

## LANDMARKS PRESERVATION AND THE LAW:

**T**he 19th century American missionaries who set out to proselytize Hawaii were effective individuals; in time, when their families owned or controlled most of the islands, it was said that “they came to do good and did very well indeed.”

In the same vein, a private developer involved with landmark preservation may have mixed motives and the wisest public policies reflected in law will be those that assure the maximum public good consistent with opportunities for competent and honorable private practitioners to “do well.”

### INTERPRETATIONS OF PUBLIC GOOD

These are loaded terms since each can mean what we wish them to mean; even the term ‘landmarks preservation’ represents different things to different people. To some it means restoration, putting a building of unusual history or aesthetic interest back into its original state; to others it means renovation, which implies physical upgrading; to others, it can mean adaptive use where older buildings are recycled to new uses.

Mount Vernon, a classic restoration, is presumably ready for George Washington to resume residence on a moment’s notice and is fully equipped for him, down to a new set of his wooden false teeth. Ghirardelli Square in San Francisco and Boston’s Old City Hall, on the other hand, are examples of adaptive use. They have been reincarnated in forms more imaginative and aesthetically pleasing than in their first lives. And many homes in Washington’s Georgetown, Boston’s Back

Bay, and Philadelphia's Society Hill have been superbly renovated, providing the same surroundings for new residents as for the original owners, but with steam heat, electricity, and running water.

The old French saying, "the Good is the enemy of the Best; the Best is the enemy of the Good," is applicable because if pure restoration is the goal, adaptive use can be destructive. On the other hand, if adaptive use or renovation is acceptable, all parties should agree on the degree of historic authenticity and continuity required because the economic feasibility (therefore the "do-ability") of an otherwise desirable project might be destroyed in the early planning stage.

Common sense would limit pure restoration to those philanthropic groups equipped, financially and technically, to undertake them. Private skills and guidance can be hired on a fee basis, but there is no place for private sector entrepreneurial involvement.

With pure restoration left to eleemosynary groups, renovation and adaptive use are areas for a fruitful cooperation between public and private entities.

#### PUBLIC INTEREST AND PRIVATE DEVELOPERS

Public interest in the recycling of older structures is increasing as it is an important factor in revitalizing key areas in decaying old center-cities. As properties are brought back to social and economic health, the effect on adjoining areas becomes evident. Property tax rolls increase, new jobs are created, fresh purchasing power is attracted back to declining areas, and more efficient use is made of an under-utilized urban infrastructure.

The enterprise is a 'positive sum game' in which everyone comes out ahead. We preserve buildings, then neighborhoods, and finally the city itself. Given the public benefits that flow from such activity, it follows that legitimate public interest should focus on the problems a private developer faces and on steps to help overcome them.

The financial analysis a developer performs on a recycling project is the same he applies to any other development, and the basic equations are simple:

Gross Development Cost – Total Financing = “Equity Investment”  
Gross Income – Real Estate Taxes, Operating Cost + Debt Services =  
“Net Cash Flow”

“Net Cash Flow” + Equity Investment = “Return on Equity”

Anything that lowers the gross development cost or increases available financing cuts down on the developer’s cash required. Anything that increases income or cuts down on real estate taxes, debt service, or operating expenses increases a project’s cash flow. It follows that the higher the return on equity, the more appealing the project becomes to the developer.

The legal problem is to devise mechanisms that:

- a) Determine the appropriate public aims to be achieved.
- b) Define the private role
- c) Make optimum use of incentives available to the private sector that achieve public aims.

Stringent application of local building codes originally designed for new construction; superimposing on preservation projects of social goals (such as HUD’s “targeting” rule with respect to low-income or minority populations) as a condition for an array of governmental subventions, grants, and aids; uncertainties and delays caused in one way or another by government added to the uncertainties and delays inherent in preservation work – all these add to the costs, and lessen the economic feasibility, of projects whose successful completion may be in the public interest.

Availability of capital (mortgage and equity) persistently plagues the preservation field (and “front-end” cash is difficult to come by). Contractors and architects are reluctant to provide firm bids and guaranteed completion dates where structural problems, initially hidden, come to light as work progresses and result in delays and cost overruns. The small size of many preservation projects prevents “economies of scale.” All are risks the developer faces.

Risk-taking is part of the entrepreneur’s role, but in the long run,

society pays for undue risks, either in the form of worthwhile projects left undone or in rewards necessary to attract desirable developers.

On the positive side are the growing array of governmental aids for preservation work. The federal government's National Historic Preservation Act (1966), National Environmental Policy Act (1969), and National Historic Preservation Fund (1976) provide important preservation tools; a variety of HUD programs are aimed at preservation, and the Department of Commerce (through the Economic Development Administration and Small Business Administration) provides several sources of funds. The more accessible these are, the better for everyone.

The major federal benefit available to preservation developers is their allowable depreciation deduction against federal income taxes. Since Section 2124 of the Tax Reform Act of 1976 permits the developer of a historic structure to write off his capital expenditures over a five-year period and to sell off in advance his excess tax losses to high-bracket investors, a source of capital thus becomes available at a crucial early stage.

Local aids to the developer that make preservation appealing vary from locality to locality and often involve forms of property tax abatement such as New York City's J-51 program. TDRs (Transferable Development Rights) by which development densities may be transferred from one preservation location to another site, and 'façade easements' where a public body may assume the obligation to renovate and maintain a building's outer shell, are other tools whose use should be encouraged.

The problems of historic preservation law involve more effective use of current tools rather than the creation of new ones. In 'the real world' the implementation of a law is as important as its formulation, the application and interpretation of preservation law must be seen as an area of importance. Clarity and internal consistency of regulations, speed and flexibility in administration, are of even greater importance in this field than in others. The credibility of local government, in living up to its obligations is significant in a field involving so many intangibles.

Imaginative use of existing tools should be encouraged at all levels of government because they are consistent with the underlying legislative intent.

Possible waivers of controls in preservation projects may be appropriate in building codes, zoning restrictions or social engineering.

#### CONCLUSION

Nothing I have said should be construed as limiting the legitimate controls, reviews, and inspections private developers should be subject to as it must be assumed that developers will do only what is in their financial self-interest. When relying on a developer's conscience, one would do well to remember H.L. Mencken's definition of conscience as "the small voice that tells you someone may be looking."

Properly harnessed, however, the private developer represents the best preservation resource we have; and for the public good his 'care and feeding' should be a matter of general public concern.

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