral.org/wp-content/uploads/2015/11/Demko-Appeal.pdf> [hereinafter ZBA Decision].

⁹⁶ Brief for Appellant, *supra* note 94, at 8.

⁹⁷ ZBA Decision, *supra* note 95, at 6.

⁹⁸ Lauri Gravina, *Why the URA Chose TREK to Lead the Garden Theater Block*, NEXTPITTSBURGH (Dec. 23, 2014), <http://www.nextpittsburgh.com/city-design/ura-chose-trek-lead-garden-theater-block-third-act/>.

C. *Act Two: Trek's Relief Lies in Variances from the Zoning Code*⁹⁹

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.¹⁰⁰ 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.¹⁰¹ 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)¹⁰² 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 2:1.¹⁰³

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,¹⁰⁴ or Zoning Board of Adjusters (ZBA) from which landowners may seek variances to a zoning code's requirements imposed on their land.¹⁰⁵ Variances are a form of quasi-judicial relief granted by the ZBA, and have been referred to as a "safety valve" for landowners.¹⁰⁶ However, courts have declined to grant variances on a whim.¹⁰⁷ Instead, Pennsylvania's MPC requires a landowner must suffer an unnecessary

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.

¹⁰⁵ Pennsylvania Municipalities Planning Code, 53 PA. STAT. § 10910.2 (West 2018).

¹⁰⁶ Jonathan E. Cohen, Comment, *A Constitutional Safety-Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 308 (1995).

¹⁰⁷ *Id.*

hardship from the zoning regulations before receiving a variance.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.¹⁰⁹

Pennsylvania also recognizes a distinction between landowners seeking use variances compared to dimensional variances.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.¹¹¹ Dimensional variances, however, require a lesser quantum of proof in order to establish unnecessary hardship.¹¹² Thus, the *Hertzberg* standard from the Pennsylvania Supreme Court case *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.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.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 4.8:1.¹¹⁵ The ZBA granted both variances.¹¹⁶ However, an objector and local property owner, David Demko, appealed the decision to the Court of Common Pleas,

¹⁰⁸ Pennsylvania Municipalities Planning Code, 53 PA. STAT. § 10919.2(a)(3) (West 2018).

¹⁰⁹ *Id.* § 10910.2(a)1–5.

¹¹⁰ *Hertzberg v. Zoning Bd.*, 721 A.2d 43, 47 (Pa. 1998).

¹¹¹ *Id.*

¹¹² *Id.* at 47–48.

¹¹³ *Id.*

¹¹⁴ *Id.* at 47; Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Conscientiously Ignored, or Something in Between?*, 39 URB. LAW. 877, 881 (2007).

¹¹⁵ ZBA Decision, *supra* note 95, at 2.

¹¹⁶ *Id.* at 5–7.

which found for Demko and overturned the ZBA's decision to grant the variances.¹¹⁷ 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.

*D. Act Three: Dueling Arguments over Pennsylvania's Past*¹¹⁸

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.¹¹⁹ 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 *Hertzberg* dimensional variance standard.¹²⁰ *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).¹²¹

According to Trek, consideration of the costs of preserving a historic building fits logically within *Hertzberg's* scope of application.¹²² Pennsylvania case law supports this notion, and the Commonwealth Court should recognize that some

¹¹⁷ Demko v. City of Pittsburgh Zoning Bd. of Adjustment, SA 15-000871, 1, 9 (Pa. Ct. Com. Pl. 2016).

¹¹⁸ 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.

¹¹⁹ Brief for Appellant, *supra* note 94, at 9.

¹²⁰ 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 *Hertzberg* standard for dimensional variances); Robert Simpson & Joshua S. Mazin, *A Historical Review of the Land Use Jurisprudence of Pennsylvania's Commonwealth Court*, 20 WIDENER L.J. 59, 78 (2010) (noting that *Hertzberg* standard cases occur frequently and are emblematic of Pennsylvania land use law).

¹²¹ *Hertzberg v. Zoning Bd.*, 721 A.2d 43, 50 (Pa. 1998).

¹²² Brief for Appellant, *supra* note 94, at 14-15.

instances of historic preservation of a property may constitute unnecessary hardship to be relieved by the grant of a dimensional variance.¹²³

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.¹²⁴ 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.¹²⁵ The Garden Theater buildings, unfortunately, are in a similar state as those in case law precedent.¹²⁶ 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.¹²⁷

The URA's statutory ability to conserve historic structures is not the only source validating their preservation requirement of the building's facades.¹²⁸ While never addressed by the Pennsylvania Supreme Court, two Commonwealth Court

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.¹²⁹ In *Holmes v. Zoning Hearing Bd. of Kennett Twp.*, land owners sought a variance from a flood hazard ordinance which required buildings to be a certain distance away from a stream.¹³⁰ 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.¹³¹ 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.¹³² The Commonwealth Court agreed, holding that the ZBA did not abuse its discretion in considering that the value of losing the pine trees could constitute an unnecessary hardship.¹³³ 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.¹³⁴ 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.¹³⁵

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.¹³⁶ Their demolition would undoubtedly constitute waste and cause the foundations to be destroyed or “be unused,”¹³⁷ and the public had overwhelming

¹²⁹ *Tidd v. Lower Saucon Twp. Zoning Hearing Bd.*, 118 A.3d 1, 11–12 (Pa. Commw. Ct. 2015); *Holmes v. Zoning Hearing Bd.*, 396 A.2d 859, 860–61 (Pa. Commw. Ct. 1978).

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.¹³⁸

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.¹³⁹ 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.¹⁴⁰ Because CDBG is federal funding, entities like the URA must comply with the impact surveys of NHPA.¹⁴¹ 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.¹⁴² Moreover, expenditure of those federal funds, just to demolish the whole block against the overwhelming community opinion, is wasteful and raises ethical concerns.¹⁴³

Demko appealed the ZBA's decision and the Court of Common Pleas reversed.¹⁴⁴ 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

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).

¹³⁹ *Marshall v. City of Philadelphia*, 97 A.3d 323, 333 (Pa. 2014).

¹⁴⁰ Reply Brief for Appellants, the City of Pittsburgh and the URA at 7, *Demko v. City of Pittsburgh Zoning Bd. of Adjustment*, 646 CD 2016 (Aug. 12, 2016) (S.A. 15-000864).

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).

¹⁴⁴ *Demko v. City of Pittsburgh Zoning Bd. of Adjustment*, SA 15–000871, 1, 5 (Pa. Ct. Com. Pl. 2016).

afford relief because other uses could technically renovate the building in accordance with the forty-five-foot LNC zoning restriction.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.¹⁴⁶ This draconian position turns a blind eye to the URA's statutory mandate to preserve and restore buildings,¹⁴⁷ the URA's potential consideration of any NHPA impacts,¹⁴⁸ the overwhelming community support,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 *Hertzberg*.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.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,¹⁵² that rule is quite distinguishable from the issue here. In *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

¹⁴⁵ ZBA Decision, *supra* note 95, at 5; Brief for Appellant, *supra* note 94, at 20.

¹⁴⁶ ZBA Decision, *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) (“[i]f the buildings were demolished, it could easily be developed in accordance with the Code.”).

¹⁴⁷ See *supra* text accompanying notes 92–93.

¹⁴⁸ See *supra* text accompanying notes 139–42.

¹⁴⁹ See *supra* text accompanying note 138.

¹⁵⁰ See *supra* text accompanying notes 124–35.

¹⁵¹ Marshall v. City of Philadelphia, 97 A.3d 323, 330 (Pa. 2014); see *supra* text accompanying notes 144–45.

¹⁵² ZBA Decision, *supra* note 95, at 6 (citing *One Meridian Partners v. ZBA of Philadelphia*, 867 A.2d 706, 710 (Pa. Commw. Ct. 2005)).

unnecessary hardship where the developer simply wanted to build the largest building possible.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶ 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”).

¹⁵⁶ *Demko v. City of Pittsburgh Zoning Bd. of Adjustment*, 155 A.3d 1163 (Pa. Commw. Ct. 2017). See Charles Rosenbaum, *With a Strong Community-Input Process, a North Side Residential Project Moves Forward*, PITT. CITY PAPER (Nov. 4 2015), <http://www.pghcitypaper.com/pittsburgh/with-a-strong-community-input-process-a-north-side-residential-project-moves-forward/Content?oid=1866000>; *supra* note 137. The decision even infiltrated the popular online media giant, Reddit, generating twenty-two different comments, most expressing disappointment with the ruling. Jhvv412, *No appeal for Garden Theater Block Redevelopment Effort*, REDDIT (Mar. 10, 2017, 9:11 PM), https://www.reddit.com/r/pittsburgh/comments/5ym8zi/no_appeal_for_garden_theater_block_redevelopment/.https://www.reddit.com/r/pittsburgh/comments/5ym8zi/no_appeal_for_garden_theater_block_redevelopment/.

viable way within conformity of the zoning code.¹⁵⁷ Instead, the court categorized the variances as an “increase in non-conformity for economic viability.”¹⁵⁸

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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.”¹⁶²

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.¹⁶³ 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-agencys-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.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.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.¹⁶⁶

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.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.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.¹⁶⁹ However, the Court failed to explain why the ZBA in *Demko* was not afforded deference under *Marshall*. Presumably, the Court is pointing to their dissatisfaction with evidence presented for the historic preservation requirement constituting an unnecessary hardship.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.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

¹⁶⁴ *Id.*; *Hertzberg v. Zoning Bd.*, 721 A.2d 43, 50 (Pa. 1998).

¹⁶⁵ *See, e.g., Hertzberg*, 721 A.2d at 52; *Marshall*, 97 A.3d 323, 333 (Pa. 2014).

¹⁶⁶ *Demko*, 155 A.3d at 1170–71 (citing Section 2 of the URL, 35 P.S. § 1702.1(c)).

¹⁶⁷ *Id.* at 1171.

¹⁶⁸ *See Marshall*, 97 A.3d at 334; *Tidd v. Lower Saucon Twp. Zoning Hearing Bd.*, 118 A.3d 1, 19 (Pa. Commw. Ct. 2015).

¹⁶⁹ *Demko*, 155 A.3d at 1171 (quoting *Tidd*, 118 A.3d 16 (Leadbetter, J., dissenting)).

¹⁷⁰ *See supra* notes 160–66.

¹⁷¹ *Tidd*, 118 A.3d 39–40 (Leadbetter, J., dissenting).

grant money for the rehabilitation of the building that would be lost if not approved, and had overwhelming community support.¹⁷² Many of these facts are present in Trek's variance request, but the Commonwealth Court found them questionably insufficient.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,¹⁷⁴ and failed to find specific instances of the project's benefit to the health and welfare of the community.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"¹⁷⁶ to require preservation under the Court's precedent are still lacking in many municipalities.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.¹⁷⁸ This highlights only one aspect of the

¹⁷² *Id.* (citing *Marshall*, 97 A.3d 323–33).

¹⁷³ *See supra* notes 124–26, 136–38, 140–43, and 154.

¹⁷⁴ *Demko*, 155 A.3d at 1169–70.

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.

¹⁷⁶ *Demko*, 155 A.3d at 1170.

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

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.¹⁷⁹ The major criticism is that federal law only provides procedural protections for historic preservation efforts under the NHPA.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.¹⁸¹ Furthermore, international law has limited protection because it is nonbinding upon the United States unless it is adopted by Congress.¹⁸² Also, the 1972 Cultural and Natural Heritage UNESCO Convention, the major piece of international law protecting historic structures, is exceptionally hard to satisfy.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.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.¹⁸⁵ As previously recognized, part of this

¹⁷⁹ Schoen, *supra* note 14, at 1342; Phelps, *supra* note 6, at 126–27.

¹⁸⁰ Lewis, *supra* note 11, at 352.

¹⁸¹ Phelps, *supra* note 6, at 126–27.

¹⁸² 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).

¹⁸³ See *supra* note 57 and accompanying text.

¹⁸⁴ See *supra* note 77 and accompanying text.

¹⁸⁵ Schoen, *supra* note 14, at 1342.

local regime includes the adoption of municipal zoning laws which have increasingly considered historic preservation in their zoning codes and ordinances.¹⁸⁶

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.¹⁸⁷ In an urban mecca like New York City, an estimated 17,000 buildings do not conform to the city's zoning code.¹⁸⁸ 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."¹⁸⁹ 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.¹⁹⁰

Moreover, local municipal regulation within the state has not only been the first body to pass preservation ordinances protecting significant historical resources,¹⁹¹ 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.¹⁹² Properties listed on federal or state registers that are privately owned and have not received funding from state or federal sources are able

¹⁸⁶ *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. LEFÈVRE, *supra* note 73, at 4. Still, many other jurisdictions could have historic preservation ordinances without being a designated historic district.

¹⁸⁷ See, e.g., Quotrung 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/forty-percent-of-manhattans-buildings-could-not-be-built-today.html>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* notes 144–45, 157–58.

¹⁹¹ Francois Quintard-Morenas, *Preservation of Historic Properties' Environs: American and French Approaches*, 36 URB. LAW. 137, 144 (2004).

¹⁹² JAMES A. COON, N.Y. STATE DEP'T OF STATE, LEGAL ASPECTS OF MUNICIPAL HISTORIC PRESERVATION (photo. reprint 2011) (2002).

to freely alter their property.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶

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.*¹⁹⁷

Long debated as to what this provision actually required of the state, *Pennsylvania Environmental Defense Foundation v. Commonwealth* clarified certain aspects of the amendment.¹⁹⁸ The Court held that the amendment needed no implementing legislation to be effective, contrary to what the Republican Caucus had urged.¹⁹⁹ The third sentence of the amendment created a trust in these resources, for and actionable

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 3.

¹⁹⁵ Schoen, *supra* note 14, at 1342 (citing *New State Ice v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

¹⁹⁶ *Id.* at 1343.

¹⁹⁷ PA. CONST. art. I § 27 [emphasis added].

¹⁹⁸ *Pennsylvania, Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

¹⁹⁹ *Id.* at 936–37.

by the people, to be managed by the state.²⁰⁰ 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.²⁰¹ While it has not yet been expressly held that historic structures are part of the "historic"²⁰² value of "the environment,"²⁰³ 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.²⁰⁴ 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.²⁰⁵ The return from the sale is then used to fund other rehabilitation and preservation projects.²⁰⁶ 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.²⁰⁷

More efficient market-based solutions are option agreements between landowners and preservation organizations.²⁰⁸ There, instead of directly purchasing the property, preservation organizations use their funding to cover an owner's

²⁰⁰ *Id.* at 939.

²⁰¹ *Id.* at 947 (Baer, J., concurring and dissenting); Robert B. MicKinstry, Jr. & Harry Weiss, *Pennsylvania Supreme Court Extends Its Landmark Robinson Township Decision in Pennsylvania Environmental Defense Foundation v. Commonwealth, BALLARD SPAHR, LLP* (July 11, 2017), <http://www.ballardspahr.com/alertspublications/legalalerts/2017-07-11-pa-supreme-court-extends-landmark-robinson-twp-decision-in-pedf-v-commonwealth.aspx>.

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.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.

Studied on an individual level, one could ascertain only limited details. Yet viewed as a collection, lifeways become more apparent—like the diet habits over time, the family's social status and make-up, how the farmstead [where we were excavating] evolved, and other similar themes. Much of this analysis will happen in the lab at Penn State, but one find resonated within me immediately. As I was excavating a unit in the cellar, I uncovered a glass cat's eye marble. A short period later, we found the remnants of a leather child's shoe. It became clear we were unearthing someone's childhood. Here, lost for decades beneath bramble and bush, was the site where local lives once began.

Id.

²¹⁷ Nathaniel C. Guest, Note, *Putting History on a Stone Foundation: Toward Legal Rights for Historic Property*, 18 TEMP. POL. & CIV. RTS. L. REV. 699, 699 (2009).

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.²²¹ They should attempt to save as much character of the past structure as possible in the development of the new structure.²²²

V. CONCLUSION

The URA and Trek have understandably decided not to pursue the lengthy appeal process from the Commonwealth Court.²²³ The appeal from the Court of Common Pleas already took nearly a year.²²⁴ 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,²²⁵ 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.²²⁶ 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.

²²⁴ The Court of Common Pleas handed down its decision in March of 2016, while the Commonwealth Court issued its decision in March of 2017, almost one year later. *Demko v. City of Pittsburgh Zoning Bd. of Adjustment*, 155 A.3d 1163, 1164 (Pa. Commw. Ct. 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).

²²⁶ *See, e.g., supra* notes 177–79. Many local municipal zoning schemes do not simply cover all historic buildings, but only certain geographical districts. *See, e.g.,* Carly Hoilman, *Building Believed to be the Birthplace of the Bill of Rights Partially Demolished, Owners Had ‘No Clue,’* THE BLAZE (Jan. 19, 2016), <http://www.theblaze.com/news/2016/01/19/building-believed-to-be-birthplace-of-the-bill-of-rights-partially-demolished-owners-had-no-clue/>; Nancy Lowry, *Demolition enables projects to move forward, angers those who tried to save buildings*, NEW CASTLE NEWS (Feb. 7, 2017), http://www.ncnewsonline.com/news/demolition-enables-project-to-move-forward-angers-those-who-tried/article_c74bb90e-ecdc-11e6-b5f5-bf5d7c170f2b.html.

disagree about how adequately historic structures are protected, if at all, under these ordinances.²²⁷ 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.²²⁸ 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.²²⁹ 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.²³⁰ 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.²³¹ Yet, overturning or overcoming the ruling at the Commonwealth Court level is attainable with the right case,²³² 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

²²⁷ See, e.g., David Erickson, *Structural engineer disputes Bozeman developer's claims about Missoula Mercantile*, RAVALLI REPUBLIC (Mar. 12, 2016), http://ravallirepublic.com/news/article_c262777e-6454-551a-9271-cd0bfecf00db.html.

²²⁸ See ZBA Decision, *supra* note 95, at 6–7.

²²⁹ *Marshall v. City of Philadelphia*, 97 A.3d 323, 333 (Pa. 2014). See also *Tidd v. Lower Saucon Twp. Zoning Hearing Bd.*, 118 A.3d 1, 9 (Pa. Commw. Ct. 2015).

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, *The Wilderness and Its Place in Forest Recreational Policy*, 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". *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.

²³¹ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting that while *stare decisis* is usually the best policy, it is not an "inexorable command").

²³² See *supra* notes 166–77 and accompanying text.

previous generations and their heritage, functioning like a physician's Hippocratic Oath: do no harm.²³³



A concept image of Trek's proposed development which includes the preservation of the historic facades.²³⁴

²³³ Striner, *supra* note 19, at 12.

²³⁴ *Garden Theater Block Update*, ALLEGHENY CITY CENT. (Nov. 11, 2015), <http://www.allegheycitycentral.org/2015/11/garden-theater-block-update-2/>.