

## Taylor, Bernice

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**From:** marie elena saccoccio <saccocciom@yahoo.com>  
**Sent:** Monday, June 26, 2023 1:11 PM  
**To:** City Clerk; City Council; City Manager  
**Cc:** Marilee Meyer; Betty Lee Saccoccio; Joan Pickett; Vickey Bestor; 'John Pitkin'; William Dines; John Whisnant; Francesca Gordini  
**Subject:** Fw: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"  
**Attachments:** Document 163.docx; Bagalay v Avon Hill Neighborhood Conservation District Commission 2004 MBAR 532 Mass Super 2004 (1) (2).pdf; Hancock Village I LLC v Town of Brookline (1) (2).pdf; massachusetts\_state\_historic\_preservation\_plan\_021411.pdf; Jane Jacobs and NCD's vs Affordable housing.pdf

Dear Council Members and Mayor:

Please find below and attached my prior submissions on this issue. I did attend the last meeting on this issue at which no public comment was allowed under the guise that this was a continuation of the prior meeting. A bit of leger de main. LOL Let me add that at the last meeting, over and over, I heard the age of Charles Sullivan and his length of tenure introduced as if the real necessity for this butchering is his age. To say it was insensitive is an understatement. Age was used like a hammer to justify the goal of the proponents. Let me also note that the proponent and author carry the burden. They need to justify their chosen language based on their research and knowledge. Instead, the Executive Director was ordered to review 40 years of cases in which petitions were denied or granted. Any Councilor should have recognized that the burden rests with the proponents and the breath of this request was nonsensical.

Respectfully submitted, Marie Elena Saccoccio, Esquire

----- Forwarded Message -----

From: marie elena saccoccio <saccocciom@yahoo.com>  
To: City Clerk <cityclerk@cambridgema.gov>; City Council <citycouncil@cambridgema.gov>; citymanager@cambridgema.gov <citymanager@cambridgema.gov>; Charles M. Sullivan <csullivan@cambridgema.gov>; Bruce Irving <irving@compass.com>  
Sent: Tuesday, June 20, 2023 at 09:37:58 AM EDT  
Subject: Fw: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"

City Councilors,

Quite suddenly posted to the City Calendar is notice of upcoming Ordinance Meeting on the Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks." No further information is posted. No link for public comment. No proposed text other than a reference to amended language from meeting of April 2023, though if memory serves me that was the formal meeting in which the proposed language not only was not publicly posted, it was not even previously shared with the Cambridge Historic Commission. I am submitting my prior opposition with attachments. I note that the chief proponents of the gutting of historical protections for this city will no longer be with us. One is relocating happily

out of state and the other, after flagrantly violating Plan E strictures, is stepping down. Can we please take a breath. What is being proposed is not even lawful procedurally or substantively.

Respectfully,  
Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141  
BBO#552854

----- Forwarded Message -----

From: marie elena saccoccio <saccocciom@yahoo.com>  
To: City Council <citycouncil@cambridgema.gov>; City Clerk <cityclerk@cambridgema.gov>;  
citymanager@cambridgema.gov <citymanager@cambridgema.gov>; Charles M. Sullivan <csullivan@cambridgema.gov>;  
Bruce Irving <irving@compass.com>  
Sent: Monday, May 29, 2023 at 12:25:56 PM EDT  
Subject: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"

Madam Clerk:

Could you kindly submit my attached opposition, case law and journal articles for consideration of the upcoming Ordinance Committee meeting on deliberation of proposed changes to the Historic and Landmark Ordinance?

Thank you for your time and assistance.

Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141

Dear Madam Clerk:

Could you kindly forward this submission and attachments to the Ordinance Committee for consideration of the Proposed Amended Buildings and Landmarks Ordinance now being considered?

Dear City Councilors :

The backdrop of the Proposed Ordinance should not be ignored since it was in direct response to our labor. As many of you know, I am fourth generation Cambridge resident. My family has paid taxes to this city for over a century. My parents and grandparents worked in the factories here. I say this to emphasize my breath of interest in preservation of our history, whether it be our immigrant industrial history; our African American history; or, yes, even the history of our privileged West Cambridge landed gentry. Based on this appreciation and full well having experienced the razing of Boston's West End, along with the unbridled development in Kendall, I rallied some neighbors to study the possibility of establishing a Conservation District in East Cambridge. We were not a group of old white privileged wealthy people. We were a group of serious-minded residents who were truly motivated by an appreciation of the value in our history and architecture. We met weekly for about 9 months in the St. Francis of Assisi Church Hall, a notable Landmark itself. We spent much time establishing boundaries, looking at other guidelines employed around the country and within Cambridge, taking walking tours of the boundaries; and researching the history of this great neighborhood.

Once the petition for establishing an East Cambridge Conservation District was filed, we were pilloried all over social media. Audrey Vetrano Cunningham and I were mocked incessantly with video clips posted to twitter even ridiculing our "Italian accents." Bill Dines was portrayed as an out of control privileged old white man. John Whisnant was mercilessly described as an old greedy white man. Truly the basis was absurd since the positions we were taking were absolutely supported in law. Our MGL c. 40(C) provides standing to owners. It is the law. There is no value judgement we were making. It is the law. Hence, in response to our proposed Conservation District, you have before you what has been termed the "Crowe Petition."

Recently I note that Conservation Districts in Brookline have been struck down as unlawful. Why?? Because they did not mirror the process or requirements set forth in MGL. C. 40(C). Our Conservation District ordinance and process up to now is absolutely faithful to 40(C). The Citizen Petition now presented as a Proposed Ordinance is devoid of any foundation in law to be presented as a variation of any Conservation District composition or process. The Proposed Ordinance creates some kind of land use system, not zoning and not preservation, premised on equity and diversity and business interests. It completely alters the rigors of standing which are as old as property law itself and violates 40C. It rejects any notion of professional or academic qualifications, likewise in violation of 40C and in doing so the Proposed Ordinance insults the lawyers, architects, real estate professionals, urban planners and historians who have always

comprised the Commission and the Neighborhood Conservation Districts as uncompensated volunteers. This is not to say that adherence to the strictures of 40C is the only lawful process that can be adopted. However, adherence to 40C is the wisest process since that process has been wedded and analyzed and ordained within a statute that has stood legal challenges throughout the years.

I am attaching here two cases for your review. The Brookline case clearly provides that even with a Neighborhood Conservation District, the strictures of MGL c. 40C apply. You simply cannot ignore state law. And I am attaching here a Cambridge case involving our Avon Hill Neighborhood Conservation District in which the Superior Court found that:

**“The Commission incorrectly argues for a "supported by substantial evidence" standard. Cambridge Municipal Code, 2.78.240 ("The superior court may reverse a determination if it is not supported by substantial evidence in the record"). To the extent such section of the Municipal Code seeks to alter the statutory standard of review as set out in G.L.c. 40C, §12A, such section violates state supremacy, and is therefore void.”**

I also note that in violation of Plan E, one City Councilor intervened with the Cambridge Historic Commission, personally attempting to stop the process and promote her constituents' position. I have a letter she authored attesting to this and there is also a recorded meeting of the Conservation District in which she demanded that the entire process be stopped. As this is a flagrant violation of Plan E, I am requesting that City Councilor refrain from any further participation, including discussion at Council, and any vote or decision that may result.

I am attaching here a wonderful resource compiled on the history of preservation in this Commonwealth. It is not a tool we suddenly discovered to become rich overnight. I also note that our Historic Commission, and especially the Neighborhood Conservation Districts, are often cited nationally as a kind of gold standard. Please find attached here an informative read explaining how historic preservation can be a tool for ensuring affordable housing and not its enemy. It discusses Jane Jacobs and how she would view the Affordable Housing vs. Preservation false dichotomy. Also, cited within that article, Cambridge in 1983, created the first Conservation District in the country, quickly forming the basis for Nashville, Dallas, Miami, and Chapel Hill. Today there are over 165 NCD's in 35 states.

In sum, I support the requested changes presented by Charles Sullivan, Executive Director of the Cambridge Historic Commission. They are crafted to comply with the law and amend where needed.

Respectfully submitted,  
Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141  
BBO#552854

**2004-MBAR-532**

**John Bagalay et al.**

**v.**

**Avon Hill Neighborhood Conservation  
District Commission et al.**<sup>[1]</sup>

**No. 0304830**

**Superior Court of Massachusetts**

**November 22, 2004**

Opinion No.: 86756

As-is Docket Number: 03-04830

Venue: Middlesex

Judge (with first initial, no space for  
Sullivan, Dorsey, and Walsh): Houston, J.

Opinion Title: MEMORANDUM OF  
DECISION AND ORDER ON PLAINTIFFS'  
MOTION FOR JUDGMENT ON THE  
PLEADINGS

This is an appeal from a decision of the Avon Hill Neighborhood Conservation District Commission ("Commission") denying plaintiff's application for a certificate of appropriateness to build a garage in the front setback of their property. This appeal is pursuant to G.L.c. 40C, §12A. Plaintiff moves for judgment on the pleadings pursuant to Mass.R.Civ.P. 12(c).<sup>[2]</sup>

#### BACKGROUND

Plaintiffs, John and Julia Bagalay, submitted an application for a certificate of appropriateness to the Commission to construct a 21' x 22' garage within the front setback of their home. It is undisputed that the proposed design was by the original architect of the Bagalay's home, was consistent with the historical and architectural character of the home, and was consistent with the historical and architectural character of the entire neighborhood. After two public hearings and a site visit, the Commission voted unanimously to deny the application. The

Bagalays appealed to the Cambridge Historical Commission. The Cambridge Historical Commission failed to act on the appeal within thirty days from the date of filing, thereby entitling the Bagalays to an appeal before this court, pursuant to G.L.c. 40C, §12A and Cambridge Municipal Code, 2.78.240.

#### DISCUSSION

The superior court may only annul a decision of a historic district commission if: (1) the decision exceeds the authority of the commission, or (2) the decision is unsupported by the evidence. G.L.c. 40C, §12A. Two courts have refined this standard using somewhat similar language. In *Marr v. Back Bay Architectural Comm'n*, the court stated that a historic district commission decision may be annulled if: (1) the reasons given on the face of the decision are insufficient in law to warrant the commission's decision, or (2) if the reasons given on the face of the decision are unwarranted by the evidence. See 23 Mass.App.Ct. 679, 683-84 (1987). In *Gumley v. Board of Selectmen of Nantucket*, the court stated that a decision may be annulled if: (1) the decision is based on legally untenable grounds, or (2) the decision is "unreasonable, whimsical, capricious or arbitrary." See 371 Mass. 718, 724 (1977) citing *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638-39 (1970).<sup>[3]</sup>

The plaintiff attempts to argue that the Commission fails both prongs of the inquiry. As to the first prong, plaintiff claims that the Commission failed to consider the statutory criteria of "appropriateness,"<sup>[4]</sup> specifically, "architectural value and significance," and instead denied plaintiffs' application based solely on a legally untenable valuation of public space over private space.

The certified record clearly reveals that the Commission considered the "architectural value and significance" of the proposed garage as well as its "relation to the land area... and to buildings... in the vicinity..." G.L.c. 40C, §7.<sup>[5]</sup> Furthermore, the Commission's consideration of the relative value of public space, on a case by

case basis, clearly falls within the specific statutory mandate for Historic District Commissions. G.L.c. 40C, §2 ("The purpose of this chapter is to promote the educational, cultural, economic and general welfare of the public through the preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth... through the maintenance and improvement of settings for such buildings and places...") (emphasis added). The protection of historically significant public space is also included among the statutory criteria of appropriateness. See G.L.c. 40C, §7 ("[T]he commission shall consider, among other things<sup>[6]</sup>... the building... in relation to the land area upon which the building... is situated... and the commission may in appropriate cases impose... set-back requirements...") (emphasis added); see also Cambridge Municipal Code, 2.78.220.

Therefore, to the extent the application was denied based upon the incongruousness of the front setback garage to the public's enjoyment of the "place" of Avon Hill, and the incongruousness of the front setback garage to the "setting" in which Avon Hill's historic houses reside, such basis for decision was entirely appropriate under the law.

Turning to the second prong of the inquiry, the court will not intrude upon the discretion granted the Commission by the legislature to make such a determination of incongruity unless such determination was "unreasonable, whimsical, capricious or arbitrary" in light of the evidence before the court.<sup>[7]</sup> Gumley, 371 Mass. at 724. The evidence before the court is the certified record dated March 25, 2004, and upon this record, the Commission's determination that the proposed siting of the garage was incongruous to the historic character of Avon Hill is entirely reasonable and cannot be said to be whimsical, capricious, or arbitrary.

Plaintiffs' assertions to the contrary are meritless: (1) that the Commission ignored the unanimous support of neighbors for the plaintiffs'

project is of no moment<sup>8</sup> the Commission is tasked by c. 40C with promoting "the general welfare of the public" and not simply the interests of a few abutters; (2) that there exists a maximum 30% lot coverage cap in the applicable zoning ordinance does not mean there exists a "certificate of appropriateness by right" for all projects falling below the maximum; (3) the Commission agreed that the garage's architecture was significant, beautiful, and congruous to the neighborhood, but nowhere in the statute does it state that architectural factors are more important than the physical siting of the garage or the siting's effect on the public's enjoyment of an historic streetscape; and (4) any concern expressed by the Commission about setting unfavorable precedent is a mere statement of the consequences the Commission believed in good faith would attend the improper granting of a certificate of appropriateness. That the certificate would be improper was based upon a careful and reasoned judgment in light of the statutory criteria of appropriateness<sup>9</sup> a judgment which the court may not replace with its own.

#### ORDER

For the foregoing reasons, it is hereby ORDERED that judgment enter AFFIRMING the decision of the Avon Hill Neighborhood Conservation District Commission denying Plaintiffs' application for a certificate of appropriateness.

Julian T. Houston

Justice of the Superior Court

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Notes:

<sup>[1]</sup> Cambridge Historical Commission.

<sup>[2]</sup> See also Superior Court Standing Order 1-96(4).

<sup>[3]</sup> The Commission incorrectly argues for a "supported by substantial evidence" standard.

Cambridge Municipal Code, 2.78.240 ("The superior court may reverse a determination if it is not supported by substantial evidence in the record"). To the extent such section of the Municipal Code seeks to alter the statutory standard of review as set out in G.L.c. 40C, §12A, such section violates state supremacy, and is therefore void.

pieces of evidence before the Commission falls solely within the discretion of the Commission.

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[4] Delineated by G.L.c. 40C, §7.

[5] Some examples of the Commission's consideration of the statutory criteria are as follows: "Mr. Irving said... the proposed garage worked with the main house and was subsidiary to it." C.R. at 101; "Ms. Norfleet commended the applicants for the original drawings... [S]he disagreed that the garage would not detract from the pedestrian experience of the street." C.R. at 101; "[Ms. Born] said the information and design were very good." C.R. at 102; "Ms. Born recommended that the motion deny the application based on the proposed siting of the garage but not on the architectural design of the garage building." C.R. at 118.

[6] "Among other things" are several "General Conservation Standards" as set forth in the "Avon Hill Neighborhood Conservation District Order (June 15, 1998)." C.R. at 79. The general conservation standards are to "conserve the historic development patterns of the neighborhood, including its green space, open vistas, generous setbacks, and predominantly low density lot coverage [and to] enhance the pedestrian's visual enjoyment of the neighborhood's buildings, landscapes and structures..." These standards permissibly expand upon the statutory criteria of appropriateness and conform to the explicit purpose of c. 40C as delineated in §2.

[7] Plaintiffs urge this court to rule that the Commission did not give "sufficient weight to the statutory factors and criteria of 'appropriateness,' " specifically, the architectural significance of the garage and its relation to surrounding buildings and the land. Plaintiffs' brief at 3-4 (emphasis added). The amount of weight to grant the various



2019 WL 4189357

Only the Westlaw citation is currently available.

Massachusetts Land Court,  
Department of the Trial Court,  
Norfolk County.

**HANCOCK VILLAGE I, LLC**, Plaintiff,

v.

The **TOWN OF BROOKLINE**, Defendant.

PERMIT SESSION CASE No. 18

**PS**

000192 (HPS)

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Dated: September 4, 2019

### DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Howard P. Speicher, Associate Justice

#### INTRODUCTION

\*1 “You call this a barn? This looks like a stable.”

“Well, if you look at it, it's a barn; if  
you smell it, it's a stable.”

“Well, let's just look at it.”<sup>1</sup>


Sometimes one's perception of the nature of a thing (or in this case, a law) depends on one's perspective or on the context in which it is perceived. In the present dispute, plaintiff **Hancock Village I, LLC** (“plaintiff”) perceives **Brookline's** Neighborhood Conservation District Bylaw as a zoning bylaw illegitimately masquerading as a general bylaw in order to stymie the redevelopment of the plaintiff's property. The **town** of **Brookline** (“**Brookline**” or “the **town**”) perceives the same bylaw as a legitimate exercise of its home rule powers to enact a general bylaw. According to the plaintiff, however, **Brookline** has chosen to view the bylaw from a perspective that willfully and conveniently ignores its true substance and nature. In short, the plaintiff contends that the **town** has elected not to smell the stable so that it might insist that it is a barn.

In 2011, the **town** of **Brookline** adopted a “neighborhood conservation district” bylaw. This bylaw would serve to create local commissions with the ability to regulate the dimensions, layout, and design of construction in designated districts. **Brookline** adopted the bylaw not as an amendment to its zoning bylaw pursuant to G. L. c 40A, or as a historic district bylaw pursuant to G. L. c. 40C, but as a general **town** bylaw pursuant to its general home rule powers.

The first district established under the bylaw comprised solely the entire **Brookline** portion of the 70-acre property of plaintiff.<sup>2</sup> Plaintiff filed this action seeking to invalidate both the bylaw establishing the framework for the creation of neighborhood conservation districts in the **town**, as well as the particular section of the bylaw creating the district encompassing the plaintiff's property. It contends that the bylaw was not a proper exercise of **Brookline's** general police power, as its subject matter falls squarely under the purview of G. L. c 40A and G. L. c. 40C, and must therefore have been enacted pursuant to the procedures provided in those statutes, and with the substantive protections and mechanisms required by those statutes.

For reasons discussed below, I find and rule that although the Neighborhood Conservation District Bylaw and the related **Hancock Village** Neighborhood Conservation District Bylaw were in the form of general bylaws, they are both properly characterized as zoning bylaws that fail to comply with the procedural and substantive requirements of the Zoning Act, G. L. c. 40A, and that further, to the extent they are characterized as historic district bylaws, they fail to comply with the procedural and substantive requirements of G. L. c. 40C. Accordingly, they will be declared to be invalid and of no force and effect.

#### PROCEDURAL HISTORY

\*2 On April 13, 2018, plaintiff **Hancock Village I, LLC** filed a six-count complaint against defendant the **town** of **Brookline** seeking declarations to the effect that Section 5.10 of the **Brookline** General Bylaws was invalidly enacted and is of no force and effect. Counts I through IV seek declaratory judgment pursuant to G. L. c. 231A. Count I requests a declaration that the bylaw in question was enacted without compliance with the procedures of  G. L. c. 40A, § 5, and Count II requests a declaration that the substance of the



bylaw is in conflict with G. L. c. 40A. Count III requests a declaration that the bylaw was enacted without compliance with G. L. c. 40C, § 3, and Count IV requests a declaration that the substance of the bylaw is in conflict with the same. Count V seeks a determination of the validity of the bylaw as applied to its property pursuant to G. L. c. 240, § 14A. Count VI asserts a violation of the Due Process Clause of the 14th Amendment of the United States Constitution, and Part I, Article 10 of the Massachusetts Declaration of Rights.

**Brookline** filed an Answer on May 14, 2019, and an Amended Answer on May 21, 2019. The parties attended a case management conference on May 29, 2018. In accordance with an agreed-upon schedule, on February 15, 2019 the parties filed cross-motions for summary judgment and responses to each other's motions. A hearing was held before me on the parties' respective motions on May 7, 2019, after which I took the motions under advisement.

#### UNDISPUTED FACTS

The following material facts are found in the record for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the pending motions for summary judgment:

1. **Hancock Village** is a 70-acre mixed-use development consisting of 789 garden-style apartments, 530 of which are in **Brookline**, with the remainder in the 20-acre portion of the property that lies over the city line in Boston. **Hancock Village** is owned by plaintiff **Hancock Village I, LLC**.<sup>3</sup>
2. The vast majority of the **Brookline** portion of **Hancock Village** is located in the M-O.5 (Apartment) zone, **Brookline's** lowest density apartment house district.<sup>4</sup> The remainder is in a single-family district.
3. In August, 2011, the plaintiff submitted an application for "Major Impact Project Review" to the **Brookline** Building Commissioner, which is a preliminary step in applying for a special permit under the **Brookline** Zoning Bylaw. The application was for the development of thirty-one detached single-family homes and 162 dwelling units in a multifamily building.<sup>5</sup>
4. In the fall of 2011, two warrant articles – Article 5 and Article 6 – were proposed, and were scheduled for consideration at a November 15, 2011 Special **Town** Meeting.<sup>6</sup>

5. Article 5 would insert Section 5.10 into **Brookline's** General Bylaws; this section, titled "Neighborhood Conservation Districts" (the "NCD Bylaw"), set out the framework for the operation of Neighborhood Conservation Districts ("NCDs") in **Brookline**.<sup>7</sup>
6. The petitioner's description of the NCD Bylaw that accompanied the warrant for Article 5 described NCDs as a tool "designed to be more neighborhood specific than the **Town's** Local Historic District (LHD) By-Law ... The guidelines for a particular NCD, unlike an LHD, can be focused less on preservation of the specific details of each structure and more on preserving the general character of a neighborhood, by ensuring that the general scale, composition, massing and design is compatible with the site as well as other existing structures in the surrounding area." It stated that "the guidelines for an NCD could address landscape and urban issues such as protection of landscapes, open spaces, viewsheds and paving without grade changes."<sup>8</sup>
7. Article 6 would insert Section 5.10.3.d.1 into this section, creating the **Hancock Village** Neighborhood Conservation District ("**Hancock Village** NCD"), which was to be an NCD applicable solely to the plaintiff's property.<sup>9</sup> This was the first time an NCD had been on the warrant for any **town** meeting in **Brookline**.<sup>10</sup>
- \*3 8. These articles were proposed as general **town** bylaws under the **town's** home rule power, rather than as zoning bylaws adopted pursuant to the procedures in G. L. c. 40A.
9. Articles 5 and 6 were discussed and debated at seventeen meetings of various **town** boards and committees.<sup>11</sup>
10. Article 5 and Article 6 were approved by **Town** Meeting in November 2011. Article 5 was passed by a recorded ballot vote of 183 in favor, 35 opposed, with 5 abstentions. Article 6 was passed by a counted vote of 200 in favor and 24 opposed.<sup>12</sup>
11. On May 30, 2012, the Attorney General approved the adoption of Article 5 and Article 6; however, she noted that the "question is close" as to whether the proposed bylaw should have been adopted as a zoning bylaw.<sup>13</sup>
12. Since the passage of the NCD Bylaw, plaintiff has secured comprehensive permit approvals pursuant to G. L. c. 40B for the further development of **Hancock Village**. The

development approved under the comprehensive permit would be exempt from the requirements of the NCD Bylaw.<sup>14</sup> **Brookline** and a number of abutting landowners filed an appeal of plaintiff's comprehensive permit on March 11, 2015. That appeal was dismissed by order of the Land Court (Piper, J.) on July 17, 2018.<sup>15</sup>

13. Plaintiff has made at least six applications to the **Hancock Village** NCD Commission for work on existing homes. None of these have been denied.<sup>16</sup>

14. On April 3, 2018, plaintiff filed the present action seeking to invalidate the NCD Bylaw contained in Section 5.10 as a whole, including both its establishment of the general NCD framework as well as the particular **Hancock Village** NCD contained in Section 5.10.3.d.1.<sup>17</sup>

#### *The NCD Bylaw*

15. Section 5.10.1 of the NCD Bylaw, which sets forth the bylaw's purpose, states, in part:

This by-law is enacted for the purposes of preserving and protecting groups of buildings and their settings that are architecturally or historically significant; preserving and protecting the layout of neighborhoods or historical subdivisions of neighborhoods, vehicular and pedestrian circulation patterns, green spaces, landscapes, and viewsheds that are historically significant or significant to the character of the **town** or its neighborhoods; preserving and protecting distinctive features of the architectural, cultural, economic, political, or social history of the **town** and its neighborhoods, and limiting the detrimental effect of alterations, additions, demolition and new construction on the character of the **town** and its neighborhoods. Through this by-law, alterations, additions, demolition, and new construction may be reviewed for compatibility, including without limitation design, massing, topography, scale and materials with the existing buildings, green spaces, open spaces, courtyards, landscapes, neighborhood and subdivision plans and layouts, circulation patterns, viewsheds, settings, and neighborhood character.<sup>18</sup>

16. Pursuant to Section 5.10.4 of the NCD Bylaw, each NCD is to be overseen by a commission ("NCD Commission") of at least five members, consisting of a combination of **Brookline** Preservation Commission members and residents of the **town** appointed by the Board of Selectmen.<sup>19</sup>

17. Each NCD Commission is tasked by the NCD Bylaw with "exercis[ing] its powers in administering and regulating the alteration of buildings, other structures and natural and manmade elements within such NCD as set forth under the procedures and criteria established in this by-law," and "review[ing] all Reviewable Projects in the NCD, including without limitation new construction, demolition or alterations that affect the landscape of topography, the exterior architectural features of buildings and other structures, or the mass and siting of buildings and other structures."<sup>20</sup>

\*4 18. Section 5.10.2 defines "Reviewable Project" as including "(i) a change to a building or other structure or part thereof such as removal, construction, reconstruction, restoration, renovation, replication, rehabilitation, addition, partial or total demolition and other similar activities, or the construction of a new building or other structure or part thereof ... (iii) addition or replacement of doors or windows ... (iv) a change to a site that includes constructing, placing, erecting, installing, enlarging, or moving a building or other structure or similar activities; (v) the removal or addition of streets, driveways, parking areas, walkways, or paved surfaces..."<sup>21</sup>

19. Section 5.10.5 provides that "a building permit (which shall include permits for demolition) or an occupancy permit may not be issued for an altered building, structure, site or property or other Reviewable Project without the prior issuance of a Certificate of Appropriateness."<sup>22</sup>

20. Section 5.10.7 states in part: "The Commission shall determine whether the proposed alteration or other Reviewable Project, including any modification thereof agreeable to the applicant, is compatible with the specific design guidelines of the applicable district and the purposes of the bylaw." It further states that a Certificate of Appropriateness will be issued if the Commission deems it compatible, and denied if it is deemed incompatible.<sup>23</sup>

21. Section 5.10.3.c states: "The Commission may impose dimensional requirements that further the purposes of the by-law, including without limitation preventing Reviewable Projects inconsistent with the historic or architectural aspects, scale or massing, neighborhood or subdivision plan or layout, circulation patterns, or green

space, open space, landscape, vegetation or viewshed character of the NCD.”<sup>24</sup>

22. Section 5.10.3.d.1 establishes the **Hancock Village** NCD, and provides a number of specific “design guidelines” for the NCD. Per these guidelines, elements that “shall be compatible with the existing buildings in the district” include: “[t]he architectural design and building materials” (Section 5.10.3.d.1.i); the elements of the façade, such as windows, doors, and trim (Section 5.10.3.d.1.iii); the “shape, pitch, style, and type of roof” (Section 5.10.3.d.1.iv); and “[t]he size, height and massing of a building or other structure.” (Section 5.10.3.d.1.ii).<sup>25</sup>

23. As to this final category, Section 5.10.3.d.1.ii of the Bylaw goes on to state: “Compatible building size, height and massing shall include, but not be limited to limited to [sic]: (a) No building over 2 ½ stories in height ... shall be constructed. (b) In relation to any abutting single family, detached homes, any new single-family homes shall be similarly oriented, have similar rear yard depths, and similar distance between dwelling units.”<sup>26</sup>

24. Section 5.10.3.d.1.v also states that the project shall “maintain the spatial organization of the district,” and shall not have a “significant negative impact on historical architectural or landscape elements ....” It further provides that “[s]ignificant negative impacts shall include, but not be limited to: ... (d) Addition of new impervious surfaces within 100 feet of abutting properties, and (e) Loss of open space through building coverage exceeding 20% of the area of the district ....”<sup>27</sup>

#### *The Zoning Bylaw*

25. As provided in Section 1.00, the purposes of the **Brookline** Zoning Bylaw (the “Zoning Bylaw”) include “(b) preventing overcrowding of land ... (e) preventing undue concentration of population ... (j) encouraging the preservation of historically and architecturally significant structures; ... (l) providing for adequate open space, including landscaped and usable open space, public shade trees and other landscape and natural features.”<sup>28</sup>

\*5 26. Sections 5.00 – 5.92 of the Zoning Bylaw comprise extensive dimensional regulations imposed on districts throughout the **town**. Table 5.01, in particular, provides specific height maximums, minimum lot sizes, open

space requirements, minimum setback requirements, and floor area ratio maximums.<sup>29</sup>

27. Section 5.06 of the Zoning Bylaw provides “Special District Regulations” for certain areas of the **town** on the basis that “unique land use, environmental, architectural and other physical conditions present within the **Town** require detailed neighborhood, district or site planning and design review to insure: orderly and planned growth and development; [and] historic and natural resource conservation; residential neighborhood preservation ....” These Special District Regulations are to be established by **Town** Meeting “from time to time, in accordance with M.G.L. Chapter 40A.”<sup>30</sup>

28. Special District Regulations established under Section 5.06 impose dimensional requirements, such as maximum height, minimum open space, and maximum floor area ratio, which differ from those which would otherwise be required by Table 5.01.

29. Section 5.09 of the Zoning Bylaw, which is applicable in a number of designated areas in the **town**, establishes a “Design Review” process with the purpose of “provid[ing] individual detailed review of certain uses and structures which have a substantial impact on the character of the **Town** and upon traffic, utilities and property values therein, thereby affecting the public health, safety, and general welfare thereof.”<sup>31</sup>

30. This process allows the Planning Board and Zoning Board of Appeals to review proposed construction for, among other things, “consisten[cy] with “use, scale, yard setbacks and architecture of existing buildings and the overall streetscape of the surrounding area” (Section 5.09(4)(c)); “the location and configuration of open space” (Section 5.09(4)(d)); the impact of layout on vehicular circulation (Section 5.09(4)(e)); and consideration of “historic, traditional or significant uses, structures or architectural elements ....” (Section 5.09(4)(k)).<sup>32</sup>

#### JURISDICTION


\*6 The Land Court has exclusive jurisdiction over actions brought pursuant to **G. L. c. 240, § 14A** for the determination of the validity of an ordinance “adopted under the provisions of chapter forty A or under any special law relating to zoning, so called, which purports to restrict or limit the present

or future use, enjoyment, improvement or development of such land.” *G. L. c. 240, § 14A*. “The primary purpose of proceedings under § 14A is to determine how and with what rights and limitations the land of the person seeking an adjudication may be used under the provisions of a zoning enactment in terms applicable to it, particularly where there is no controversy and hence no basis for other declaratory relief.” *Hansen & Donahue, Inc. v. Town of Norwood*, 61 Mass. App. Ct. 292, 295, 809 N.E.2d 1079 (2004). There is no dispute that plaintiff is the owner of the land which is subject to the challenged bylaw, and the nature of its challenge – contending that the bylaw should have been, but was not, enacted pursuant to G. L. c. 40A – falls within the purview of the statute. See *G. L. c. 240, § 14A*; *Valley Green Grow, Inc. v. Town of Charlton*, 27 LCR 99, 103 (2019) (Foster, J.) (“The court sees little distinction between determining the validity of a bylaw enacted under c. 40A and the validity of a bylaw that the plaintiffs claim should have been enacted under c. 40A.”).

This court likewise has jurisdiction over the plaintiff’s counts for declaratory judgment under G. L. c. 231A. Under that statute, the Land Court may “on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby ... in any case in which an actual controversy has arisen and is specifically set forth in the pleadings.” *G. L. c. 231A, § 1*. “A landowner who seeks to challenge the validity of a zoning by-law where there is an actual controversy may bring a proceeding in the Land Court under G. L. c. 231A or under *G. L. c. 240, § 14A*.” *Mantoni v. Board of Appeals*, 34 Mass. App. Ct. 273, 275, 609 N.E.2d 502 (1993).

Construing the plaintiff’s constitutional claims as a subset of its *G. L. c. 240, § 14A* claim, they may properly be heard in the Land Court as well. Typically, a plaintiff must notify the Attorney General of constitutional claims pursued within the context of a declaratory judgment action. See *id.*, quoting *Gamache v. Acushnet*, 14 Mass. App. Ct. 215, 223, 438 N.E.2d 82 (1982) (“If the party seeks to involve a question of constitutionality in the declaratory judgment proceeding, ‘the attorney general shall also be notified of the proceeding.’”). The record reflects the plaintiff’s previous communications to the Attorney General strenuously objecting to the passage of the Warrant Articles; however, there is no indication one way or the other whether the plaintiff has indeed notified the Attorney General of the present action. Nonetheless, no notice to the Attorney General is required for an action under *G. L. c. 240, § 14A*. *Id.* Accordingly, the Land Court may maintain


jurisdiction over the plaintiff’s constitutional claims insofar as they are considered to be incorporated into its *G. L. c. 240, § 14A* action.

The Land Court independently has jurisdiction over the present action because it was properly filed in the Permit Session. Pursuant to  *G. L. c. 185, § 3A*:

The permit session shall have original jurisdiction, concurrently with the superior court department, over civil actions in whole or part: (a) based on or arising out of the appeal of any municipal, regional or state permit, order, certificate or approval, or the denial thereof, concerning the use or development of real property, including without limitation appeals of such permits, orders, certificates or approvals, or denials thereof, arising under or based on or relating to chapter ... 40A to 40C, inclusive, ...or any local bylaw or ordinance; (b) seeking equitable or declaratory relief (i) designed to secure or protect the issuance of any municipal, regional or state permit or approval concerning the use or development of real property or (ii) challenging the interpretation or application of any municipal, regional or state rules, regulations, statutes, laws, bylaws, ordinances concerning any permit or approval; ...and (d) any other claims between persons holding any right, title or interest in land and any municipal, regional or state board, authority, commission or public official based on or arising out of any action taken with respect to any permit or approval concerning the use or development of real property but in all such cases of claims (a) to (d), inclusive, only if the underlying project or development involves either 25 or more dwelling units or the construction or alteration of 25,000




square feet or more of gross floor area  
or both.

\*7 Although not a direct appeal of a denial of a permit, the plaintiff alleges in its complaint, and the record supports the claim, that the adoption of the NCD Bylaw is a direct response to, and improperly impacts plaintiff's efforts to develop additional housing – both single-family units and multi-family units – as well as other improvements on the **Hancock Village** property.<sup>33</sup> In August 2011, the plaintiff proposed a “major impact project” to add additional housing at **Hancock Village**.<sup>34</sup> It is not in dispute that the proposal to adopt the NCD Bylaw and the **Hancock Village** NCD Bylaw was a direct response to this proposal.<sup>35</sup> Under these circumstances, the Land Court's jurisdiction is properly grounded in  G. L. c. 185, § 3A, in addition to G. L. c. 240, § 14A and G. L. c. 231A.

## DISCUSSION

### SUMMARY JUDGMENT STANDARD


“Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law.” *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644, 766 N.E.2d 864 (2002); *Mass. R. Civ. P. 56(c)*. “The moving party bears the burden of affirmatively showing that there is no triable issue of fact.” *Ng Bros. Constr.*, *supra*, 436 Mass. at 644, 766 N.E.2d 864. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, 436 N.E.2d 139, cert. denied, 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982). Whether a fact is material or not is determined by the substantive law, and “an adverse party may not manufacture disputes by conclusory factual assertions.” See  *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Ng Bros. Constr.*, *supra*, 436 Mass. at 648, 766 N.E.2d 864. When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); *Mass. R. Civ. P. 56(c)*.

### SUMMARY OF THE PARTIES' ARGUMENTS

The crux of this case is whether **Brookline** has impermissibly circumvented G. L. c. 40A and G. L. c. 40C by utilizing its general home rule power to pass a bylaw that is, in truth, either a zoning bylaw, a historic district bylaw, or both. Plaintiff argues that the NCD Bylaw replicates the manner of regulation governed by these two statutes, but evades their mandatory procedural and substantive requirements for enactment and administration. It also argues that the provisions governing an NCD commission's power to impose requirements are too vague to pass constitutional muster, and deprive an applicant of due process. **Brookline** contends that the effect of the NCD Bylaw is not to amend the **Brookline** Zoning Bylaw, but rather to supplement it through land use regulation not the exclusive domain of zoning. Similarly, it argues that the NCD Bylaw differs from historic district bylaws, and that G. L. c. 40C does not govern all bylaws that happen to fall within the broad field of historic preservation. Therefore, it contends, the NCD Bylaw was properly enacted pursuant to the **town's** general police powers, and did not need to adhere to the procedural requirements of either G. L. c. 40A or G. L. c. 40C. Alternatively, it argues that, even if the NCD Bylaw does fall under the ambit of these statutes, **Brookline** substantially complied with the procedural requirements of both. **Brookline** also repeatedly draws attention to the fact that Neighborhood Conservation District bylaws have been adopted in other Massachusetts municipalities as general **town** bylaws, as they are seen as an effective alternative to more traditional means of regulation.<sup>36</sup>

#### I. THE NCD BYLAW IS PROPERLY CHARACTERIZED AS A ZONING BYLAW AND WAS INVALIDLY ADOPTED AS A GENERAL BYLAW

\*8 **Towns** may enact “by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature in accordance with ... [art. 89, § 8, of the Amendments to the Constitution].” *Board of Appeals of Hanover v. Housing Appeals Comm. in the Dept. of Community Affairs*, 363 Mass. 339, 360, 294 N.E.2d 393 (1973). A municipality's zoning power is “one category of the more general police power, concerned specifically with the regulation of land use,” and an exercise of its zoning power must adhere to the procedural requirements of G. L. c. 40A.

 *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368

Mass. 385, 392 n.4, 331 N.E.2d 910 (1975). A municipality cannot utilize its general police power to enact a bylaw which is, at its essence, a zoning regulation, if it does not resort to G. L. c. 40A; doing so would frustrate the purpose and implementation of the statute. See *id.* As previously noted by this court, “[t]he reason for this is that zoning bylaws have different, stricter requirements for enactment than general bylaws. A zoning bylaw must be reviewed by the planning board in a public hearing and then reported on by the board, and, crucially, may only be enacted by a two-thirds vote of **town** meeting. General bylaws have no such requirements—they may be enacted by a majority vote.” *Valley Green Grow, Inc. v. Town of Charlton*, 27 LCR supra, at 105 (internal citations omitted).

**Brookline** impermissibly evaded these stricter requirements in a circumstance where they were necessary. **Brookline's** NCD Bylaw is, in its fundamental substance, a creature of zoning. It regulates subject matter falling within both the traditional definition of zoning as well as the existing purview of the **Brookline** Zoning Bylaw. Despite this, **Brookline** enacted the NCD Bylaw as a general **town** bylaw, and made no attempt to follow the particular procedures laid out in G. L. c. 40A. Accordingly, having failed to strictly comply with the requirements for enactment of a zoning bylaw, Section 5.10 of the **Brookline** General Bylaws is invalid, and of no force and effect.

#### *A. The NCD Bylaw Addresses Subjects Traditionally Classified as Zoning Under Chapter 40A*

The NCD Bylaw has the purpose and effect of regulating subject matter traditionally falling under the ambit of zoning. This is a significant factor indicating that a bylaw is governed by G. L. c. 40A, and must be enacted pursuant to its procedural requirements. In *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, supra, 368 Mass. at 391, 331 N.E.2d 910, the Supreme Judicial Court determined that a bylaw limiting the number of trailer park licenses that the **town** could issue was not a proper exercise of the **town's** general police power, as the “nature and effect of the ... bylaw is that of an exercise of the zoning power.” It noted that “similar by-laws have been adopted in the past by municipalities as zoning by-laws,” and that “[t]here seems little doubt that the 1971 by-law could be viewed within the scope of the **town's** zoning power.” *Id.* On the opposite side of the same coin, in *Lovequist v. Conservation Commissioner of Dennis*, 379 Mass. 7, 13, 393 N.E.2d 858 (1979), the court held that it

was not improper for the **town** of Dennis to enact a wetlands bylaw through its police power rather than as a zoning bylaw; and like in *Rayco*, the court's analysis looked in part to the universe of subject matter conventionally regulated by zoning. It noted that the bylaw was not a “zoning measure for the reason that [it] manifests neither the purpose nor the effects of a zoning regulation. The Dennis by-law does not prohibit or permit any particular listed uses of land or the construction of buildings or the location of businesses or residences in a comprehensive fashion. On its face it does not deny or invite permission to build any structure. It does not regulate density.” *Id.* The Court further elaborated that the wetlands values protected by the bylaw (such as water supply, groundwater, and flood control) were not “typical of the concerns usually reflected in the zoning process,” which instead included such things as “the character of the community and compatibility of nearby land uses.” *Id.*

**Brookline** relies heavily on *Lovequist*, citing to the proposition therein that “[w]e do not consider all ordinances or by-laws that regulate land use to be zoning laws,” and arguing that the NCD Bylaw regulates land use in a manner that need not be classified as zoning. It is true that the court in *Lovequist* recognized that “municipal regulations that simply overlap with what may be the province of a local zoning authority” do not necessarily need to be “treated as zoning enactments which must be promulgated in accordance with the requirements of G. L. c. 40A.” *Id.* at 14, 393 N.E.2d 858. However, the court made clear that such overlap was permissible in circumstances where “we think it manifest that [the bylaw] is not a zoning regulation.” *Id.* Cf. *American Sign & Indicator Corp. v. Framingham*, 9 Mass. App. Ct. 66, 69, 399 N.E.2d 41 (1980) (sign bylaw's “overlap with what may be the province of a local zoning authority” did not require it to be enacted as a zoning regulation where it “ ‘manifests neither the purpose nor the effects of a zoning regulation’ and does not involve most of the typical concerns reflected in zoning laws”); *Hamel v. Bd. of Health of Edgartown*, 40 Mass. App. Ct. 420, 422, 664 N.E.2d 1199, (1996) (board of health sewage flow regulation which overlapped with zoning's use regulations was permissible where the purpose and effect was “the maintenance of safe drinking water in the geographical area concerned.”). Here, the NCD Bylaw does not incidentally overlap with the domain of zoning while embodying a different purpose and effect.

Instead, the NCD Bylaw usurps that domain wholesale, purpose, effect, and mechanisms all.

\*9 All that the Dennis bylaw in [Lovequist](#) was not, the NCD Bylaw is. The essential focus of the NCD Bylaw's purpose clause is the protection of the “character of the town and its neighborhoods” as established by the physical and aesthetic characteristics of its structures and layout. This loudly echoes the central objectives of zoning. Zoning primarily operates to “balanc[e] rights or privileges of use with the character of neighborhoods, a task which necessarily calls into play issues of size, location, setback, traffic, and the sundry other matters addressed in local land use and zoning bylaws and ordinances.” [Rogers v. Town of Norfolk](#), 432 Mass. 374, 382, 734 N.E.2d 1143 (2000). Protecting the character of the neighborhood as reflected in its physical structures is indeed a familiar refrain in the context of zoning. See [Lovequist v. Conservation Com. of Dennis](#), supra, 379 Mass. at 14, 393 N.E.2d 858 (“[T]he character of the community and the compatibility of nearby land uses” is a “typical concern[ ] usually reflected in the zoning process.”); [Trustees of Tufts College v. City of Medford](#), 415 Mass. 753, 758, 616 N.E.2d 433 (1993) (“[P]reserving the character of an adjacent neighborhood” is one of the “purposes sought to be achieved by local zoning”); [Emond v. Board of Appeals of Uxbridge](#), 27 Mass. App. Ct. 630, 632, 541 N.E.2d 380 (1989) (“[T]o preserve the character of ... the neighborhood is one of the ‘broad purposes of zoning’ ”); [Fabiano v. City of Boston](#), 49 Mass. App. Ct. 281, 286, 730 N.E.2d 311 (2000) (the goal of “preserv[ing] within reason the historic residential character of the [neighborhood] ... is a goal surely within the purview of the [Boston zoning] enabling act.”).

The NCD Bylaw's mimicry of conventional zoning is likewise apparent in the content and effect of its substantive provisions. “[Z]oning ordinances or by-laws govern ‘the use of land and the size, location and use of buildings.’ ” [Hamel v. Bd. of Health of Edgartown](#), supra, 40 Mass. App. Ct. at 422, 664 N.E.2d 1199, quoting [MacGibbon v. Board of Appeals of Duxbury](#), 356 Mass. 635, 636, 255 N.E.2d 347 (1970). As provided in the Act of the Legislature revamping G. L. c. 40A, St. 1975, c. 808 § 2A, zoning bylaws achieve the purposes of zoning by regulating such subjects as “size, height, bulk, location, and use of structures ...; areas and dimensions of land ... to be occupied or unoccupied by uses

and structures, courts, yards and open spaces; ... and the development of the natural scenic and aesthetic qualities of the community.” The court in [Lovequist](#) itself helpfully identified a number of characteristics of conventional zoning, including regulation of density, uses of land, construction and location of structures, as well as provision of a means to apply for permission to build structures. See [Lovequist v. Conservation Com. of Dennis](#), supra, 379 Mass. at 13, 393 N.E.2d 858.


Here, the NCD Bylaw's definition of “Reviewable Project” itself makes clear that the NCD Bylaw is indeed almost entirely concerned with the construction and siting of buildings. Its provisions go on to provide for regulation of the dimensional characteristics of such reviewable projects in order to manage the neighborhood's density and physical character: at the heart of the NCD Bylaw are the NCD Commission's powers to regulate “alterations, additions, demolition and new construction, and its powers to consider “without limitation” features including “design, massing, topography, scale and materials ... green spaces, open spaces, courtyards, landscapes, neighborhood and subdivision plans and layouts” among others.<sup>37</sup> The [Hancock Village](#) NCD even raids the traditional zoning toolbox for particular dimensional controls, such as the delineation of specific height, setback, and open space regulations.<sup>38</sup> There can be no question that, unlike the bylaw in [Lovequist](#), the NCD Bylaw has “the purpose [and] the effects of a zoning regulation.” [Lovequist v. Conservation Com. of Dennis](#), supra, 379 Mass. at 13, 393 N.E.2d 858.<sup>39</sup>

#### *B. The NCD Bylaw Addresses Subjects Already Governed by the Brookline Zoning Bylaw*

\*10 The second factor compelling the conclusion that the NCD Bylaw falls within the scope of Chapter 40A is the fact that its subject matter has, in fact, been previously regulated in [Brookline](#) by the Zoning Bylaw. “If the municipality has a history of regulating that subject matter through its zoning bylaw, then it can only be further regulated through the zoning bylaw, not through a general municipal bylaw.” [Valley Green Grow, Inc. v. Town of Charlton](#), supra, 27 LCR at 105. In [Rayco](#), the court considered it “significant that prior to the adoption of the 1971 by-law the town's zoning by-law dealt specifically with the subject of trailer parks,” and that “the zoning by-law purported to cover this subject in a comprehensive fashion and it follows that



the 1971 by-law necessarily modified the earlier by-law.”

 *Rayco Inv. Corp.*, supra, 368 Mass. at 393, 331 N.E.2d 910. Similarly, in *Spenninhauer v. Town of Barnstable*, 80 Mass. App. Ct. 134, 140, 951 N.E.2d 967 (2011), the town adopted a general ordinance, not a zoning bylaw, regulating the subject of parking. The Appeals Court noted that the town had “historically regulated off street parking through its zoning bylaws, not its general ordinances or bylaws,” and did indeed have a “comprehensive bylaw regulating parking” enacted through its zoning power. *Id.* The new parking bylaw, by comparison, was intended to address the impact of parking on the “character and quality of the town’s neighborhoods, precisely the target at which the town’s zoning ordinance is so thoroughly and comprehensively aimed.” *Id.* at 141, 951 N.E.2d 967. Accordingly, the court concluded that “the challenged ordinance is a matter for regulation through the town’s zoning power, not through its use of a general ordinance.” *Id.*



Given the above conclusion that the NCD Bylaw regulates subject matter conventionally at the heart of zoning, it is unsurprising that those subjects are, in fact, already comprehensively governed by the Brookline Zoning Bylaw. The Zoning Bylaw’s stated purposes reflect those expressly outlined in the NCD Bylaw – of particular note are the purposes of “encouraging the preservation of historically and architecturally significant structures” and “providing for adequate open space, including landscaped and usable open space, public shade trees and other landscape and natural features.”<sup>40</sup>

The mechanisms by which the NCD Bylaw sets out to achieve these objectives replicate, and indeed replace, those already present in the Zoning Bylaw. Table 5.01 of the Zoning Bylaw contains the typical dimensional controls, common across all zoning ordinances and bylaws, which regulate height, setbacks, open space, and density of construction in the town. These provisions are intended to control the massing, scale, and siting of structures and buildings. The NCD Bylaw displaces the Zoning Bylaw by generally empowering the NCD Commission to set its own requirements related to precisely these same categories. Section 5.10.3.c allows the Commission to “impose dimensional requirements that further the purposes of this by-law, including without limitation preventing Reviewable Projects inconsistent with the historic or architectural aspects, scale or massing, neighborhood or subdivision plan or layout, circulation patterns, or green space, open space, landscape, vegetation

or viewshed character of the NCD.”<sup>41</sup> Section 5.10.3.d.1 goes even further to impose its own version of particular dimensional controls already expressly provided in the Zoning Bylaw: it requires 80% open space, a 100 foot setback,<sup>42</sup> and a maximum building height of two and a half stories,<sup>43</sup> thus baldly supplanting the dimensional requirements set forth in Table 5.01 of the Zoning Bylaw. The NCD Bylaw’s usurpation of the Zoning Bylaw’s domain is made expressly clear by the concluding statements in both Section 5.10.11 and 5.10.3.d that, where the NCD Bylaw imposes stricter requirements than other bylaws, the NCD Bylaw shall prevail.<sup>44</sup>

In fact, in replacing baseline dimensional requirements for a designated locale, the NCD Bylaw appears to operate in a similar manner to a mechanism already contained with the Zoning Bylaw – the creation of Special Districts. Pursuant to Section 5.06 of the Zoning Bylaw, the town may establish Special Districts encompassing certain areas of the town; these are meant to address “unique land use, environmental, architectural and other physical conditions” of certain neighborhoods which require particularized regulation. To address these factors, Special Districts are subjected to dimensional requirements which differ from those otherwise imposed by Table 5.01. Thus, not only is the imposition of generalized dimensional controls the province of the Zoning Bylaw, but even the act of designating special areas for particularized regulation is as well. The NCD Bylaw cannot usurp this power by filling geographic holes which have purposefully been left free of such particularized regulation. Brookline’s argument that its NCD districts “supplement” the Zoning Bylaw is no different from the town’s unavailing argument in *Spenninhauer* that, because the “detailed and extensive” parking regulations in the zoning bylaw did not apply to single family homes, parking for that use could be properly regulated by a supplementary general bylaw. The court in *Spenninhauer* rejected this, holding that the framework’s inapplicability to a particular use “does not create a hole the town can fill through enactment of general ordinances.” *Spenninhauer v. Town of Barnstable*, supra, 80 Mass. App. Ct. at 140, 951 N.E.2d 967.

\*11 In sum, the NCD Bylaw’s imposition of its own dimensional requirements – whether discretionarily crafted by the Commission, or delineated by the bylaw itself – regulates a field already comprehensively addressed by the Zoning Bylaw, and for precisely the same purpose. Though Brookline contends that the NCD Bylaw’s regulation of these


subjects permissibly supplements the Zoning Bylaw because it is tailored to specific neighborhoods, this argument employs “supplement” as a euphemism for “supplant.” They expressly regulate the same subject matter, and the NCD Bylaw serves to effectively replace the Zoning Bylaw's requirements. As in  *Rayco*, the NCD Bylaw's effect is to “necessarily modif[y]” the zoning bylaw in such a way that it “ought to be considered as an amendment to the zoning by-law.”  *Rayco Inv. Corp.*, *supra*, 368 Mass. at 394, 331 N.E.2d 910.


## II. THE NCD BYLAW IMPERMISSIBLY INVADES THE PROVINCE OF CHAPTER 40C

**Brookline** next points to the fact that, apart from its dimensional regulations, the NCD Bylaw also regulates aesthetic architectural and landscaping elements through “design guidelines.” It contends that design has been traditionally regulated through **Brookline's** general bylaws, rather than the Zoning Bylaw, as the latter only regulates such aesthetic and design elements for certain uses or structures or in certain areas of the **town**. Therefore, it argues, the subject matter regulated by the NCD Bylaw does not overlap with that of the Zoning Bylaw. Nor does it, **Brookline** contends, improperly overlap with G. L. c. 40C's regulation of historic districts, but instead acts as a permissible alternative to the manner of regulation envisioned by that statute. Even assuming that the NCD Bylaw's “design guidelines” could be practically severed from its dimensional regulations – a highly unlikely proposition, given the manner in which they are closely intertwined – the **town's** contention that they are permissible subjects of the **town's** general police power is still unavailing, as they do indeed intrude upon the domain of G. L. c. 40C.

First, it should be noted that the Zoning Bylaw does itself regulate design to a certain degree. Section 5.06 of the Zoning Bylaw imposes Special District Regulations on certain designated Special Districts in the **town**; these address “unique land use, environmental, architectural and other physical conditions” of particular neighborhoods which require further regulation. Not only do these Special District regulations alter the dimensional requirements to which the district would otherwise be subject, but they also subject an applicant to design review pursuant to Section 5.09 of the Zoning Bylaw. Section 5.09's Design Review Guidelines provide for “individual detailed review of certain uses and structures which have a substantial impact upon the character of the **Town**....” This requires the Planning Board to submit design recommendations to the Board of Appeals, which must

then consider those recommendations as an additional factor when reviewing special permit applications. This design review includes consideration of “historic, traditional or significant uses, structures or architectural elements.” For one particular district, it provides that “any new structure shall be harmoniously related to nearby pre-existing structures and the street façade in terms of color, texture, materials, scale, height, setbacks, roof and cornice lines, signs, and design elements ....”<sup>45</sup>


Plaintiff nonetheless agrees that the preservation of historic architectural design elements is indeed “more definitively”<sup>46</sup> regulated under Section 5.6 of the **town's** general bylaws, titled “Preservation Commission and Historic Districts Bylaw,”<sup>47</sup> than by the Zoning Bylaw. **Brookline** likewise points to this section as proof that the NCD Bylaw's proper place is amongst the **town's** general bylaws.<sup>48</sup> However, the appearance of historic district regulation in the **town's** general bylaws does not open the door to unrestrained regulation of the subject under the **town's** home rule power, because Section 5.6 was enacted pursuant to and is governed by G. L. c. 40C. The NCD Bylaw's regulation of historic design mimics that statute, and must likewise follow its necessary procedures. **Brookline**, contending that it did not have to follow the procedural requirements for adoption of a historic district bylaw as provided by G. L. c. 40C, §§ 3 and  4, does not argue that it has complied with those requirements.

\*12 G. L. c. 40C pursues the “preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth and its cities and **towns** or their architecture....” G. L. c. 40C, § 2. Similar to G. L. c. 40A's mandate allowing **towns** to establish zoning districts only pursuant to specified procedures, G. L. c. 40C states that “[a] city or **town** may, by ordinance or by-law adopted by two-thirds vote ... establish historic districts subject to” a number of procedural requirements that must be followed “[p]rior to the establishment of *any historic district*.” G. L. c. 40C, § 3. (emphasis added) It is true that “[Chapter 40C] gives municipalities unfettered discretion whether to establish a historic district and, if so, what lands, buildings, and structures to include in that district.”  *Springfield Preservation Trust, Inc. v. Springfield Library & Museums Ass'n*, 447 Mass. 408, 419, 852 N.E.2d 83 (2006). However, if a municipality does choose to establish a historic district, it must follow the statutory procedures for doing so.<sup>49</sup>


The practical framework of G. L. c. 40C provides that no building permit shall issue in a historic district “for alteration of an exterior architectural feature” without a certificate of appropriateness, certificate of non-applicability, or certificate of hardship. G. L. c. 40C, § 6. In determining whether an alteration is historically appropriate,

the commission shall consider, among other things, the historic and architectural value and significance of the site, building or structure, the general design, arrangement, texture, material and color of the features involved, and the relation of such features to similar features of buildings and structures in the surrounding area. In the case of new construction or additions to existing buildings or structures the commission shall consider the appropriateness of the size and shape of the building or structure both in relation to the land area upon which the building or structure is situated and to buildings and structures in the vicinity, and the commission may in appropriate cases impose dimensional and setback requirements in addition to those required by applicable ordinance or by-law.

#### G. L. c. 40C, § 7.

The regulation of architectural design for the purposes of historic preservation under this framework, and under the comparable framework provided in **Brookline's** Preservation Commission and Historic Districts Bylaw, is no different from the regulation of design provided by the NCD Bylaw. Section 5.10.3.d.1 begins by articulating the history of the **Hancock Village** neighborhood, and describes the particulars of its historic architectural design. In addition to the dimensional requirements described above, the NCD Bylaw's substantive design guidelines govern the same exterior design features covered by  G. L. c. 40C, § 7; and, like the statute, the NCD Bylaw requires evaluation of those features for compatibility with the surrounding neighborhood's historical character. It




provides for this evaluation with the aim of “preserving and protecting groups of buildings and their settings that are architecturally or historically significant,” which again directly mirrors the purpose set forth in G. L. c. 40C, § 2. It even calls for the same manner of approval – a “Certificate of Appropriateness” – as appears in the statute. Although **Brookline** contends that the NCD Bylaw differs in that it “allows **Brookline** to address issues beyond the scope of M.G.L. c. 40C,” the additional issues it lists – “landscape and urban issues such as protection of landscapes, open spaces, viewsheds”<sup>50</sup> – are simply the very same issues which themselves improperly fall within the purview of the Zoning Bylaw and G. L. c. 40A, as described above. A bylaw cannot escape categorization under either statute by packaging the content of one along with the other.


\*13 The unavoidable conclusion is that, with regard to exterior design elements, the NCD Bylaw establishes a historic district of the type specifically envisioned by G. L. c. 40C. Accordingly, by purporting to enact the NCD Bylaw pursuant to **Brookline's** general home rule power, but without following the procedural requirements G. L. c. 40C, **Brookline** has frustrated that statute's purpose. See *Board of Appeals of Hanover v. Housing Appeals Comm.*, *supra*, 363 Mass. at 360, 294 N.E.2d 393. **Brookline** contends that G. L. c. 40C does not occupy the field of historic preservation, and that the NCD Bylaw may therefore regulate historic preservation without conforming to the requirements of the statute. As support for this contention, **Brookline** cites no applicable authority other than the Attorney General's memorandum, which itself concluded without citation to any precedent that G. L. c. 40C “neither explicitly or implicitly preempts other types of by-laws aimed at architectural or historic preservation.”<sup>51</sup> There is no apparent reason, however, why the interaction between a municipality's general home rule power and the statutory scheme provided in G. L. c. 40C should differ in any way from the interaction between that power and the statutory scheme of G. L. c. 40A. The principles articulated in  *Rayco* and *Spennlinhauer* apply just as much in the context of the former as they do in the latter. It might be so that the entire field of historic preservation, speaking broadly, is not preempted by G. L. c. 40C; however, it is not so difficult to determine that a **town** bylaw which singles out a district for historic preservation, utilizes a mechanism identical to that of G. L. c. 40C, does so for the same professed purpose, and does so in a **town** that has already accepted G. L. c. 40C, has trespassed on the purview of the statute. Were it otherwise, the statute's provision of

procedural requirements for the creation of a historic district would be meaningless, as municipalities could avoid them at will.





Accordingly, even if the NCD Bylaw's regulation of historic architectural design does not fall under the umbrella of G. L. c. 40A and the Zoning Bylaw, it is functionally identical to the historic districts governed by G. L. c. 40C, and would therefore in any event be required to follow that statute's procedural requirements for enactment.

### III. THE ENACTMENT OF THE NCD BYLAW FAILED TO COMPLY WITH THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF CHAPTER 40A AND CHAPTER 40C

Because the NCD Bylaw's dimensional regulations are, in purpose and effect, an amendment to the **Brookline** Zoning Bylaw, the bylaw can only be valid if enacted pursuant to the procedures of G. L. c. 40A. It was not. **Brookline** argues that the process “substantially complied”<sup>52</sup> with the provisions of G. L. c. 40A, and that this is sufficient to sustain the bylaw. It is not. In *Canton v. Bruno*, 361 Mass. 598, 603, 282 N.E.2d 87 (1972), the Supreme Judicial Court expressly rejected this same argument, then advanced by the **town** of Canton, that “substantial compliance” was sufficient to satisfy the procedural requirements of the predecessor statute to  G. L. c. 40A, § 5. Interpreting the same language that now appears in the current text of  § 5, it held that “the Legislature mandated a rule of strict compliance by the plain language ‘[Zoning] ordinances or by-laws may be adopted ... but only in the manner ... provided’ ....” *Canton v. Bruno*, supra, 361 Mass. at 598, 282 N.E.2d 87. See *Penn v. Town of Barnstable*, 26 LCR 215, 217 (2018) *Penn v. Town of Barnstable*, 26 LCR 215, 217 (2018) (Vhay, J.). Cf. *McIntyre v. Selectmen of Ashby*, 31 Mass. App. Ct. 735, 739, 584 N.E.2d 1137 (1992) (noting that  G. L. c. 40, § 21(17), which authorizes earth-removal ordinances, was enacted “to avoid the involved and strict procedural requirements for adopting or amending zoning ordinances and by-laws ....”).

**Brookline** asserts that the numerous **town** and board meetings held concerning the NCD Bylaw were more than sufficient to provide notice and procedural protection equivalent to that available under Chapter 40A. Strict compliance, however, brooks no equivalence. It is not in dispute that **Brookline** failed to strictly comply<sup>53</sup> with the provisions of  G. L. c. 40A, § 5; accordingly, Section 5.10 of the **Brookline** General Bylaws, as enacted by the passage of Warrant Articles 5

and 6, cannot stand. Similarly, the NCD Bylaw failed to comply with G. L. c. 40C's procedural requirements for enactment. These failures include, among others, the failure to give written notice of the public hearing on the required report of a study committee at least fourteen days prior to the date of the required hearing. G. L. c. 40C, § 3, ¶ 1. **Brookline's** contention, repeated once more, that it “substantially complied” with the requirements of G. L. c. 40C is just as unavailing the second time as the first. Thus, even if Section 5.10's regulation of historic exterior design in **Hancock Village** were severable from its dimensional regulations, the bylaw still could not survive.

\*14 Of course, even had the **town** complied with the procedural requirements for the adoption of a zoning bylaw in  G. L. c. 40A, § 5, the bylaw as passed is invalid because it fails to include or incorporate (as was the **town's** apparent intention) the many substantive protections and mechanisms of G. L. c. 40A. The NCD Bylaw, purporting to be a general bylaw, provides no protection for prior nonconforming uses or lots as required by  G. L. c. 40A, § 6; it does not recognize the zoning freeze provisions of the same section; it does not provide for zoning relief to be granted in the form of special permits or variances, but instead substitutes types of approvals and relief not sanctioned by G. L. c. 40A; it institutes as the local board granting approvals a commission composed in a manner not recognized or sanctioned by G. L. c. 40A; it does not provide for the notice or hearing requirements required by G. L. c. 40A, §§ 11 and  15; and perhaps most egregiously, by providing no specific avenue of appeal, it provides for what is only a limited record review by an action in the nature of certiorari instead of the more robust de novo review required by  G. L. c. 40A, § 17.

### IV. THE NCD BYLW VIOLATES THE UNIFORMITY PROVISIONS OF G. L. c. 40A, § 4

Aside from its invalidity for failure to utilize the procedural requirements for adoption of a zoning bylaw, and its failure to include the substantive protections, noted above, required to be included in every zoning bylaw, the NCD Bylaw is also invalid because it violates the uniformity principles that are fundamental to the validity of any zoning laws, and which are required by G. L. c. 40A, § 4. Pursuant to that section, “[a]ny zoning ordinance or by-law which divides cities and **towns** into districts shall be uniform within the district for each class or kind of structures or uses permitted.” G. L. c. 40A, § 4. A bylaw fails to provide uniformity where it is so



general in its grant of powers as to effectively provide a permit granting authority with unbridled discretion to fashion its own requirements on an ad hoc basis. See *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 108, 472 N.E.2d 269 (1984); *Fafard v. Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 572, 672 N.E.2d 21 (1996). Such an improper delegation of legislative power results in a scheme in which criteria are “devised for the occasion, rather than of uniform applicability.” *Id.* at 572, 672 N.E.2d 21.

The seminal example of a violation of uniformity is provided by *SCIT v. Planning Board of Braintree*, where a town's zoning bylaw rendered every use in a particular district subject to a special permit, with the only rubric for consideration being the bylaw's general purpose clause. See *SCIT, Inc. v. Planning Bd. of Braintree*, supra, 19 Mass. App. Ct. at 103-108, 472 N.E.2d 269. The Appeals Court found this to be invalid, holding that § 4 “does not contemplate ... conferral on local zoning boards of a roving and virtually unlimited power to discriminate” between different applications. *Id.* at 108, 472 N.E.2d 269. The bylaw violated the uniformity requirement of § 4 because “[i]t attempted to delegate to the board ... a new power to alter the characteristics of zoning districts, a power conferred ... only upon the legislative body of the city to be exercised only in the manner prescribed by [G. L. c. 40A] ... and it attempted to do this without furnishing any principles or rules by which the board should be guided, leaving the board unlimited authority to indulge in ‘spot zoning’ at its discretion or whim.” *Id.*, quoting *Smith v. Board of Appeals of Fall River*, 319 Mass. 341, 344, 65 N.E.2d 547 (1946). Cf. *Salvadore v. Town of Westborough*, Case No. 97-0547, 2002 WL 1554586, at \*4, 2002 Mass. Super. LEXIS 199, at \*3 (May 22, 2002) (bylaw which provided for adoption of dimensional requirements on a case-by-case basis for municipal structures was valid; though “structures in other zones, such as single-family residences, commercial or industrial structures” are amenable to uniform requirements, municipal uses – such as water towers and fire stations – are not).

The requirement for uniformity is not limited to zoning bylaws subject to G. L. 40A, § 4, but extends to other exercises of the police power as well. “In the administration of controls limiting the use of land – as with any exercise of the police power – uniformity of standards and enforcement

are of the essence.” *Fieldstone Meadows Dev. Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 267, 816 N.E.2d 141 (2004), quoting *Fafard v. Conservation Comm'n of Reading*, supra, 41 Mass. App. Ct. at 569, 672 N.E.2d 21. For example, in *Fieldstone Meadows*, supra, 62 Mass. App. Ct. at 267 n.5, 816 N.E.2d 141, a conservation commission administering a local wetlands bylaw employed a policy prohibiting construction within twenty-five feet of bordering vegetated wetlands. This requirement was, however, not specifically laid out within the actual regulatory framework; moreover, it “provide[d] that ‘special justification’ could be advanced for proposals for building within the twenty-five foot zone.” The court held that this policy did not provide uniformity of application, and was a legally insufficient basis for the commission's denial. *Id.*, at 270, 816 N.E.2d 141.

\*15 Nonetheless, discretion in applying dimensional requirements is not *per se* delegation of authority resulting in a violation of the uniformity principle; it is only when a board's discretion is truly unrestrained that uniformity is threatened. In *Emond v. Board of Appeals of Uxbridge*, supra, 27 Mass. App. Ct. at 632, 541 N.E.2d 380, a provision of the bylaw permitted the board to grant special permits for lots with less frontage or area than required by the bylaw's dimensional requirement, as long as the lots were “in neighborhoods where there is a general pattern of house lots that deviate similarly ....” The court found no violation of § 4: “The by-law does not give the board unlimited discretion.... Adjustments to conform zoning standards to the circumstances of particular fact situations need not, we think, be made exclusively by establishing zoning districts on a neighborhood by neighborhood basis. Authorizing adjustments by special permit, subject to clear and uniform standards, does not violate the uniformity requirement of G. L. c. 40A, § 4.” *Id.* See also *MacGibbon v. Board of Appeals of Duxbury*, supra, 356 Mass. at 638, 255 N.E.2d 347 (“The by-law confers a measure of discretionary power to the board, but it does not confer unrestrained power to grant or withhold special permits by the arbitrary exercise of that discretion.”).

Here, the NCD Bylaw goes too far in delegating what is, in effect, an unrestrained power to legislate ad hoc zoning requirements. In particular, Section 5.10.3.c missteps in affording the Commission the general power to conjure up whatever dimensional requirements it sees fit on a case-by-

case basis. Section 5.10.3.c states, “The Commission may impose dimensional requirements that further the purposes of the by-law, including without limitation preventing Reviewable Projects inconsistent with the historic or architectural aspects, scale or massing, neighborhood or subdivision plan or layout, circulation patterns, or green space, open space, landscape, vegetation or viewshed character of the NCD.” Like the bylaw in *SCIT*, this provides virtually unlimited discretion, guided only by very general statements of purpose, to create dimensional zoning requirements from whole cloth, and to do so on a case-by-case basis, resulting in the very antithesis of uniform application.<sup>54</sup> See *SCIT, Inc. v. Planning Bd. of Braintree*, supra, 19 Mass. App. Ct. at 108, 472 N.E.2d 269. And, it provides not just the power to tweak the numerical element of a set dimensional constraint – such as *Emond’s* downward adjustment of the frontage requirement – but also the power to create whatever new categories and types of dimensional constraints the Commission might imagine. Unlike *Emond*, the ability of the Commission to discretionarily create and impose its own dimensional requirements deprives the bylaw of the “clear and uniform standards” which must necessarily be articulated in the bylaw itself. *Emond v. Board of Appeals of Uxbridge*, supra, 27 Mass. App. Ct. at 632, 541 N.E.2d 380. The NCD Bylaw suffers from this deficiency whether it is classified as a zoning bylaw (as concluded above) or a general bylaw (as contended by *Brookline*).

#### V. THE NCD BYLAW CONSTITUTES IMPERMISSIBLE SPOT ZONING

\*16 A variant of violation of the principle of uniformity required by G. L. c. 40A, § 4 is spot zoning. “Spot zoning involves the singling out for disparate treatment of one parcel of land from similar parcels in the same zoning district.” *Murphy v. City of Springfield*, Case No. 114481, 1987 WL 966132 \*2 (Mass. Land Court, 1987) (Fenton, J.), aff’d 25 Mass. App. Ct. 1121, 522 N.E.2d 1017 (Rule 1:28 Decision). “‘Spot zoning’—singling out a parcel of land for special treatment as compared to other parcels in the same zoning district—is unlawful.” *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 293, 346 N.E.2d 732 (1975). Where a single parcel is re-zoned at the behest of citizens objecting to a particular proposed use of the parcel, such re-zoning violates the uniformity principle and is invalid spot zoning.

*Scherzter v. City of Somerville*, 345 Mass. 747, 752, 189 N.E.2d 555 (1963).

A zoning amendment “will be sustained unless there exists no substantial relation between it and the expressed purposes of [G. L. c. 40A].” *Id.* at 751, 189 N.E.2d 555. “If the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body (here the zoning commission of Boston) should be sustained and the reviewing court should not substitute its own judgment. Nevertheless, a zoning ordinance or by-law will be held invalid if it is unreasonable or arbitrary, or substantially unrelated to the public health, safety, convenience, morals or welfare.” *National Amusements, Inc. v. City of Boston*, 29 Mass. 305, 309-310, 560 N.E.2d 138 (1990) *National Amusements, Inc. v. City of Boston*, 29 Mass. 305, 309-310, 560 N.E.2d 138 (1990) (citations omitted).

The re-zoning of a single lot of land “at the instigation of citizens who objected to a particular proposed business use,” setting it apart from other similar adjacent uses, “constitute[s] arbitrary and unreasonable action.” *Scherzter v. City of Somerville*, supra, 345 Mass. at 752, 189 N.E.2d 555. This is so even if the target site of the re-zoning is large enough that it would not ordinarily be unreasonable for it to be treated as a subject of re-zoning. In *National Amusements, Inc. v. City of Boston* *National Amusements, Inc. v. City of Boston*, the Appeals Court upheld a judgment of the Land Court invalidating the re-zoning of a 13.8-acre parcel from business use to residential, holding that zoning changes, “which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable.” *National Amusements, Inc. v. City of Boston*, supra, 29 Mass. at 312, 560 N.E.2d 138.

There is no doubt that *Brookline’s* purpose in adopting the NCD Bylaw and the *Hancock Village* NCD Bylaw was the same purpose deemed invalid in *Scherzter* and *National Amusements*: to frustrate a single property owner’s efforts to develop a particular use on its property. See *Scherzter v. City of Somerville*, supra, 345 Mass. at 752, 189 N.E.2d 555; *National Amusements, Inc. v. City of Boston*, supra, 29 Mass. at 312, 560 N.E.2d 138. In August, 2011, the plaintiff submitted an application package to the *town’s* building commissioner seeking a “Major Development Impact Review” for an immediate proposal to build 31 single-family dwellings as well as multi-family housing at *Hancock*

**Village**.<sup>55</sup> An August 29, 2011 memorandum by the building commissioner confirms that the single-family part of the proposal, and probably the multi-family portion as well, could be approved by special permits issued by the board of appeals.<sup>56</sup>

The proposal to adopt the NCD Bylaw and the **Hancock Village** NCD Bylaw followed directly, with, as noted above, an explicit written acknowledgment by the **Brookline** Advisory Committee Subcommittee on Planning and Regulation that “[t]he impetus for [Article 6 of the **Town** Warrant adopting the **Hancock Village** NCD Bylaw] comes from the proposals by [the owner of **Hancock Village**] to add as many as 466 new housing units to **Hancock Village** ... [the owner's] most recent proposal (August 2011) is a major impact project that includes 31 detached single-family houses and 162 units in a multi-family building. The Planning Board, Building Commissioner, Preservation Commission, Department of Public Works (Traffic and Engineering), and Housing Advisory Board all have begun to review the proposal.”<sup>57</sup> The Board of Selectmen also made it abundantly clear that the **town's** intention in adopting Article 6 was to force **Hancock Village** to remain the quaint garden-style apartment complex it has been since first built in 1949. In the Board of Selectmen's “Supplemental Recommendation” to the **Town** Meeting on the subject of Article 6, the Selectmen wrote:

\*17 **Hancock Village** was designed and constructed in accordance with commitments made by the developer John **Hancock** Insurance Company, including not only a commitment that there would be a buffer strip along the side of the land facing Russett and Beverly Roads, but also an agreement that the area would be a “garden **village** type of housing” development, with horizontally divided (as opposed to vertically divided **town**-house type units) not exceeding 25% of the units, with flat roofs not exceeding 25% of the buildings, with building coverage not exceeding 20% of the area, and with no building over 2 stories in height.

...

The design guidelines in Article 6 are intended to ensure that the development and alterations within the **Hancock Village** area are compatible with the existing neighborhood and abutting properties ... to provide “an additional layer of protection for existing residents of **Hancock Village** and its immediate surroundings.”<sup>58</sup>

These explicit acknowledgments of the purpose of the proposed warrant articles, coming from the committee charged with reviewing the proposed warrant articles prior to their consideration by the **town** meeting and from the board of selectmen, in combination with the surrounding undisputed circumstances of the adoption of Warrant Articles 5 and 6, including their timing in light of **Hancock Village's** submission of its development proposal,<sup>59</sup> compel the inference that in adopting the two NCD bylaws, “the **town** was concerned only with blocking the plaintiff[s] development.” *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, 399 Mass. 771, 779, 506 N.E.2d 1152 (1987). Where the undisputed record allows the court to draw such an inference, the **town's** action, even adopted by **town** meeting, may be invalidated. *Id.* (facially valid eminent domain taking for park purposes invalidated where undisputed record allowed inference that true purpose was to block proposed G. L. c. 40B development).

The NCD Bylaw and the **Hancock Village** NCD Bylaw, although facially not adopted as zoning amendments, were, for the reasons stated above, bound to comply with the principles governing the adoption of zoning amendments, and also for the reasons stated above, violated the requirements for uniformity that prohibit spot zoning.

## CONCLUSION

For the foregoing reasons, the plaintiff's Motion for Summary Judgment is ALLOWED, and the defendant's Motion for Summary Judgment is DENIED. The court need not address the plaintiff's arguments as to the unconstitutional vagueness of the NCD Bylaw, as it invalid for the independent grounds articulated above. Because it failed to adhere to the procedural and substantive requirements of G. L. c. 40A and G. L. c. 40C, and fails to provide for uniformity of application, the enactment of Warrant Articles 5 and 6 was beyond the scope of the **town's** power and authority, and Section 5.10 of the **Brookline** General Bylaws, in its entirety, is accordingly invalid and of no force and effect.<sup>60</sup> Judgment will enter in accordance with this decision.


## All Citations

Not Reported in N.E. Rptr., 2019 WL 4189357



## Footnotes

- 1 Chico Marx and Groucho Marx, *The Marx Brothers' Monkey Business* (Paramount Pictures 1931); directed by Norman Z. McLeod, screenplay by S. J. Perelman.
- 2 Fifty acres of the plaintiff's property are in **Brookline**; the other 20 acres are in Boston.
- 3 Agreed Facts ¶¶ 1-2, 10.
- 4 Agreed Facts ¶ 12.
- 5 Joint Appendix pp. 784, 1170, 1172.
- 6 Agreed Facts ¶ 21. The exact date on which they were proposed is not in the record.
- 7 Joint Appendix pp. 394-404.
- 8 Complaint Ex. A.
- 9 Agreed Facts ¶ 36; Joint Appendix pp. 394-404.
- 10 Agreed Facts ¶ 27.
- 11 Agreed Facts ¶ 24.
- 12 Agreed Facts ¶¶ 28-29; Supplemental Statement of Agreed Facts ¶¶ 29-29(b).
- 13 Agreed Facts ¶ 32; Joint Appendix pp. 376-389. The Attorney General's letter concluded: "[A]lthough the question is close, we cannot say it is clear that the amendments adopted under Article 5 and 6 were required to be adopted as zoning by-laws. Portions of the amendments reflect the 'nature and effect' of a zoning by-law, but other portions do not. Therefore, based upon the Attorney General's limited scope of review and the presumption of validity of municipal by-laws, we must approve them, as we have in the case of two other **towns** general (not zoning) by-laws creating NCDs. However, we have concerns regarding various provisions of the amendments, as detailed below .... In sum, our review of the amendments adopted under Article 5 reveals that they carry many of the features of a zoning by-law, and an argument could be made that the **Town** has frustrated the purpose of the Zoning Act by not adopting them as such. However, based on the Attorney General's limited standard of review, and because there is no Massachusetts case establishing that such by-laws must be adopted as zoning by-laws, we are constrained to approve them." Joint Appendix pp. 379, 384.
- 14 Agreed Facts ¶ 39; Joint Appendix p. 1170.
- 15 See July 17, 2018 Notice of Docket Entry in *The **Town** of **Brookline** v. **Brookline** Zoning Board of Appeals*, Case No. 15 MISC 000072.
- 16 Agreed Facts ¶ 37.
- 17 Complaint ¶¶ 28-62.
- 18 Joint Appendix pp. 635, 877.
- 19 Joint Appendix pp. 637-638.
- 20 Joint Appendix p. 638.
- 21 Joint Appendix p. 636.
- 22 Joint Appendix pp. 639, 894.
- 23 Joint Appendix pp. 640-641, 897.
- 24 Joint Appendix pp. 637, 879.
- 25 Joint Appendix pp. 652-655, 879-882.
- 26 Joint Appendix pp. 644, 880-881.
- 27 Joint Appendix pp. 645, 881-882.
- 28 Joint Appendix p. 694.
- 29 Joint Appendix pp. 694, 754.
- 30 Joint Appendix p. 759
- 31 Joint Appendix p. 781.
- 32 Joint Appendix pp. 787-789.

- 33 Complaint ¶ 24 (NCD Bylaw will prevent development of 28 lots assessed as single-family lots in single-family zoning district because of imposition of “greenbelt” setback buffer by NCD Bylaw); Complaint ¶ 27 (NCD Bylaw would impact ability to build proposed community center otherwise allowed by local zoning).
- 34 Joint Appendix, p. 1179.
- 35 “The impetus for [the warrant article imposing a Neighborhood Conservation District on **Hancock Village**] comes from proposals by [the owner of **Hancock Village**] to add as many as 446 new housing units to **Hancock Village**/// “Report on Article 6: **Hancock Village** Neighborhood Conservation District.” Joint Appendix pp. 1296-1297.
- 36 In the face of **Brookline's** repeated references to comparable bylaws in other municipalities, the court is compelled to note that its decision in the present case invalidates a section of **Brookline's** bylaw, and **Brookline's** alone; the court passes no judgment on the validity of any other municipality's bylaw, no matter how similar. Those other bylaws are not before the court. The validity of each depends on an analysis of its particulars, and the court is neither inclined nor empowered to undertake such an analysis within the context of the present dispute.
- 37 Section 5.10.1, NCD Bylaw. Joint Appendix p. 875. Although not discussed by the parties, it appears that by purporting to give NCD Commissions the power to regulate “subdivision plans and layouts” the NCD Bylaw also impermissibly invades the exclusive province of the **Brookline** Planning Board under the Subdivision Control Law, *G. L. c. 41, §§ 81K, et seq.* This is another basis of the invalidity of the NCD Bylaw.
- 38 The NCD Bylaw gives the Commission the unfettered discretion to “impose dimensional regulations that further the purposes of this by-law...” Section 5.10.3.c, NCD Bylaw. Joint Appendix p. 879.
- 39 It must be recognized that such regulation of dimensional characteristics is not *always* a function purely of zoning; though zoning must be the default classification of such ordinances, comparable regulation may appear in a non-zoning context when specifically provided by statute.  *G. L. c. 40C, § 7*, for example, does specifically allow a historic commission to “in appropriate cases impose dimensional and set-back requirements in addition to those required by applicable ordinance or by-law.” However, as discussed further below, the NCD Bylaw was not passed pursuant to *G. L. c. 40C* or any other particular statute specifically authorizing this manner of regulation.
- 40 Joint Appendix p. 694.
- 41 Joint Appendix p. 879.
- 42 As the plaintiff correctly points out, the provision prohibiting the “[a]ddition of new impervious surfaces within 100 feet of abutting properties,” though unusual in its wording, operates identically to a traditional setback requirement.
- 43 Sections 5.10.3.d.1.ii.a; 5.10.3.d.1.v.d and e. Joint Appendix pp. 881-882.
- 44 Joint Appendix pp. 891, 899.
- 45 Joint Appendix p. 789, “Specific Standards for Beacon Street and Coolidge Corner General Business District.”
- 46 Plaintiff's Memorandum in Support, p. 55.
- 47 Joint Appendix pp. 851-859.
- 48 **Brookline** points to a number of other general **town** bylaws for the same proposition, but none contain any comparable regulation of architectural design, and need not be addressed in depth. The other general bylaws cited as ostensibly similar to the NCD Bylaw's design regulation include Section 8.26, which regulates storm drains for the purpose of “eliminat[ing] non-stormwater discharges”; Section 8.27, which governs wetlands protection; Section 5.1, regulating the connection of an alarm to a police station; Section 5.2, regulating condominium health and safety; Section 5.4, which governs refuse pick-up; Section 5.8, which regulates signs; and Section 5.9, which adopts the provisions of 780 CMR 120.AA for the construction of energy-efficient buildings.
- 49 That is, provided that the municipality has accepted the provisions of the chapter and it has thereby become effective in the municipality. See *Allen v. Old King's Highway Reg'l Historic Dist.*, 2000 Mass. App. Div. 330, 332 (2000). It is clear that **Brookline** has done so, as it has a historic preservation bylaw passed expressly under *G. L. c. 40C*.

50 Defendant's Memorandum of Law in Response, p. 22.

51 Joint Appendix p. 385.

52 **Brookline's** Memorandum in Response to Plaintiff's Motion for Summary Judgment, p. 14.

53 There appears to be some dispute as to whether the plaintiff complied with a number of § 5 requirements. For example, the plaintiff contends that the Planning Board held a meeting concerning the NCD Bylaw, but it did not hold a "public hearing" as required by § 5, and did not provide proper notice that the meeting's subject matter would be the consideration of a zoning ordinance; **Brookline**, on the other hand, contends that two public hearings were indeed held. A Planning Board memorandum states that "The Planning Board held two meetings on Articles 5 & 6, one of public testimony ... and one for board discussion." Joint Appendix p. 203. There is also no indication in the record of precisely when Articles 5 and 6 were first submitted to the Board of Selectmen, for the purpose of evaluating compliance with the requirement that a Planning Board hearing be held within 65 days of the Articles' submission. Regardless, it has never been in dispute that Articles 5 and 6 were not specifically noticed as an amendment to the Zoning Bylaw; a failure to specifically identify a bylaw as Chapter 40A zoning (let alone what appears to be **Brookline's** concerted effort to emphasize that the NCD Bylaw was *not* zoning, but instead an alternative to zoning) is necessarily a "misleading" defect for the purposes of G. L. c. 40A, § 5 ¶ 2. Moreover, as discussed below, the bylaw likewise fails to comply with G. L. c. 40A's substantive requirements.

54 **Brookline** asserted at oral argument that Section 5.10.3.d.1's provision of particular dimensional requirements for **Hancock Village** meant that the Commission could not craft its own additional dimensional requirements through Section 5.10.3.c, and would be limited to those contained in Section 5.10.3.d. This reading does not comport with the plain meaning apparent in the text. Section 5.10.3.c generally empowers the Commission to "impose dimensional requirements that further the purposes of the by-law" and provides examples of the types of requirements it may impose. Section 5.10.3.d.1, applicable to **Hancock Village** in particular, states that structures "shall be compatible with the existing buildings in the district," and shall not have a "significant negative impact on historical architectural or landscape elements." Although it then provides a number of specific requirements within each of these categories, it states that the categories "shall include, but not be limited to" those specifically-provided requirements. Both 5.10.3.c and Section 5.10.3.d.1 provide the Commission with the discretion to impose its own requirements which do not specifically appear in Section 5.10.3.d.1.

55 Joint Appendix pp. 1169-1170.

56 Joint Appendix pp. 127-129.

57 Joint Appendix p. 1297.

58 Joint Appendix, pp. 632-633.

59 At a public hearing on the proposed warrant articles on September 20, 2011, a member of the Board of Selectmen expressed concern that the NCD might not be passed in time to stop the approval of **Hancock Village's** major project impact review application: "Is any understanding or concern about when this – the – NCD would have to be passed in relation to the building application – the building permit application or the approval of that application? Is there – is there a point at which the fact that we've – declared a NCD is too late in the process?" Joint Appendix p. 136.

60 It must be noted that the **Hancock Village** NCD is not the only NCD to exist as a subsection within the overall framework of Section 5.10: enacted as Section 5.10.3.d.2. is the "Greater Toxteth Neighborhood Conservation District." While the validity of this other NCD was not directly at issue in this case, the necessarily wholesale invalidation of the enabling sections of Section 5.10 for the reasons enumerated above logically precludes the independent survival of that other NCD.

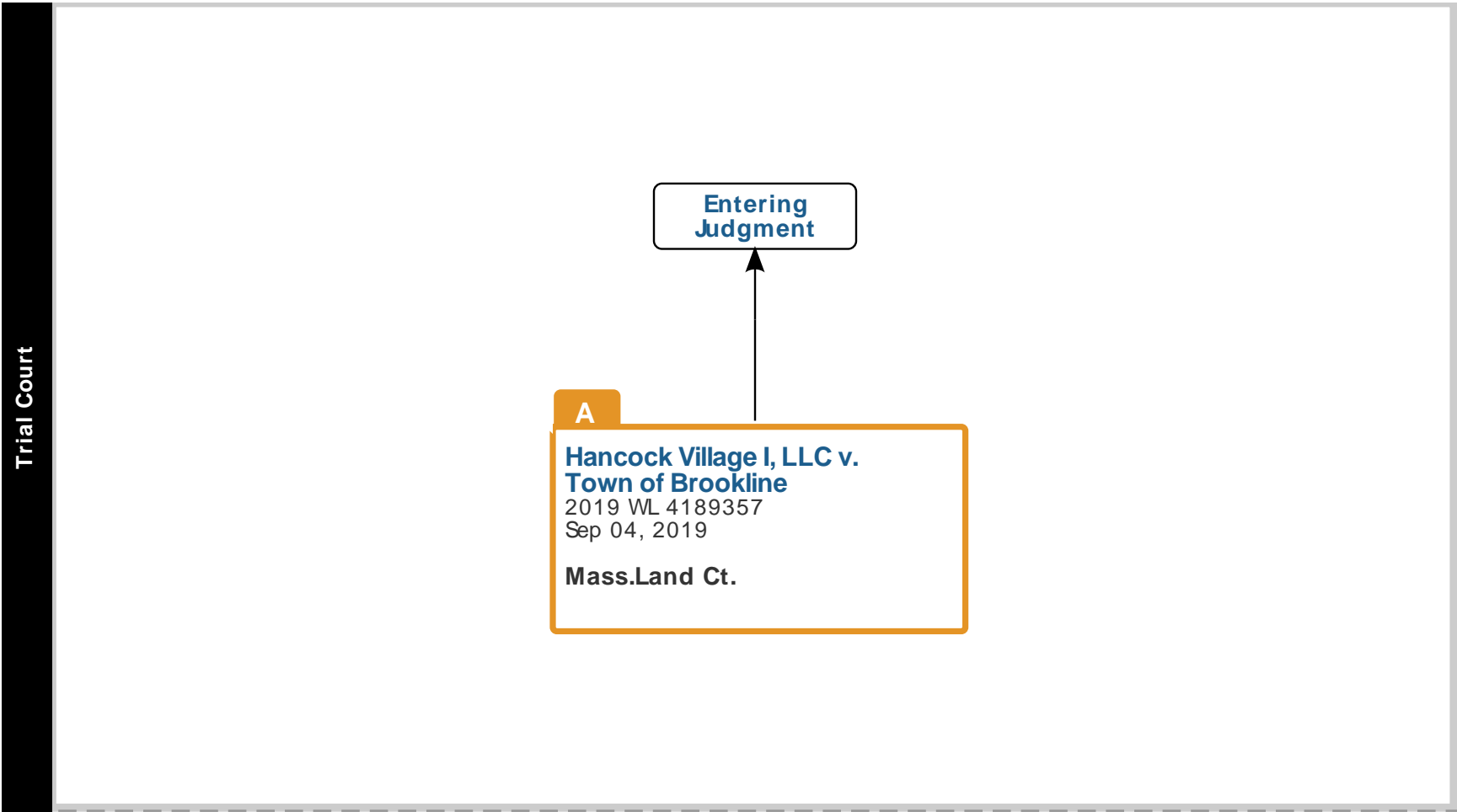
## History (2)

### Direct History (2)










1. [Hancock Village I, LLC v. Town of Brookline](#)   
2019 WL 4189357 , Mass.Land Ct. , Sep. 04, 2019


















*Judgment Entered by*

2. [Hancock Village I, LLC v. Town of Brookline](#)  
2019 WL 4187764 , Mass.Land Ct. , Sep. 04, 2019



## Table of Authorities (32)








Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	<p><b>1. Allen v. Old King's Highway Regional Historic Dist.</b></p> <p>2000 WL 1876571, Mass.App.Div., 2000</p> <p>This appeal seeks judicial review and annulment of a decision of the Old King's Highway Regional Historic District approving a Certificate of Appropriateness sought by James...</p>	Case			12
Cited	<p><b>2. American Sign and Indicator Corp. v. Town of Framingham</b></p> <p>399 N.E.2d 41, Mass.App.Ct., 1980</p> <p>Action was brought to declare that portion of town's sign bylaw, which affected changing message signs, was null and void. The Superior Court, Middlesex County, Mitchell, J., held...</p>	Case		”	8
Cited	<p> <b>3. Anderson v. Liberty Lobby, Inc.</b></p> <p>106 S.Ct. 2505, U.S.Dist.Col., 1986</p> <p>Libel action was brought against magazine, its publisher, and its chief executive officer. The United States District Court for the District of Columbia, 562 F.Supp. 201, granted...</p>	Case			7
Cited	<p><b>4. Attorney General v. Bailey</b></p> <p>436 N.E.2d 139, Mass., 1982</p> <p>Attorney General and Commissioner of Education brought action in which they sought declaration that certain persons were required to report to superintendent of schools the name,...</p>	Case			7
Cited	<p><b>5. Board of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs</b></p> <p>294 N.E.2d 393, Mass., 1973</p> <p>Two suits in equity were brought by Board of Appeals of town of Hanover and Board of Appeals of town of Concord seeking review of decisions of Housing Appeals Committee reversing...</p>	Case		”	8+
Cited	<p> <b>6. Canteen Corp. v. City of Pittsfield</b></p> <p>346 N.E.2d 732, Mass.App.Ct., 1976</p> <p>Proceeding was brought to determine validity of city zoning ordinance amendment which reclassified petitioner's land as residential. The Land Court, Sullivan, J., held that...</p>	Case		”	16
Cited	<p><b>7. Community Nat. Bank v. Dawes</b></p> <p>340 N.E.2d 877, Mass., 1976</p> <p>An individual who had signed the promissory note of a corporation appealed from the action of the Superior Court, Middlesex County, McNaught, J., in holding him liable as an...</p>	Case			7

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Distinguished	 <b>8. Emond v. Board of Appeals of Uxbridge</b> 541 N.E.2d 380, Mass.App.Ct., 1989 Abutters brought action to challenge decision of town's board of appeals granting special permit for home construction. The Superior Court, Worcester County, William C. O'Neil,...	Case			9+
Cited	<b>9. Fabiano v. City of Boston</b> 730 N.E.2d 311, Mass.App.Ct., 2000 REAL PROPERTY - Zoning and Planning. Amendment restricting historic row houses to residential use was not impermissible spot zoning.	Case			9
Cited	 <b>10. Fafard v. Conservation Com'n of Reading</b> 672 N.E.2d 21, Mass.App.Ct., 1996 Wetlands. Municipal conservation commission arbitrarily denied permission for landowner to build house close to buffer zone of vegetation required between construction and...	Case			14+
Discussed	 <b>11. Fieldstone Meadows Development Corp. v. Conservation Com'n Of Andover</b> 816 N.E.2d 141, Mass.App.Ct., 2004 GOVERNMENT - Municipalities. Conservation commission's denial of application was improperly based on a policy existing outside of the regulatory framework.	Case			14+
Cited	<b>12. Gamache v. Town of Acushnet</b> 438 N.E.2d 82, Mass.App.Ct., 1982 Property owners brought declaratory judgment action and appeal from decision of town board of zoning appeals denying their request for variance and nonconforming use permit to...	Case			6+
Cited	 <b>13. Hamel v. Board of Health of Edgartown</b> 664 N.E.2d 1199, Mass.App.Ct., 1996 Clean Water. Town board of health regulation prohibiting construction of new guesthouses in effort to address declining water purity was valid.	Case			8+
Cited	<b>14. Hansen &amp; Donahue, Inc. v. Town of Norwood</b> 809 N.E.2d 1079, Mass.App.Ct., 2004 REAL PROPERTY - Zoning and Planning. Neighbors had standing to challenge whether land could be use for discontinued ambulance service.	Case			6+



Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Distinguished	 <b>15. Lovequist v. Conservation Commission of Town of Dennis</b> 393 N.E.2d 858, Mass., 1979 Developer brought action challenging denial by town conservation commission of its application to construct access road across cranberry bog. The Superior Court, Barnstable County,...	Case			8+
Cited	 <b>16. MacGibbon v. Board of Appeals of Duxbury</b> 255 N.E.2d 347, Mass., 1970 Proceeding upon bill in equity appealing from decision of Board of Appeals denying special permit to excavate and fill a portion of shoreland. The Superior Court, Lurie, J.,...	Case			9+
Cited	<b>17. Mantoni v. Board of Appeals of Harwich</b> 609 N.E.2d 502, Mass.App.Ct., 1993 Zoning. There is no requirement that Attorney General be given notice of proceeding brought under statute providing for judicial determination of validity of municipal zoning...	Case			6+
Cited	<b>18. McIntyre v. Board of Selectmen of Ashby</b> 584 N.E.2d 1137, Mass.App.Ct., 1992 After excavators received special permit for removal of sand and gravel from zoning board of appeals, board of selectmen denied application for permit under town's general bylaw...	Case			13
Cited	<b>19. Murphy v. City of Springfield</b> 1987 WL 966132, Mass.Land Ct., 1987 In this case, the plaintiff challenges the validity of an amendment to a municipal zoning ordinance by which the zoning designation of the plaintiff's property was changed. The...	Case			16
Cited	<b>20. Ng Brothers Const., Inc. v. Cranney</b> 766 N.E.2d 864, Mass., 2002 REAL PROPERTY - Liens. Perfecting mechanic's lien is possible without filing or recording notice of substantial completion.	Case			7+
Cited	 <b>21. Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington</b> 506 N.E.2d 1152, Mass., 1987 Town, acting through its selectmen, purported to take 14.5-acre parcel of property for purposes of park, recreation, and construction of moderate income housing. Property owners,...	Case			17+

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Examined	 <b>22. Rayco Inv. Corp. v. Board of Selectmen of Raynham</b> 331 N.E.2d 910, Mass., 1975 Applicant for trailer park license filed bill for declaratory relief concerning the effect of a purported town bylaw on its right to operate a mobile home park. The Superior...	Case			8+
Cited	 <b>23. Rogers v. Town of Norfolk</b> 734 N.E.2d 1143, Mass., 2000 REAL PROPERTY - Zoning and Planning. Town's bylaw restricting size of child care facilities was facially valid, but invalid as applied.	Case			9
Cited	<b>24. Salvatore v. The Town of Westborough</b> 2002 WL 1554586, Mass.Super., 2002 FRANCIS R. FECTEAU, Justice. This is an action pursuant to the provisions of G.L.c. 40A, § 17, that seeks judicial review of the decision of the Zoning Board of Appeals ("board")...	Case			14
Discussed	 <b>25. Schertzer v. City of Somerville</b> 189 N.E.2d 555, Mass., 1963 Proceeding on petition to determine validity of amendment to zoning ordinance. By amendment petitioners alleged the invalidity of two ordinances. The Land Court, Fenton, J., held...	Case			16+
Discussed	 <b>26. SCIT, Inc. v. Planning Bd. of Braintree</b> 472 N.E.2d 269, Mass.App.Ct., 1984 Development corporation which was denied a special permit by town planning board to build an office building on land zoned a business district filed a complaint against the town...	Case			14+
Mentioned	 <b>27. Smith v. Board of Appeals of Fall River</b> 65 N.E.2d 547, Mass., 1946 Suit in equity by Clifford E. Smith and others against the Board of Appeals of Fall River to have amendment to Fall River Zoning Ordinance declared invalid and decisions thereunder...	Case			14
Discussed	<b>28. Spenlinhauer v. Town of Barnstable</b> 951 N.E.2d 967, Mass.App.Ct., 2011 REAL PROPERTY - Zoning and Planning. Limits on overnight off-street parking in residential areas was a matter for regulation through town's zoning power.	Case			10+
Cited	 <b>29. Springfield Preservation Trust, Inc. v. Springfield Library and Museums Ass'n, Inc.</b> 852 N.E.2d 83, Mass., 2006 REAL PROPERTY - Zoning and Planning. City's intent to exempt buildings from historical commission's review powers could be honored in part.	Case			12

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	<b>30. Town of Canton v. Bruno</b> 282 N.E.2d 87, Mass., 1972 Bill in equity by which town sought to enjoin defendants from excavating or removing or permitting excavation or removal of gravel or other earth material from land owned by them...	Case			13+
Cited	 <b>31. Trustees of Tufts College v. City of Medford</b> 616 N.E.2d 433, Mass., 1993 Zoning. College could not be prospectively enjoined from applying its ordinance to future construction projects in core area of college campus or to future projects similar to...	Case			9
Cited	<b>32. Valley Green Grow, Inc. v. Town of Charlton</b> 2019 WL 1087930, Mass.Land Ct., 2019 On November 4, 2016, the voters of the Commonwealth voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of...	Case			6+

### **Negative Treatment**

There are no Negative Treatment results for this citation.

### **Citing References**

There are no Citing References for this citation.

### **Filings**

There are no Filings for this citation.

# **Massachusetts State Historic Preservation Plan 2011–2015**



**William Francis Galvin  
Secretary of the Commonwealth  
MASSACHUSETTS HISTORICAL COMMISSION  
220 Morrissey Boulevard  
Boston, MA 02125**

**February 14, 2011**



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On the cover:

Pending for listing in the National Register of Historic Places, the Crossman Bridge located in the town of Warren was recently rehabilitated. The bridge is a wrought-iron single-span lenticular pony truss bridge originally built in 1888.

The *Massachusetts State Historic Preservation Plan 2011-2015* has been financed in part with federal funds from the National Park Service, U.S. Department of the Interior. However, the contents and opinions do not necessarily reflect the views or policies of the Department of the Interior. This program receives Federal funds from the National Park Service. The U.S. Department of the Interior prohibits discrimination on the basis of race, color, national origin, age, gender or handicap in its federally assisted programs. If you believe you have been discriminated against in any program, activity, or facility as described above, or if you desire further information, please write to: Office for Equal Opportunity, U.S. Department of the Interior, 1849 C Street NW, Room 1324, Washington, DC 20240.

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*Highlands Historic District, Fall River*





# Introduction

For over 10,000 years, human activity has shaped the landscape of this Commonwealth. Today, this landscape has stories to tell everywhere we look. Whether they are archaeological sites associated with Native American inhabitants, wood framed structures from early European settlement or factory villages adjacent to water powered sites, the landscapes of Massachusetts offer variety and interest that enhance the quality of life for residents and visitors alike. Today, the Massachusetts landscape is multi-layered as human activity on the landscape has shifted and shifted again.



*The Paul Revere House located in the North End, Boston*

The buildings, bridges, parks, burial grounds, agricultural landscapes, mill housing, industrial complexes, archaeological sites and the many other historic and cultural resources found in the cities and towns of Massachusetts are significant to our understanding of our past. They establish our sense of connection to our communities and they are the very reason people choose to live, work, and visit here.

As irreplaceable significant historic and cultural resources have been threatened or

destroyed, advocates for their preservation have organized, voiced their concern, and worked tirelessly to protect them. Today, a network of local commissions, local and state non-profit organizations and state government agencies work to assure that historic resources remain an integral part of our cities and towns while still allowing growth, change, and new patterns of development.

This State Historic Preservation Plan for 2011-2015 offers the chance for all of us to recognize our past accomplishments, view the challenges ahead, and see how we can all work together towards a Commonwealth that continues to reflect the stories of everyone in the historic landscape around us.

## **The Massachusetts State Historic Preservation Plan 2011–2015**

As the State Historic Preservation Office, the Massachusetts Historical Commission (MHC) is responsible for taking the lead in preparing the five-year state historic preservation plan. The MHC is responsible for ensuring that its programs and activities further the broad goals, objectives, and priorities outlined in this plan. While the Massachusetts Historical Commission is the primary user of the plan, it is meant to be a plan that will be useful for all preservation

partners at the local, state, and national levels. The preservation community in Massachusetts includes well over 500 organizations as well as many more organizations directly involved with historic resources or with the management of historic resources. At over 450, local historic district commissions and historical commissions make up the majority of the preservation organizations statewide. In reviewing this plan, local historical commissions and historic district commissions will note their own goals, challenges, and accomplishments. Likewise, so will the many other organizations highlighted in this plan. Unlike previous state historic preservation plans, the goals section of this plan includes the organization responsible for carrying out each objective.

This plan reflects the input, discussion, and hard work of many individuals representing many different agencies and groups. Its goal is to provide all of the preservation partners, including municipal governments, state agencies, regional and statewide organizations and the Massachusetts Historical Commission with a clear direction on how best to protect the irreplaceable historic and cultural resources of Massachusetts.

For the Massachusetts Historical Commission this plan has particular importance. Each year, the Massachusetts Historical Commission develops an Annual Work Program, based on the State Plan, that describes the implementation priorities and the specific tasks necessary to accomplish the goals of the State Plan within existing legislative, funding, and staffing opportunities and constraints.

### **Creating the 2011-2015 Massachusetts State Historic Preservation Plan**

The development of the 2011-2015 State Historic Preservation Plan began in late 2009 with a review of the content of the previous 2006-2010 State Historic Preservation Plan for accomplishments, outstanding goals, and remaining challenges. Following a review of current state historic preservation plans from other states, a general outline for a new state historic preservation plan began taking shape.

During December 2009 and January 2010, a list of Advising Organizations was developed. This list included over 80 organizations representing historic preservation partners at the local, regional, and state level as well as state agencies and non-profit organizations involved with historic resources.



During early 2010, MHC staff compiled a revised Municipal Status Database that compiled information on preservation activities for the 351 cities and towns in Massachusetts during the previous five-year planning cycle. Information included the general level of preservation activity, historic property surveys undertaken, new National Register listings, and local bylaws or ordinances that were established.

At the end of January 2010, MHC contacted all of the Advising Organizations to introduce them to the state historic preservation planning process, to ask them if they thought other organizations should be on the Advising Organizations list and to seek their input regarding recent major accomplishments. Local

commission members were involved in this process through the MHC Local Preservation Update e-newsletter.

MHC followed up with requests for additional comments during the Spring of 2010 through the Masshistpres listserve and e-newsletter. For the Advising Organizations that had not responded at that time, MHC followed up directly either in person, by phone, or by email.

Public meetings began in Spring 2010 with a western Massachusetts meeting in Holyoke at Wistariahurst Museum, hosted by the Holyoke Historical Commission. An additional eastern Massachusetts public meeting was held in Duxbury in June. At each of the meetings, MHC staff discussed MHC and its programs, previous state preservation planning efforts, and the outline for the current preservation plan. A discussion, facilitated by MHC staff, followed that considered accomplishments, challenges, and goals for the coming five years.

By the Fall of 2010, a draft document was ready for distribution to the Advising Organizations. During October and November 2010, comments from the Advising Organization members, local commission members, and the general public were received, reviewed, and incorporated where appropriate.

The result of this planning process is the *Massachusetts State Historic Preservation Plan 2011-2015*.

For the Massachusetts Historical Commission, accomplishments for this plan cover the following federal fiscal years:

Fiscal Year 2006 – October 1, 2005 to September 30, 2006

Fiscal Year 2007 – October 1, 2006 to September 30, 2007

Fiscal Year 2008 – October 1, 2007 to September 30, 2008

Fiscal Year 2009 – October 1, 2008 to September 30, 2009

Fiscal Year 2010 – October 1, 2009 to September 30, 2010



*Once threatened with demolition, Highfield Hall in Falmouth received an MHC Preservation Award in 2010.*

## History of Historic Preservation Planning in Massachusetts

Below is a timeline of legislation, events, and documents that have shaped historic preservation efforts in Massachusetts over the past 150 years.

**1848**

The 1699 John Shelton House in Deerfield is demolished despite an organized historic preservation campaign to save it.

**1863**

The John Hancock House in Boston is demolished.

**1876**

The Old South Meetinghouse in Boston is saved from demolition.

**1881**

The Old State House in Boston is saved by a citizens group that later becomes the Bostonian Society.



**1891**

The Trustees of Reservations is established.

**1908**

The House of Seven Gables in Salem is restored for the Salem Settlement House Association. The Paul Revere House is opened to the public.

**1909**

The 1768 Jeremiah Lee Mansion is acquired by the Marblehead Historical Society.

**1910**

The Society for the Preservation of New England Antiquities is founded. Today, it is known as Historic New England.

**1925**

USS Constitution is restored with public and private funds.

**1927**

Relocated historic buildings are incorporated into Storrowtown in West Springfield.

**1934**

The Historic American Buildings Survey begins an architectural recording program in Massachusetts.

**1938**

Salem Maritime National Historic Site becomes the first national historic site in the national park system.



**1939**

The Massachusetts Archaeological Society is founded.

**1944**

Historic Salem, Incorporated is founded.

**1946**

Old Sturbridge Village is opened to the public.

**1947**

Plimoth Plantation established.

**1949**

National Trust for Historic Preservation is founded.

**1952**

Historic Deerfield is incorporated.

**1954**

The federal Housing Act is passed which provides financial incentives for urban renewal plans that would demolish entire neighborhoods.

**1955**

Local Historic Districts on Beacon Hill and Nantucket are established as the first local historic districts in Massachusetts.



*Old Sturbridge Village*



*Old Corner Bookstore, Boston*

**1956**

The Federal Aid Highway Act is passed providing federal funds for new highways and sparking concerns over demolition of urban neighborhoods.

**1959**

Minute Man National Historical Park is established.

**1960**

Massachusetts General Law Chapter 40C – The Local Historic Districts Act is passed.  
Historic Boston Incorporated is founded and saves the Old Corner Bookstore from demolition.

Demolition of the West End in Boston begins under urban renewal plans.

Hancock Shaker Village in Pittsfield is founded.

**1962**

The Waterfront Historic Area League is founded in New Bedford in response to urban renewal plans.

**1963**

Massachusetts Historical Commission is established.

Massachusetts General Law Chapter 40 Section 8d is passed, which clarifies the role of local historical commissions in cities and towns of the state.

Cambridge Historical Commission is established.

**1964**

The Museum of African American History is founded.

**1966**

The National Historic Preservation Act is passed which establishes the National Register of Historic Places, the Advisory Council of Historic Preservation and State Historic Preservation Offices.

**1969**

Chapter 666 of the Acts of 1969/Massachusetts General Law Chapter 184 is passed providing statutory authority for historic preservation restrictions.

The Worcester Heritage Society is founded. Today, it is known as Preservation Worcester.

**1970**

Governor Sargent declares a moratorium on highway projects within the Route 128 area.

Plans to demolish downtown

Newburyport as part of an urban renewal plan are reversed.



*Downtown Newburyport*

**1971**

The position of State Archaeologist is established through state law.

The Massachusetts Historical Commission is established as the State Historic Preservation Office for the purpose of the National Historic Preservation Act.

Plans to demolish downtown Salem are reversed.

**1972**

The Springfield Preservation Trust is founded.

City Conservation League is formed to oppose demolition of Jordan Marsh building in Boston.

**1973**

The Old Kings Highway Regional Historic District is established covering portions of six towns on Cape Cod.

**1974**

Martha's Vineyard Commission is established.

**1975**

Jordan Marsh building in Boston is demolished.

Boston Landmarks Commission is established pursuant to Chapter 772 of the Acts of 1975.

**1976**

The Tax Reform Act is passed by Congress which provides financial incentives that encourage preservation and rehabilitation of historic buildings.

Faneuil Hall Marketplace opens.

Boston University Preservation Studies Program is established.

**1978**

Boston Preservation Alliance is founded.

Lowell National Historical Park is established.

**1979**

The Massachusetts Historical Commission adopts a comprehensive statewide preservation planning document known as Cultural Resources in Massachusetts: A Model for Management.

The Massachusetts Historical Commission initiates the statewide reconnaissance survey of historic and archeological resources.

The State Building Code is amended to provide exemptions for listed properties.

City of Cambridge establishes the first demolition delay ordinance.



*Neighborhood Conservation District, Cambridge*

**1981**

The Massachusetts Association of Olmsted Parks is established.

**1982**

The State Register of Historic Places is established by state law.

**1983**

The State's Unmarked Burial Law is passed in order to protect Native American burial sites and to insure consultation with the Massachusetts Commission on Indian Affairs.

City of Cambridge establishes an ordinance for neighborhood conservation districts.

Olmsted in Massachusetts-The Public Legacy is developed.

**1984**

Massachusetts Preservation Projects Fund is established at the Massachusetts Historical Commission.

**1985**

Historic Massachusetts, Incorporated, the statewide advocacy organization for historic preservation is established. Today, it is known as Preservation Massachusetts.

**1986**

The Blackstone River Valley National Heritage Corridor is established.

**1987**

The Massachusetts Historical Commission develops the Massachusetts Cultural Resources Inventory System (MACRIS) and initiates computerization of inventory forms.

**1988**

The Massachusetts Historical Commission's statute is amended to expand the membership of the full commission and to clarify MHC review authority. (MGL Ch. 9 Sections 26-27C)

The Massachusetts Historical Commission promulgates new State Register review regulations.



*The village center of Grafton located in the Blackstone River Valley.*

**1990**

Cape Cod Commission is established.

**1994**

Special Commission on Historic Preservation is formed to review issues and develop statewide recommendations. The 24 member Commission includes legislators, preservation organizations, state agencies, and the development community.

**1995**

Massachusetts Historical Commission begins preparing five year state historic preservation plans to meet National Park Service multi-year planning requirements for all state historic preservation offices. The five-year plan provides the framework necessary for developing annual work programs, outreach efforts, technical assistance, grant allocation, and preservation partnerships.

**2000**

The Community Preservation Act is passed.

Massachusetts Historical Commission prepares the State Historic Preservation Plan for 2001-2005.

**2004**

The Massachusetts Historic Rehabilitation Tax Credit is enacted as a pilot program.

**2005**

Massachusetts Historical Commission prepares the State Historic Preservation Plan for 2006-2010.



The annual cap on the Massachusetts Rehabilitation Tax Credit program is increased to \$50 million per year.

## **2010**

The Massachusetts Historic Rehabilitation Tax Credit program is extended to expire on December 31, 2017.

Massachusetts Historical Commission prepares the State Historic Preservation Plan for 2011-2015. The *2011-2015 State Plan* continues the five-year planning cycle and offers guidance to review past accomplishments, analyze the challenges ahead, and move onward with a clear vision.

The next periodic revision and update of the *State Historic Preservation Plan* is scheduled to begin late in 2014.



*Draper Mill, Hopedale*



## A Statewide Overview of Historic Preservation in Massachusetts

Historic preservation in Massachusetts today includes a broad range of organizations at the state, regional, and local level consisting of all branches of government, advocacy, and educational organizations as well as the many citizens that deeply value the historic and cultural resources present in this state. This section of the state historic preservation plan describes these organizations and their critical role in historic preservation efforts. The table of over eighty Advising Organizations demonstrates the breadth of organizations involved with historic preservation in Massachusetts.

### The Massachusetts Historical Commission

The Massachusetts Historical Commission was established in 1963 by the State Legislature to identify, evaluate, and protect the important historical and archaeological assets of the Commonwealth. Preservation programs at the Massachusetts Historical Commission include the Inventory of Historic and Archaeological Assets of the Commonwealth, the National Register of Historic Places, Local Government Programs, Survey and Planning Grants, Massachusetts Preservation Projects Fund Grants, reviews of state and federally funded or licensed projects, federal and state historic rehabilitation tax credits, annual preservation awards, and archaeology month. The Massachusetts Historical Commission is also the office of the State Historic Preservation Office and the State Archaeologist. The Commission, which is also the State Review Board, consists of eighteen members appointed from various disciplines. Professional staff includes architectural historians, architects, archaeologists, and preservation planners.

The *Inventory of Historic and Archaeological Assets of the Commonwealth* has been compiled and maintained by the MHC since MHC's creation in 1963 and has grown to include records on an estimated 200,000 properties and sites. The inventory includes buildings, structures, sites,



*Civic Center National Register District, Peabody*

objects, areas, parks, landscapes, and burial grounds. Inventory information is recorded on MHC inventory forms, following standards and guidelines set forth in the MHC's *Historic Properties Survey Manual*.

The *National Register of Historic Places* is a program of the National Park Service administered in Massachusetts by the Massachusetts Historical Commission. Properties listed in the National Register include districts, sites, structures, buildings, and objects that are significant in American history, architecture, archaeology, engineering, and culture. The National Register of Historic Places is the official list of the nation's cultural resources worthy of preservation.

Through *Local Government Programs*, the Massachusetts Historical Commission provides assistance and advice to local commissions through publications, compiled resource material, regional workshops, listserv monitoring, DVDs, and answering daily inquiries.

The annual MHC *Survey and Planning Grant* program is utilized primarily by local commissions for historic property survey, national register nominations, design guidelines, and educational outreach materials. Depending on funding availability, these grants are sometimes limited to Certified Local Governments.

Administered by the Massachusetts Historical Commission, the *Massachusetts Preservation Projects Fund* supports the preservation of historic properties, landscapes and listed, or in certain circumstances, eligible for listing in the State Register of Historic Places. Properties must be in municipal or non-profit ownership and can include pre-development and development projects consisting of stabilization, protection, rehabilitation and restoration.

The MHC is authorized by state and federal law to review and comment on certain state and federally licensed, permitted, or funded projects to determine whether the proposed project will have an impact on historic or archaeological properties. Through *review and compliance*, if it is determined that the project poses a threat to a historic property within the project area, then project proponents and the MHC jointly explore alternatives to avoid, minimize, or mitigate any damaging effects.

The Federal and State Historic Rehabilitation Tax Credits are also administered through the Massachusetts Historical Commission. These tax credits are available to certified rehabilitation projects on income-producing properties.

The State Archaeologist, whose permits ensure that important archaeological resources are properly conserved, oversees archaeological excavations on public lands or on lands in which the Commonwealth has an interest. The State Archaeologist also reviews development projects that affect archaeological properties and negotiates solutions to protect the sites.

### **Preservation Massachusetts, Incorporated**

Preservation Massachusetts, Incorporated is the statewide non-profit advocacy organization for historic preservation. Preservation Massachusetts (PM) advocates for historic resources at the local level through such initiatives as the Endangered Historic Resources List and the Circuit Rider program. At the state level, PM advocates for policies, funding and tax incentives that help to preserve historic and cultural resources.

### **Municipal Governments**

Local Historical Commissions and Historic District Commissions, part of municipal government, constitute the bulk of historic preservation efforts statewide. Together, local commissions are responsible for updating and expanding their historic property survey, nominations to the National Register for eligible properties, educating the public about historic resources, advocating for significant historic resources and establishing and/or administering local bylaws and ordinances that protect historic resources. Local Historic District Study Committees investigate the establishment of local historic districts.



### **Tribal Historic Preservation Officers**

The Tribal Historic Preservation Officers are responsible for historic preservation on tribal property. This may include identifying significant properties, nominating properties to the National Register and consulting directly with federal agencies in a government-to-government relationship regarding potential project effects to sites of traditional and religious significance to the tribes.

### **Regional Planning Agencies**

The regional planning agencies provide planning assistance in their region on economic development, community development, land use, transportation, mapping, housing, historic preservation as well as other areas. There are thirteen regional planning agencies in Massachusetts with two regional planning agencies having professional preservation staff.

### **Local and Regional Organizations**

A wide variety of local and regional organizations exist in Massachusetts. Many of these organizations are advocacy organizations for their locality or region. Others are museum organizations focusing on a particular locale or period. There are also five National Heritage Areas. Together, these organizations offer expertise and insight on a diverse range of historic resources.



### **State Agencies**

Besides the Massachusetts Historical Commission, there are many state agencies that play a role in historic preservation. Many state agencies are owners of historic properties including open spaces, buildings and archaeological sites. Other state agencies administer funds, develop policies and regulate projects that could impact historic resources.

### **Degree Programs**

The degree programs include certificate, bachelor and post-graduate education in historic preservation. Each program provides a unique level of expertise for understanding, informing and preserving our significant historic resources.

### **Creating the Advising Organizations List**

As the Massachusetts Historical Commission developed this state historic preservation plan, efforts were made to reach out to the great variety of organizations, governmental bodies and individuals involved in historic preservation.

The result was the list of over eighty Advising Organizations found on the next page. These organizations participated in the development of this state plan from its earliest stages through to the completion of a final version in the Fall of 2010.

# State Historic Preservation Plan 2011-2015

## Advisory Organizations

<b>Local and Regional Organizations</b>
John H. Chafee Blackstone River Valley National Heritage Corridor
Boston Preservation Alliance
Boston Society of Architects – Historic Resources Committee
The Bostonian Society
Cape Cod Modern House Trust
Dartmouth Heritage Preservation Trust
DOCOMOMO New England Chapter
Essex National Heritage Area
Freedom’s Way Heritage Area
Friends of Modern Architecture/Lincoln
Historic Boston, Inc.
Historic Deerfield, Inc.
Historic New England
Historic Salem, Inc
Nantucket Preservation Trust
Newburyport Preservation Trust
New England Museum Association
Preservation Worcester
The Last Green Valley
Society for Industrial Archeology – Southern New England Chapter
Society of Architectural Historians – New England Chapter
Springfield Preservation Trust
Trustees of Reservations - Highland Communities Initiative
Upper Housatonic Valley National Heritage Area
Vernacular Architecture Forum-New England Chapter
Victorian Society-New England Chapter
Waterfront Historic Area League
Western Massachusetts Chapter - American Institute of Architects
<b>Municipal Government</b>
Local Historical Commissions
Local Historic District Commissions
Certified Local Governments
Local Historic District Study Committees

Community Preservation Committees
<b>Regional Planning Agencies</b>
Berkshire Regional Planning Commission
Cape Cod Commission
Central Massachusetts Regional Planning Commission
Franklin Regional Council of Governments
Martha's Vineyard Commission
Merrimack Valley Planning Commission
Metropolitan Area Planning Council
Montachusett Regional Planning Commission
Nantucket Planning and Economic Development District
Northern Middlesex Council of Governments
Old Colony Planning Council
Pioneer Valley Planning Commission
Southeastern Regional Planning and Economic Development District
<b>State Agencies</b>
Massachusetts Architectural Access Board
Massachusetts Board of Building Regulations and Standards
Massachusetts Coastal Zone Management
Massachusetts Department of Agricultural Resources
Department of Conservation and Recreation
Department of Housing and Community Development
Massachusetts Dept of Transportation – Cultural Resources
Massachusetts Dept of Transportation – Scenic Byways
Division of Capital Asset Management
MassDevelopment
MEPA Office – Ex Office of Energy and Environmental Affairs
Massachusetts Office of Travel and Tourism
Massachusetts Archives
Massachusetts Board of Underwater Archaeological Resources
Massachusetts Commission on Indian Affairs
Massachusetts Cultural Council
Massachusetts School Building Authority
<b>State and National Organizations</b>
Massachusetts Historical Society
Community Preservation Coalition
Environmental League of Massachusetts
Massachusetts Municipal Association
Massachusetts Archaeological Society
Massachusetts Association of Realtors
MA Association of Community Development Corporations
Massachusetts Economic Development Council
Massachusetts Federation of Building Officials



National Trust for Historic Preservation
Preservation Massachusetts
Trust for Public Land
The Trustees of Reservations
<b>Tribal Historic Preservation Offices</b>
Nipmuc Tribe - South Grafton
Stockbridge Munsee Band of Mohican Indians
Wampanoag Tribe of Gay Head (Aquinnah)
Mashpee Wampanoag Tribe
<b>Degree Programs</b>
Boston Architectural College
Boston University Preservation Studies
University of Massachusetts/Amherst – Public History
University of Massachusetts/Amherst - Design & Historic Preservation
University of Massachusetts/Boston – Public History



*Downtown Manchester-by-the-Sea*

# Major Accomplishments

The preparation of this *2011-2015 State Historic Preservation Plan* offers a unique opportunity to acknowledge the many accomplishments of the past five years. The Massachusetts preservation community has had many great successes. While not a comprehensive list, this section of the plan takes a look back over the past five years to reflect on these achievements.

## **1. Identifying and Documenting Historic and Archaeological Resources**

### Additions to the Statewide Inventory

MHC's Inventory of Historic and Archaeological Assets of the Commonwealth continued to grow largely as a result of ongoing community efforts to update and expand documentation of historic properties and sites. Over 5000 inventory forms were added to the statewide historic properties inventory from 2006 to 2010. Many local historical commissions continued to update their surveys incrementally at a modest rate through their own documentation efforts or through contracted consultant services. Through much of the period, funding for surveys through MHC's Survey and Planning Grant program was limited to Certified Local Government (CLG) communities. With the limited availability of this traditional funding source for professional surveys, Community Preservation Act (CPA) funds became a key source of support for professional historic properties surveys in municipalities that have adopted the Act. Among towns who used CPA to fund surveys, at least seven, Carlisle, Dartmouth, Groton, Norwell, Northborough, Randolph and Salisbury undertook multi-year or multi-phase, comprehensive communitywide surveys. Statewide, at least a dozen communities undertook substantial, professionally-completed communitywide or neighborhood survey projects. Among the CLG communities that received Survey and Planning Grant support, Boston completed a multi-year survey of Beacon Hill, and initiated a multi-year survey update of the Central Business District, Lowell surveyed its Acre and Pawtucketville neighborhoods, Plymouth updated the survey of its local historic district, and Quincy updated the survey of Quincy Center. Interest in documenting mid-20<sup>th</sup> century resources grew, and the towns of Lincoln and Brookline undertook thematic surveys of their mid-20<sup>th</sup> century resources, the latter with Survey and Planning grant support, and Boston's CBD survey included a reevaluation of mid-century buildings as a key component of the project.

### Electronic Submissions and Inventory File Scanning

MHC continued to update its survey program to develop standards for digital photography and the use of digital mapping resources, and to provide guidance on web-based research methods. It also developed standards for receiving and processing electronic version submissions to supplement hard-copy inventory forms. MHC also developed and tested a working prototype online inventory form mapping tool, as a first phase in the development of a web-based interface for completing inventory forms.

The addition of over 10,000 records to the MACRIS database over the period reflected both the growth in the inventory and the addition of new National Register designations. More significantly, MHC made major steps toward its long-held goal of making digital images of its paper inventory files and photographs accessible through the MACRIS interface. MHC staff developed and tested a work-flow strategy for digital scanning of its inventory files, and succeeded in obtaining the support of a Preserve America Grant from the National Park Service to support its digitization efforts. With this work ongoing, MHC developed and launched an updated MACRIS interface on its web site, allowing users to search, view, save, and print digital images of inventory forms as they are converted in the ongoing scanning project.

#### Historic Property Survey Planning

MHC continued its pilot project to assist select communities in western Massachusetts prepare historic property survey plans. In 2007, a historic property survey plan was completed for the Town of Heath. While directly useful to the town of Heath, the model has been distributed widely around the state for use by other communities. Additionally, this pilot project provided recommendations for the next phase of survey plans, the survey planning website. As an outgrowth of its western Massachusetts initiative, MHC developed a Reconnaissance Survey Planning Website to provide local historical commissions with an online interface for entering and uploading street addresses, digital photographs, historical information and notes. Building on the survey plan methodology developed by MHC Staff for the towns of Granby and Heath, the website offers local historical commissions a method of organizing and reviewing basic property by property survey information. After the website was developed, two interns assisted with community-wide digital photography in select communities. The website is available to any community with survey needs interested in planning a survey project.

#### Mid 20<sup>th</sup> Century Resources

In the town of Lincoln, Friends of Modern Architecture (FoMA) has funded a project to survey the town's significant collection of mid-20<sup>th</sup> century modernist residences and is working with the Lincoln Public Library to begin the process of providing archival material to the library. FoMA has also been in touch with the neighboring towns of Lexington and Concord, and with Historic New England (which has also initiated information gathering on modernist architecture throughout the region) to provide or share historical information. Elsewhere, the Cape Cod Modern House Trust was incorporated in 2007 to promote the documentation and preservation of significant examples of Modernist architecture on the Outer Cape. In the City of Boston, the Boston Preservation Alliance and the New England Chapter of DoCoMoMo have advocated for the re-examination of important local mid-century buildings, and the Boston Landmarks Commission undertook such a review as part of the first phase of its survey update of the city's Central Business District.

## **2. Evaluating and Registering Historic and Archaeological Resources**

### Listings During the Last Planning Cycle

The number of nominations completed and properties listed in the NR diminished since the publication of the last State Plan, but there were nevertheless a number of major achievements. More than 165 nominations were completed, documenting the significance of



*Leverett Center National Register District listed in 2008.*

more than 4,700 contributing resources. Ten communities saw their first National Register listings ever during the 2006-2010 period, and almost all were achieved with local funding. These included: districts in Brimfield, Boxborough, Heath, Holbrook, Leverett, and Plympton; individual properties in Rochester, Shutesbury, and Southwick; and a municipal park in West Bridgewater. Large districts in several communities contributed to the high volume of listed properties, including town center districts in Brimfield, Dedham, Leicester, Millville, Medway, Winthrop, secondary areas of development in Marshfield, Middleborough, Sandwich, Westborough, and Weymouth and sizable expansions of early listings in the centers of Sandwich and Shelburne Falls. In all, some 56 districts were listed during the period since the last State Plan. Most were initiated by local historical commissions and were funded with largely local resources. Community Preservation Act funds aided district nominations in two communities (Dedham and Marshfield) and individual nominations in several others (including Duxbury, Groton and Wellesley).

#### Middlesex Canal

One of the most significant accomplishments was the listing of the Middlesex Canal, a linear district of some 225 contributing resources in nine municipalities, primarily archaeological sites. The 2009 designation, the result of collaboration between the MHC, the Middlesex Canal Commission, and the Middlesex Canal Association, updated and expanded a very early nomination that had listed only a portion of the canal's 27-mile-long route; the revised nomination incorporated recent scholarship on the canal, one of the most significant engineering achievements of the early Republic.

#### National Register and Federal Investment Tax Credits

While many National Register nominations were primarily for honor and recognition, incentive programs prompted a sizable number of listings, another major accomplishment. National Register listings in support of federal investment historic rehabilitation tax credits comprised a significant portion of the nominations completed since the last plan—almost fifty professionally prepared nominations were listed as part of a certified rehabilitation project.

#### National Register and Massachusetts Preservation Projects Fund

Seventeen nominations for properties owned by municipalities or private nonprofits resulted in applications to the Massachusetts Preservation Projects Fund during the period.

#### Under-Recognized Property Types Listed

During the period since publication of the last plan, interest in listing previously under-recognized property types continued to grow. Three individual properties were added to the National Register through the Underground Railroad context. Other properties associated with African Americans in Massachusetts were added to the National Register, including one district, the Myrtle Baptist Church Historic District in Newton, that is comprised of the remnants of a largely African American neighborhood that was partially lost in the 1960s with the construction of the Massachusetts Turnpike. Other properties included: the Samuel Harrison House in Pittsfield, the home of Rev. Harrison, chaplain for the 54<sup>th</sup> "Glory" Brigade, former slave and eloquent spokesman for racial equality; and two churches, the Bethel African Methodist Episcopal Church in Plymouth and the Clinton African Methodist Episcopal Zion Church in Great Barrington. Long overlooked, historic properties associated with Native Americans were also of considerable interest during the period since the last state plan. The Vanderhoop Homestead, Aquinnah, and the Sachem Rock Farm, East Bridgewater, both listed in the National Register in 2006, hold associations with the Wampanoag Tribe, while several pending nominations are significant for their associations with the Nipmuc Tribe. The MHC has

collaborated with the State Department of Conservation and Recreation on a nomination, still pending at the time of the publication of the State Plan, for the Wachusett Mountain Historic District, a state-owned property with numerous areas of significance, including associations with the Nipmuc Nation. The nomination supports the significance of Wachusett Mountain as a Traditional Cultural Property. Another pending nomination, for the Hassanamisco Reservation in Grafton, also documents the significance of a property associated with the Nipmuc tribe.

#### 20<sup>th</sup> Century Properties

Interest in mid 20<sup>th</sup> century resources grew considerably during this period. National Register staff at the MHC participated in an ongoing National Park Service project to develop a context for modernist residential buildings of the outer Cape Cod. The context will lead to the National Register designation of a number of architecturally significant modernist properties in the region, including several located within the Cape Cod National Seashore.

#### Survey and Planning Grants for National Register Nominations

The MHC's Survey & Planning grant program funded five communities' National Register nominations during the period. The New Bedford CLG significantly revised and updated an early nomination for the County Street Historic District, originally listed in 1976, to more fully address the area's economic, social, and ethnic history, and nominated an important city property, Hazelwood Park. The town of Bedford's CLG prepared nominations for two districts and a town-owned cemetery. More recently, the Oxford Center Historic District (NR listing pending) adds some 220 contributing resources to the National Register. And in Lexington, a context for mid-century modern residential buildings, to be accompanied by one National Register district nomination (NR pending), will lay the groundwork for additional nominations of eligible properties in a community that grew enormously during the decades following the Second World War.

#### Cumulative Listings

At the end of 2010, Massachusetts remained a national leader in the NR program, with more than 3,800 listings since the start of the program in 1966, including close to 1,700 National Register Historic Districts and approximately 77,000 contributing resources.

### **3. Protecting Historic & Archaeological Resources through State & Federal Regulations**

#### State and Federal Reviews at the Massachusetts Historical Commission

MHC continued its extensive review of projects under state and federal law. The federal law most widely employed to help protect historic resources is Section 106 of the National Historic Preservation Act. Similar to Section 106 for federal projects, state funded, licensed, or permitted projects or projects undertaken by a state agency are reviewed by the Massachusetts Historical Commission through State Register review regulations. Under Section 106, MHC reviewed approximately 2,000 projects each year. Under State Register review, MHC reviewed approximately 10,000 state projects each year. Through additional programmatic agreements with other agencies, review commitments for some projects were minimized. Additionally, MHC has developed historic covenant language for disposition of historically significant state properties. MHC responded to issues of historic gravestone and permit applications for stone conservation.

The vast majority of projects reviewed by the MHC do not result in adverse effects to historic and archaeological properties. For instance, in 2009, the MHC reviewed 2,932 federal projects, only 56 or 2.3% of which had adverse effects on historic resources. Similarly, in 2009, MHC reviewed 9,087 state projects, 148 or 1.6% of which had adverse effects. Thus, roughly 98% of





*African Meeting House, Boston*

projects MHC reviewed have not impacted significant historic resources. In cases where there is no feasible alternative to avoid a significant site, MHC has overseen archaeological data recovery efforts, which has resulted in the preservation of archaeological data and proper curation of artifacts and records. Data recovery efforts also include disseminating information to the public. An excellent example is the African Meeting House on Beacon Hill with its report, lectures, exhibit and MHC Archaeology Month poster for 2006.

#### Preservation Restrictions under MGL Chapter 184

MHC continued to fulfill its statutory review and approval role for preservation restrictions held by qualified organizations and governmental bodies under M.G.L. Chapter 184, sections 31-33.

Perpetual preservation restrictions remain an important and effective protective mechanism. The requirement of preservation restrictions as a condition of local Community Preservation grants, and the

continued interest in the available federal tax deduction for the donation of perpetual preservation restrictions on qualified properties have meant that the volume of restrictions coming to MHC for statutory approval has continued to grow significantly. Adding to this volume has been an increased use of preservation restrictions in planning contexts as a condition for the issuing of zoning variances, special permits, subdivision approvals or land transfers related to historic properties. MHC continues to administer preservation restrictions that it holds, responding to an average four to five requests per month for review and approval of proposed activities. Among local preservation organizations, the Nantucket Preservation Trust has developed an active preservation restriction program, to date covering fourteen properties, including eight with interior protections.

#### State Building Code

MHC continued providing technical assistance regarding partially preserved and totally preserved status relative to the Massachusetts Building Code Section 3409. These designations provide some exemptions from the state building code in order to meet the needs of historic preservation coupled with public safety.

### **4. Protecting Archaeological Sites**

#### MHC reviews

In MHC review of projects, MHC has consulted with developers and project proponents to consider ways to avoid and protect significant sites. There have been many cases of project re-design to avoid impacting sites and to protect the sites from construction-related impacts. In addition, a number of sites have been placed under a preservation restriction for permanent protection such as at the Grafton State Hospital. The MHC has advocated for the acquisition of archaeological sites by towns or non-profit land trusts. Numerous sites and archaeologically sensitive areas have been purchased for conservation. In consultation with the Commission on Indian Affairs, Tribes, and Wampanoag Confederation on Repatriation, the Massachusetts Historical Commission upheld the State Unmarked Burial Law.

### State Archaeologist Permits

Approximately 100 state archaeologist permits were issued each year for archaeological investigations.

### Bibliography of Archaeological Survey and Mitigation Reports

MHC updated the bibliography of archaeological survey and mitigation reports. This is available for distribution on a CD and by paper copy.

### Archaeology Month

In cooperation with many local organizations hosting events, MHC publicized statewide archaeology month events through an event calendar brochure and the distribution of an archaeology month poster. In 2008 alone, there were 69 events in 35 communities.



## **5. Protecting Historic Resources through Financial Support**

### Federal Investment Tax Credits and State Historic Rehabilitation Tax Credit

Massachusetts continues to rank in the upper third of states in terms of number of dollars spent on rehabilitation projects under the Federal Investment Tax Credit program. The State Historic Rehabilitation Tax credit, although capped at \$50 million, has resulted in a significant increase in federal investment tax credit applications. Staff at MHC presented the tax credit program at the Traditional Building Conference and at Department of Housing and Community Development Conferences. Set to expire in 2011, the state historic rehabilitation tax credit was recently extended until 2017. The State Historic Rehabilitation Tax Credit program has grown in popularity, especially during the past few years of economic downturn. In the calendar year 2009 alone, 76 projects were awarded historic tax credits. Of those, 54 projects created a total of 701 residential rental units, 46% of which were affordable housing. There is considerable partnering with the state's low-income housing tax credit and new market tax credits. Over 5,000 temporary and 9,000 permanent jobs were created in 2009. For every dollar awarded in state historic tax credits, private investment has been leveraged at ten times that amount.

### Massachusetts Preservation Projects Fund

The Massachusetts Preservation Projects Fund (MPPF) is a 50 % matching grant reimbursement program established in 1984 for the preservation of historic properties, landscapes, and sites (cultural resources) that are listed in the State Register of Historic Places which are either under municipal or nonprofit ownership. Since the reinstatement of the MPPF program in August 1994, sixteen grant rounds have been administered and nearly \$42 million has been awarded in the form of 657 grant actions. Grants for pre-development, development, acquisition, and emergency work have been awarded to 503 historic resources in 190 communities



within the Commonwealth. This represents an estimated total investment (with matching funds) of roughly \$84 million. During the most recent 5-year period, \$5.65 million has been awarded in the form of 142 grant actions. The majority of grantees request funding assistance for the stabilization, repair, and restoration of the exterior building envelope typically involving roofing repair/replacement, foundation rebuilding, masonry repointing, carpentry repairs, window restoration, drainage systems repair/replacement, and painting. As a condition of funding, property owners must execute and record an interior and exterior MHC Preservation Restriction on the property's deeded parcel of land. This ensures that the resource will retain its historic character and integrity—long after the MHC-funded project is complete—through a formal design review and approval process by MHC staff. The MPPF is a highly recognizable and popular grant program frequently resulting in dramatic, visible improvements to historically and architecturally significant resources throughout the Commonwealth.

#### Community Preservation Act

Since its passage in 2000, 147 communities have adopted the Community Preservation Act. The CPA is a local option state law that helps communities preserve their open spaces and historic sites, create affordable housing, and develop outdoor recreational facilities. CPA allows



*Historic agricultural landscape in Groton protected through community preservation act funds.*

communities to create a local Community Preservation Fund with money raised through a surcharge of up to 3% on local property taxes. The state provides guaranteed annual CPA



matching funds based on these local surcharge collections, providing a significant incentive to communities to pass the Act. These combined funds are then available for use by adopting municipalities on community projects in open space protection, historic preservation, and the creation of affordable housing and outdoor recreation. Within these 147 communities, historic preservation is by far the most popular category of possible uses of CPA - over \$200 million in CPA funds have been appropriated for use on more than 2,083 Historic Preservation projects. CPA funds have been used to provide accessibility to historic buildings, protect historic landscapes, restore farmhouses, churches, and town halls as well as preserve historic documents. In some communities, historic preservation and affordable housing have been combined into one project. In other places, historic

preservation and open space preservation have resulted in preservation of a farmhouse with the accompanying agricultural open space.

### MHC Survey and Planning Grants

The MHC Survey and Planning grant program has very successfully provided CLGs and local commissions with matching grants for historic property survey, national register nominations, preservation plans, and public education projects. Over the past five years, MHC allocated \$651,540 to this program. With the local matches, the figure grows to \$1,094,800 in funding for historic preservation projects. During FY 2007, the survey and planning grant program was open to all municipalities not just certified local governments. During this year, 19 projects received funding.

### National Trust for Historic Preservation Grants

Since 2005, the National Trust for Historic Preservation (NTHP) has awarded \$1,485,096 in grants to 74 non-profit organizations, academic institutions, and public agencies in the state of Massachusetts. Grantees are located in 47 municipalities within the state. Funds were used to support a variety of planning, educational, and construction projects. In 2009, the Partners in Preservation Program, sponsored by American Express in cooperation with NTHP, provided \$1 million in preservation funding and greatly raised the profile of preservation needs statewide.

### Preserve America Grants

This federal program provides grant funding for projects that focus on economic and educational opportunities related to heritage tourism. Examples of funded projects in Massachusetts included promotional and marketing strategies for Gloucester and Lowell.

### Save America's Treasures Grants

Administered by the National Park Service, the Save America's Treasures grant program provides funding for nationally significant structures and sites. This matching grant program has funded projects including the Colonel James Barrett House in Concord, the United First Parish Church in Quincy, the Frederick Ayer Mansion in Boston, and Old Ship Meetinghouse in Hingham.

### Regional Grant Programs

John H. Chafee Blackstone River Valley National Heritage Corridor Commission–Heritage Partnership Grant Program and the Essex National Heritage Area - Essex Heritage Partnership Grant Program offered grants to member communities for historic preservation purposes.

## **6. Protecting Historic Resources through Assisting Local Governments**

### Historic Preservation E-mail List

Administered by the Massachusetts Historical Commission, masshistpres is a statewide listserve with over seven hundred subscribers across the state. It remains a very active list made up of local preservation commission members, preservation professionals, architects, consultants, archaeologists, planners, and many others. The opportunity to learn, discuss, and offer advice in a statewide digital format made up of volunteers and professionals provides a rich environment for networking and information sharing.

### New Outreach Material for Local Preservation Commissions

Over the past five years, the Massachusetts Historical Commission completed two DVDs for local commission members. *Local Historical Commissions in Massachusetts* is a 50 minute DVD covering all the basics of historic preservation planning. *Local Historic Districts in Massachusetts* is a 1 ½ hour DVD covering how local historic districts protect historic resources, the history of local historic districts, how to establish local historic districts, design review in local historic districts, and proper administration of local historic districts. In 2008, MHC started the Local Preservation Update E-Newsletter, a brief newsletter for local commissions covering grant opportunities, upcoming workshops, new national register listings, websites to visit, and

other pertinent information for local commission members. Distribution of the electronic newsletter has grown to approximately 2000 people. Preservation through Bylaws and Ordinances – Tools and Techniques Used in Massachusetts was thoroughly revised with many new case studies from around the state.

#### Local Commission Training Workshops

Over 70 MHC On the Road workshops were offered to local historical commissions, historic district commissions, local historic district study committees, and the general public during this planning cycle. The MHC On the Road Program includes modules on Introduction to Historic Preservation Planning, Demolition Delay Bylaws, Establishing Local Historic Districts, and the Certified Local Government Program. A workshop on the Secretary of the Interior Standards, prepared by MHC staff, was also delivered at several conferences. The Historic District/Historical Commission Committee of Preservation Massachusetts also developed and delivered modules on Preparing MHC Inventory Forms and The National Register of Historic Places.

#### Circuit Rider Program

The Preservation Massachusetts Circuit Rider Program, in partnership with the National Trust for Historic Preservation, has funded three part-time circuit riders that have provided assistance to local commissions, property owners, and concerned citizens regarding historic preservation in their community. Services have included advocacy letters, grants, and access to information on a wide range of topics. The three circuit riders are regionally focused with one circuit rider for western/central Massachusetts, the greater Boston region, and Southeastern Massachusetts/Cape Cod/Islands.

#### Department of Conservation and Recreation Heritage Landscape Inventory

During this planning cycle, the Department of Conservation and Recreation continued its successful partnership with cities and towns in preparing heritage landscape inventory reconnaissance reports. These reports identified valued heritage landscapes, discussed issues with their preservation, and provided recommendations for their protection. During this planning cycle, the program worked with 63 communities to identify 3,941 heritage landscapes in the Freedoms Way, Blackstone/Quinebaug-Shetucket, Upper Quaboag/North Quabbin and Connecticut River Valley areas.

#### Regional Planning Agency Preservation Planners

The Cape Cod Commission and the Pioneer Valley Planning Commission have staff preservation planners that assist local governments. At the Pioneer Valley Planning Commission, preservation planning staff has completed inventory forms, national register nominations, local historic district planning, tax credit application assistance, and public education projects such as tours and booklets. In addition, PVPC reviewed housing rehabilitation projects under Section 106 of the National Historic Preservation Act.

#### Local Archaeological Review

As requested, MHC was able to provide technical assistance to local governments on how to develop archaeological reviews in local regulatory programs.

## **7. Protecting Historic Resources through Local Government Actions**

#### Local Regulations

Historic preservation bylaws and ordinances at the local level increased during the past five years. There are now 127 municipalities with a demolition delay bylaw or ordinance, an increase from 108 five years ago. While most delay periods remain at 6 months, there are now twenty-



eight with a 12 month delay and five with an 18 month delay. Local historic districts continue to increase more modestly with most additions in communities with existing local historic districts. The city of Holyoke established their first local historic district on Fairfield Avenue. Several communities established architectural preservation districts including North Andover and Wellesley.

#### Public Education and Advocacy

Many local historical commissions recognized that public education and advocacy are essential components of their local preservation efforts. Even in communities without local regulatory tools, local historical commissions found success in preserving threatened resources by speaking out and mobilizing residents.

#### Reactivated Local Historical Commissions

Several communities with inactive local historical commissions were reactivated during this period such as Alford, Athol, Leyden, Richmond, and West Stockbridge. Most notable is Athol which applied for and received a survey and planning grant for survey work in their downtown.

#### New Certified Local Governments

As the survey and planning grant program was largely limited to certified local governments, interest in the program grew. Many communities inquired about the process of becoming a certified local government. The town of Lexington submitted the application material and became a Certified Local Government in 2009.



*Threatened with demolition, the significance of the Fowler-Clark House, Boston was recognized during the demolition delay period.*

## **8. Protecting the Rural Historic Landscape**

### Agricultural Lands

Between 2002 and 2007, the number of farms and farm revenue increased dramatically in Massachusetts, up over twenty seven percent. Amazingly, there was no net loss of farmland



*Agricultural land located in the town of Gill*

during this time period. With special assistance programs such as the Farm Viability program, the Department of Agricultural Resources directly assisted many farmers while at the same time protecting farmland for the future. In 2009, the Agricultural Preservation Program recorded its 750<sup>th</sup> restriction. Over the past 30 years, more than 63,000 acres of farmland have been protected.

### Barns Program

The Preservation Massachusetts Preserve Mass Barns Program held three successful regional conferences for owners of historic barns. In addition, information and resources for barn owners was placed on the Preservation Massachusetts website.

### Agricultural Commissions

From its introduction ten years ago, there are now over 100 cities and towns with an agricultural commission. Through representing the agriculture community, agricultural commissions have provided an advocacy voice for farmers, helped resolve conflicts, offered new markets for products, put forward right-to-farm bylaws, and held educational workshops. All of these efforts help to protect farmland and preserve rural landscape.

### Massachusetts Land Trust Coalition

The Trustees of Reservations opened their 100<sup>th</sup> property, Cormier Woods, in 2008. Located in Uxbridge, Cormier Woods is a 175-acre rural farmstead dating back to the early eighteenth century.

### Scenic Byways Projects

Scenic byway projects during this planning cycle included 6 corridor management plans and 3 land protection projects.

## **9. Protecting Historic and Archaeological Resources from Detrimental Natural Processes**

MHC represented the historic preservation perspective on the advisory committee for a significant, ongoing statewide disaster planning project to develop an Emergency Management Framework for Cultural Resources – Coordinated Statewide Emergency Preparedness (COSTEP), a significant pilot project led by the Northeast Document Conservation Center, the Massachusetts Board of Library Commissioners, and the Massachusetts Archives. The pilot has successfully raised the profile of cultural resources and their special needs in disaster planning among the emergency management community, and has also brought greater understanding of the emergency response framework to the cultural resources community. Participants in the COSTEP project have included state and federal level emergency managers, and representatives of the museum, library, archives, and records management communities.



*Salem, Massachusetts*

## **10. Revitalizing and Protecting Historic Urban and Industrial Areas**

### Federal and State Tax Credits

The federal and state tax credits provided financial incentives to rehabilitate sites throughout Massachusetts particularly in urban and industrial areas. A study in 2009 by Preservation Massachusetts concluded that the credits had a catalyzing impact on many communities across the Commonwealth.

## **11. Encouraging Historic Preservation through Heritage Tourism**

### Visitors to Massachusetts

Massachusetts remains a very popular destination for heritage tourists due to its history, significant historic sites, interpretation and access. According to the Massachusetts Cultural Council, historic/cultural tourism generated nearly \$2 billion in 2006. Tourism is the third largest industry in Massachusetts supporting 120,000 jobs. Findings by MCC conclude that tax dollars in Massachusetts when invested in historic/cultural travel have a more than 5:1 return on investment. Cultural tourism includes arts, heritage, recreational, and natural resources. It is the

fastest growing sector of the travel industry. Cultural tourists spend considerably more per day than other tourists and stay one half day longer at each destination.

#### Preserve America Communities

There are now twenty Preserve America Communities in Massachusetts. These are Blackstone, Douglas, Falmouth, Gloucester, Grafton, Holyoke, Hopedale, Leicester, Lowell, Mendon, Millbury, Millville, Northbridge, Plymouth, Salem, Springfield, Sutton, Upton, Uxbridge, Worcester. Preserve America designations provide recognition for local efforts in the appreciation and protection of historic resources and offer new avenues for enhancing heritage tourism.

#### Distinctive Destinations

The National Trust for Historic Preservation has now recognized five communities in Massachusetts as distinctive destinations. These are Chatham, Lowell, Northampton, Provincetown, and Salem. This program recognizes both the preservation efforts of the community and the memorable experiences for the visitor.

#### Heritage Areas and Corridors

The Blackstone River Valley, Quinebaug/Shetucket, Housatonic, Essex, and the newest heritage area, Freedoms Way all marketed interesting events that highlighted the resources in their region.

#### Historic Places for Historic Parties

The Massachusetts Historical Commission began revising the popular handbook, Historic Places for Historic Parties. This booklet lists the many venues around the state for hosting an event.

#### Scenic Byways

Administered by the Massachusetts Department of Transportation, the number of scenic byways around the state increased to fifteen with Battle Road: The Road to Revolutions Scenic Byway and Route 116 Scenic Byway established during this planning cycle. All fifteen scenic byways offer marketing opportunities that encourage heritage tourism with their interesting places to visit. Specific heritage tourism projects included the western MA byways promotional campaign and the interpretive signage and wayfinding on Jacob's Ladder Trail.

## **12. Strengthening the Stewardship of Historic and Archaeological Resources**

#### Local and State Funding Programs

As mentioned previously, the Massachusetts Preservation Project Fund, the Community Preservation Act, and the tax credit programs have greatly assisted in the rehabilitation of significant historic resources throughout the state.

#### Historic Curatorship Program

The Historic Curatorship Program at the Department of Conservation and Recreation (DCR) has generated over \$10 million in private investment at sixteen properties. Through this program, DCR partners with curators who agree to rehabilitate, manage, and maintain historic properties within the state park system in exchange for long-term leases.

#### Public and Private Property Owners

Often unrecognized are the many public and privately owned historic resources where stewardship is ongoing and where annual funding is allocated for proper maintenance. Whether it is a municipality diligently maintaining their town hall year after year, a homeowner reglazing a wood window, or one of the thousands of historic property owners statewide with a plan in



*A window removed for rehabilitation in Somerville.*



place to care for their own resource, each one constitutes a stewardship success worth noting here.

### **13. Protecting Historic Resources through Education and Public Awareness**

#### **Statewide Preservation Coalition**

Organized by Preservation Massachusetts, the preservation coalition is made up of state, regional, and local partners. It continues to serve the preservation community by providing a strong collective voice when needed.

#### **Homeowner Education**

The membership based Historic Homeowner Program at Historic New England provides homeowners with individualized assistance through the expertise of HNE professional staff on paint colors, maintenance, design, and construction. The Springfield Preservation Trust offers a list of contractors on their website.

#### **Contractor Education**

The Nantucket Preservation Trust Apprenticeship Program provides funds and educational programs geared to contractors, builders, preservationists, and students to learn traditional building methods.

#### **Most Endangered Program of Preservation Massachusetts**

Over the past five years, this annual program has provided a venue to recognize significant historic resources threatened by demolition, development, neglect or policies. As was the case with the threatened Ames Shovel Shop in Easton listed in 2008, the accompanying publicity was a contributing factor in saving this property from demolition.

#### **Plaques and Marker Programs**

Over 60 communities have a historical plaque program with many communities such as



*The Ames Shovel Shop in Easton*



*The Whittin Mill complex in Northbridge was the recipient of an MHC Preservation Award.*

Lowell, Salem, and Nantucket actively using plaque programs to recognize historic preservation activities, increase owner appreciation and educate visitors.

#### **Preservation Awards**

Organizations such as the Massachusetts Historical Commission, Preservation Massachusetts, Boston Preservation Alliance, the New England Chapter of the Victorian Society all have developed annual Preservation Award programs to recognize projects and people that have contributed to historic

preservation. In addition, many local commissions or non-profit organizations also have preservation award programs. Together, the awards and events provide excellent opportunities for education through the local media.

### Walking and Driving Tours

Many local commissions, societies, and groups organize walking tours to highlight interesting architecture, neighborhoods or sites. Tour topics offered in the city of Boston included immigration, industry, archaeology, burial grounds, and many more. Technology is providing new methods of offering on demand tours through hand held devices. The city of Lowell has offered a very successful annual program, Doors Open Lowell, which provides access to many buildings and sites not typically open to the public.

### DCR Terra Firma Bulletins

The Department of Conservation and Recreation (DCR) prepared a series of six educational bulletins on preservation topics such as historic roads, farms and town commons.

### Modern Architecture

In order to raise awareness of modern architecture, organizations such as the Friends of Modern Architecture/Lincoln, DOCOMOMO-New England Chapter, the National Trust for Historic Preservation, and the Cape Cod Modern House Trust have organized lectures, tours, forums, and symposia. FOMA/Lincoln offered a panel discussions regarding the repair and upkeep of Modern houses allowing opportunities for participation by attendees and the sharing of information.

### Historic Property Survey Forms on the Massachusetts Historical Commission Website

Historic Property Information on the MHC website improved greatly with the introduction of the first set of scanned inventory forms uploaded to the website. This project began with a scanning plan and a pilot project to test methodology and technical standards. With support from a two year Preserve America grant, scanning of MHC inventory forms began in 2009. In early 2010, the first set of inventory forms with photographs were available on the MHC website.

### Scanning National Register Nominations

The Massachusetts Historical Commission developed protocols for scanning National Register nominations for posting on the website. The nominations from 1999 to the present have been scanned and new nominations are scanned as they are completed. Posting these National Register nominations on the website has been completed.

### Massachusetts Historical Commission Publications

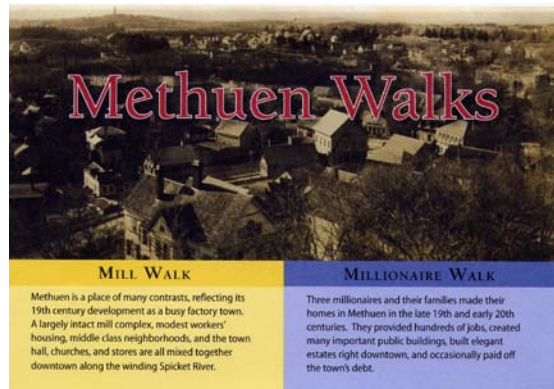
Numerous MHC publications were distributed during this planning cycle such as the annual State Register of Historic Places, Preservation Planning Manual, Preservation through Bylaws and Ordinances, Establishing Local Historic Districts, A Guidebook for Historic District Commissions, and Archaeology Month calendars.

### Press Releases

The Massachusetts Historical Commission issued press releases following each quarterly State Review Board vote on national register listings. Additionally, MHC issued press releases for annual Preservation Award winners and Archaeology Month.

### Statewide Consultants Directory

The consultants directory found on Preservation Massachusetts website has provided an excellent source for local commissions, municipalities, and citizens to find professional expertise on a variety of preservation related topics.





#### **14. Sustainably Rehabilitating Historic Properties**

##### Greening the Older Home Workshops

During 2009, Historic New England, the Massachusetts Historical Commission, and the National Trust for Historic Preservation-Northeast Office began offering a workshop on Greening the

Historic Home. Overall themes in the workshop included windows, insulation, and renewable energy. The workshops were well attended and presented in Salem, Newburyport, Medford, and Harwich.

##### Preservation and Sustainability Forum

During 2010, The Boston Preservation Alliance convened a focus group to investigate new methods of collaboration between the historic preservation and green building community on research methods, marketing, and education.



#### **15. Including diverse cultural and ethnic communities in historic preservation.**

##### Neighborhood Preservation Partnership

An exciting initiative over the past two years has been undertaken by the Boston Preservation Alliance and Historic Boston Incorporated. Working in the neighborhoods of Boston, efforts have included supporting historic property owners with technical assistance, offering a forum to discuss what the neighborhood needs regarding historic and cultural resources and fostering connections between the neighborhoods and city government. This has been accomplished through two circuit riders dedicated to providing preservation assistance.

# The Challenges Ahead

While the past five years has brought many accomplishments, challenges remain in the preservation of the historical and cultural resources of Massachusetts. Utilizing the same categories from the Major Accomplishments section, this section focuses on where those challenges remain.

## **1. Identifying and Documenting Historic and Archaeological Resources**

### Survey Activity

While survey activity during the 2006-2010 period increased over that reported in the last 5-year plan, survey activity is still much reduced from the 1990s. This appears largely the result of state-level budget constraints that greatly limited the amount and availability of MHC Survey and Planning grants during much of this time, though this was partially offset by the increased availability of Community Preservation funds to support survey projects.

### Communities with Outstanding Survey Needs

There remain 128 communities identified by Massachusetts Historical Commission as having specific outstanding survey needs.

### Many Community-wide Surveys Are Not Up-to-date

There are many communities that have not revisited their surveys in 25 or 30 years. The documentation on the existing forms may be inadequate for current standards and coverage may be insufficient. The development of a communitywide survey plan would be a particularly important first step for communities with little or no survey. Plans are needed that target priority properties for survey, identify significant historic themes, and establish a phased approach to completing the identified goals. Plans and surveys need to address the full range of local resources by type, period, theme, and location.

### Local Historical Commissions

It is essential that local historical commissions develop plans for an active and ongoing program to initiate, maintain, update, and expand their communitywide inventory of historic and archaeological resources using MHC guidelines and inventory forms in accordance with NPS standards for the identification and evaluation of cultural resources. As the local organization responsible for historic preservation planning, the inventory should be the local historical commission's highest priority.

### Funding Survey Projects

The major impediment to increasing the level of survey statewide is the lack of funding. While many communities that have passed the community preservation act, have hired a professional consultant directly or used CPA funds for a matching survey and planning grant, numerous towns have struggled to find the funding for professional survey assistance. Over the past few years, MHC grants have been typically limited to CLGs leaving non-CLG communities with no grant opportunities. During the upcoming planning cycle, it is hoped that the survey and planning grant program can be opened to non-CLGs.

### Technical Assistance, Training and Support

In particular for those local historical commissions interested in preparing a survey plan or completing survey forms themselves, there is a great need for additional technical assistance and

training. In cooperation with the Massachusetts Historical Commission, Preservation Massachusetts prepared a powerpoint presentation on preparing inventory forms. Plans to continue offering this useful workshop statewide are needed. At the Massachusetts Historical Commission, a new and updated Historic Property Survey Manual is needed that reflects changes in survey methods and technologies, including digital photography, GIS mapping, and internet-based research.

#### Professional Survey Contractors

With the majority of inventory forms submitted by professional historic preservation consultants, it is essential that training and support is offered that sustains an active community of professional survey contractors that can maintain high standards of field documentation and research.

#### Public and Non-Profit Owned Resources

Municipal, state and federal agencies, non-profit land holding organizations, including regional and local conservation land trusts own many historic and archaeological resources. In many cases, these properties do not have adequate survey. New methods of encouraging survey of public and non-profit owned resources are greatly needed.

#### Thematic Surveys

Under-represented in the historic resource inventories statewide are certain thematic resource types including historic industry-related resources, agricultural resources and rural historic landscapes, transportation and service infrastructure, commercial properties, designed landscapes, resources with ethnic associations, properties associated with African-American history, properties associated with Native Americans, and mid-20<sup>th</sup> century resources. While several municipalities have initiated reconnaissance-level surveys of ancient and historic archaeological resources in their communities, most statewide lack this level of information. While particularly useful, challenges to completing thematic survey include multiple jurisdictions as one thematic survey may include numerous municipalities.

## **2. Evaluating and Registering Historic and Archaeological Resources**

Every year, MHC evaluates some 110-120 properties for their National Register eligibility. And every year, MHC's NR staff reviews, processes, and moves toward completion on average about 35 nominations, while double that number comprise a backlog of nominations awaiting review,



*Maritime resources in Fairhaven*

editing, additional research, and/or final processing. Funding at both the local and state levels is a factor in the considerable backlog. At the local level, commissions do not have the funds necessary to hire a professional preservation consultant to prepare the nomination, meaning more time must be spent at the state level to produce a final nomination that meets the NPS's standards. At MHC, staff and funding constraints both limit the number of nominations that can be reviewed annually and brought to the State Review Board. Nevertheless, interest in the National Register program continues to grow, since the program is central to preservation planning activities statewide and the access

point for limited protection and grants opportunities for historic and cultural resources. While the volume of National Register nominations continues at a high level, a remarkable number of cities and towns in Massachusetts have yet to see listings of any of their historic resources in the

National Register. Among the two dozen communities still without any NR listings since the last plan, several have expressed interest in designation of one or more of their town's historic resources, even if those nominations have yet to be developed. These include the towns of Bellingham, Carver, Chilmark, Oakham, Otis, and Wales. The MHC remains committed, where possible, to facilitating nominations in such communities.

#### Older Nominations

With National Register listings as far back as 1966, Massachusetts has many early nominations. While national and state standards for registration have changed, nominations from the mid 1980s and earlier need improved documentation to meet current preservation planning needs and updated information to reflect current conditions. In addition, extending the period of significance for early nominations is needed which will recognize many more contributing resources.

#### Additional Education is Needed

There remains a need for additional training for local historical commissions and the general public on the benefits and the process of listing properties in the National Register of Historic Places. Designation in the National Register provides recognition, increases awareness of historic and cultural resources, provides limited protection, and access to grant and funding opportunities. Therefore, it is essential to provide access to the National Register listing process through venues such as the Preservation Massachusetts training module.

#### Modernism

The resources of the mid 20<sup>th</sup> century, including suburban neighborhoods, commercial, institutional, and civic structures, individual residences, and mid 20<sup>th</sup> century landscapes are among the region's least appreciated and most threatened historic resources. Expressions of



*An example of modernist residential housing located in Lincoln*

modernism are found in Massachusetts as early as the 1920s, and examples continued into the 1970s. Interest is growing across the state in recognizing these now-fragile resources. Context studies are presently in development for mid-century modern residences of the Outer Cape, and for individual houses and subdivisions in the town of Lexington. It is expected

that over the next five years, a number of National Register nominations for modern residential properties in these and other communities will be submitted. Other property types associated with rapid postwar development—for example, schools, commercial buildings, defense-related resources, transportation-related resources—also would be well served in terms of the National Register program by increased context development to allow for more informed evaluations and the protective and recognition opportunities that can come with National Register eligibility. One very common property type will present a particular challenge in upcoming years—the 20th century apartment building. In urban areas such as Boston and Springfield, thousands of apartment buildings were erected in the early 20<sup>th</sup> century. With incentive opportunities for historic rehabilitation, more examples of this property type are being presented for evaluation and registration. Without context development, evaluation is challenging. The MHC expects to



collaborate with consultants and communities in development of context that will help understand the significance and registration requirements of this common property type.

#### New or Little Recognized Property Types

There is additional need to evaluate properties associated with Native American tribes, African-American, Portuguese, and other ethnic groups for whom few historic and cultural resources are presently designated.

### **3. Protecting Historic & Archaeological Resources through State & Federal Regulations** Review and Compliance at the Massachusetts Historical Commission

The review and compliance program is difficult to predict since it depends on many factors including the economy, finances, real estate market conditions, state/federal/local budgets, investments as well as others. For instance, the federal economic recovery and stimulus programs resulted in a 25% increase in MHC project reviews in 2009-2010. MHC responded quickly to recovery project reviews, in order to assist with the stimulus programs. However, there was no supplemental funding for hiring additional staff. In fact, the state budget decline has further exacerbated MHC's limited staffing problem. Even with these challenges, MHC continues to use federal and state reviews as effectively as possible to result in preservation and protection of historic resources.

#### Monitoring Existing Preservation Restrictions

MHC now holds over 600 preservation restrictions on grant-assisted properties. Updating owner information, communicating with owners, and monitoring the restrictions on-site all require staff committed to these tasks. This remains very challenging with limited staff availability at MHC.

#### Establishing Additional Preservation Restrictions

The demand for preservation restriction technical assistance remains very high as CPA related preservation restrictions are implemented, as property owners seek to take federal tax deductions and as organizations expand their easement holding activities. In addition, the resources proposed for protection with a preservation restriction is highly varied. As each preservation restriction must be reviewed individually based on the significant features of the resource, processing the high volume of preservation restriction submittals remains challenging.

### **4. Protecting Archaeological Sites**

#### Lack of Archaeological Survey

Only a very small percentage of the state has been subjected to an archaeological survey. As a



*Fort Phoenix, Fairhaven*

result, perhaps only 3-5% of the number of archaeological sites expected to exist are recorded in MHC's inventory. Given the lack of systematic archaeological survey across the state, identification surveys are a priority planning activity.

#### Archaeological Awareness

The general public has a lack of awareness when it comes to archaeological resources. Below ground resources may even be overlooked by those in the preservation community. Additional public education is



needed on the archaeology of Massachusetts.

#### Regulations Protecting Archaeological Sites

While MHC may reviews impacts to significant archaeological sites in Massachusetts through review and compliance activities, most archaeological sites are on privately owned land. When development does not meet a review and compliance threshold such as federal or state funding, permitting or licensing, MHC review may be non-existent. Additional planning, education, and local review are needed to better protect significant archaeological sites.

### **5. Protecting Historic Resources through Financial Support**

#### Massachusetts Preservation Projects Fund

Aside from the challenge of maintaining funding for this program, current challenges for the MPPF program include developing a revised preservation restriction agreement which will require a standard of baseline documentation in the form of existing conditions, photographs, and other record documents. Similarly, the nearly 600 MPPF preservation restrictions, currently held by the MHC, require the development of a more active covenant monitoring program. Presently, MHC Grants Division staff is in the midst of notifying all owners of properties with MPPF preservation restrictions to remind them of their obligations and responsibilities and to update the MHC with current contact information as well as anticipated project plans.

#### Community Preservation Act

While the participation in the community preservation act continues to grow, challenges remain for increasing statewide revenue and increasing local participation from economically-challenged communities. During the economic downturn, real estate filings dropped considerably resulting in far less revenue into the community preservation trust fund. From a 100% match several years ago, the average statewide match dropped to 31% in 2010.

Meanwhile, although 147 communities have passed CPA, passage by large, urban communities as well as less affluent communities has lagged. Stimulating broader participation in CPA remains critical to extending the preservation benefits of the Act to communities statewide.

#### Survey and Planning Grants

Due to budgetary constraints, the Survey and Planning grant program operated at a minimal level during the 2006-2010 period. Except for FY 2007, only Certified Local Governments were eligible to apply. As a result, many worthwhile local projects could not be funded.

#### State and Federal Tax Credits

The state historic preservation tax credit was recently extended until 2017. Maintaining this tax credit is essential as the loss of this tax credit would be devastating. Meanwhile, efforts to remove the \$50 million annual cap have been unsuccessful.

#### 20<sup>th</sup> Century Buildings

Funding challenges will also be present as recent past buildings from the 20<sup>th</sup> Century age. Transitional masonry buildings consisting of structural steel frame, masonry walls, cast stone, and terra cotta are facing major deterioration and will require substantial investments in the coming years.



*Financial challenges face many historic properties such as this mill building in the village of Gilbertville.*

## **6. Protecting Historic Resources through Assisting Local Governments**

### Technical Assistance to Local Historical Commissions

While technical assistance to local governments is available through many different avenues such as MHC guidebooks, handouts, DVDs, phone/e-mail responses, and on-site workshops, the need for assistance remains greater than what is currently offered through commission training. Too often, the bar remains high for volunteer commission members to accomplish essential tasks such as survey, national register nominations, establishing local historic districts or mobilizing an effort to save a threatened historic resource.

### Circuit Rider Program

Although the circuit rider program is providing expertise and information to many local communities, this program was funded for only a three-year period. Additional funding will be needed to sustain this assistance program.

### Heritage Landscape Inventory Program

The Heritage Landscape Inventory Program, administered through the Department of Conservation and Recreation is on hold due to state budget cuts. This successful partnership program between local communities and a state agency was a great loss with its abrupt termination. Without it, many communities will be unable to identify important landscape resources

## **7. Protecting Historic Resources through Local Government Actions**

### Local Historical Commissions

Historic preservation efforts statewide remain largely at the local level through historical commissions and historic district commissions. Very few commissions have staff assistance and so rely almost exclusively on the volunteer efforts of commission members themselves. Local commissions face many challenges as they remain on the frontline of preservation efforts. Among their challenges are recruiting new members, assuring adequate municipal funding, and finding time to accomplish their goals. Many of the all-volunteer, local commissions are overburdened and unable to establish a strong, effective, and long-lasting presence in their community. Even though there are nearly 3000 members that make up the commissions, they are not well represented.

### Inactive Local Historical Commissions

While almost every municipality in Massachusetts has adopted a local historical commission, it is estimated that 15 % of commissions statewide are not currently active. In these communities, there may be no one that can advocate for a threatened resource, recognize the need for preservation planning, or understand that preservation options and strategies are available.

### Demolition Delay Bylaws

An impressive number of communities established a demolition delay bylaw over the past five years. Yet, there remain 224 cities and towns without this basic level of regulatory protection. Additionally, most demolition delay bylaws remain at only six months. This is often an inadequate period of time to seek alternatives to demolition.



*This unique WWII veterans housing was demolished in 2010 despite the advocacy efforts to preserve it.*

Additional demolition delay bylaws are needed and with lengthier delay periods of twelve to eighteen months.

#### Local Historic Districts

While 120 cities and towns now have a local historic district, that leaves 231 without the protection of a local historic district. Furthermore, only a very small geographic area of the state is actually protected by a local historic district. Most of the historic areas of Massachusetts remain unprotected. Establishing additional local historic districts and enlarging existing local historic districts is essential. While local historic districts remain the most effective preservation tool available, passage of additional local historic districts remains very challenging. It is estimated that only 10% of appointed local historic district study committees successfully pass a local historic district through their local legislative body.

#### Local Historic District Commissions

With the vast majority of the local historic district commissions consisting solely of volunteers without municipal staff support, district commissions struggle with design review, administration, public education, and enforcement.

#### Volunteers Needed

Although not the case in all communities, local historical commissions and historic district commissions are often facing difficulties in finding qualified, energetic volunteers to serve on their commissions. As our culture increases its mobility, fewer people have a connection and commitment to their hometown.

#### Other Regulatory Tools

While tools such as Architectural Preservation Districts remain an excellent option for cities and towns interested in protecting neighborhood character without the more stringent design review regulations of a local historic district, few communities have opted to establish architectural preservation districts.

### **8. Protecting the Rural Historic Landscape**

#### Development Trends

A report issued in 2009 by the Massachusetts Audubon Society found that 22 acres of land is developed each day in Massachusetts with some areas particularly threatened by sprawl development. While the report found good news that between 1999-2005 Massachusetts protected more land than it lost to development, the threat to the rural historic landscape is clear. As the report notes, agricultural land is highly threatened as we continue to build farther from metropolitan areas. 87% of the development was for residential construction accounting for a loss of 10,000 acres of agricultural land between 1999 and 2005. Without its agricultural landscapes, Massachusetts loses a key piece of its character.

### **9. Protecting Historic and Archaeological Resources from Detrimental Natural Processes**

Although Coordinated Statewide Emergency Preparedness (COSTEP) has made excellent progress in integrating cultural resources into emergency management, they recognize that the majority of cultural heritage institutions do not have an emergency plan with staff trained to carry it out. With several recent floods in Massachusetts impacting historic museum collections, the need for quick action through an emergency plan was acutely noted.

### **10. Revitalizing and Protecting Historic Urban and Industrial Areas**

#### Urban and Industrial Areas

The majority of residents of Massachusetts live in urban areas. In many ways, the future of historic preservation in Massachusetts rests with the urban areas of the state. Large cities, medium sized cities, and the small industrial villages scattered throughout the state have the abundance of irreplaceable historic resources. As manufacturing practices adjust to modern requirements, many of these places face challenges in funding large-scale rehabilitation projects and maintaining vibrant neighborhoods. While urban revitalization success stories abound, decades of job losses and disinvestment are the common theme. The result is that many Massachusetts residents choose new housing constructed on former agricultural fields or woodlands while opportunities for infill housing and rehabilitation are unmet. A report by MassInc and the Brookings Institution released in 2007 focused on 11 historic mill cities and found many concerns regarding their economic status compared to other areas of the state.



*Multi-family housing in the City of Worcester*

## **11. Encouraging Historic Preservation through Heritage Tourism**

### **Drawing Additional Heritage Visitors to Massachusetts**

There are numerous challenges regarding heritage tourism particularly during the economic downturn. The state budget crisis has greatly impacted the funding available to draw visitors to Massachusetts. In many cases, state funding for visitor centers has been eliminated. All of the Visitor Centers on the Massachusetts Turnpike have been closed. Publication of the Getaway Guide magazine has ceased. Additionally, grants that encourage visitation to area attractions have declined or been eliminated. At the same time, discretionary income has declined bringing fewer travels. Museums have noted that visitation by school groups has dropped off. All this could have long-lasting implications as the next generation will have less interest in historic preservation and heritage tourism sites face increased competition from other recreational venues.



*Shaker Village, Hancock*

### **Economic Impact Study**

The economic impact study from 2002 clearly demonstrated the enormous impact of heritage tourism on the economy of Massachusetts. This study is now almost ten years old and more recent statistics are needed to encourage policies that protect historic resources.

## **12. Strengthening the Stewardship of Historic and Archaeological Resources**

### **State Government Property**

While the Massachusetts Historical Commission does not own any property in the state, many state agencies do. These include the Department of Conservation and Recreation, Massachusetts Department of Transportation, and the university system. State owned historic properties include archaeological sites, buildings, bridges, landscapes, and structures. For properties in the DCR system, one of the major issues remains deferred maintenance and the lack of funding to properly maintain buildings and structures. At the MA DOT, challenges include the many historic bridges in need of rehabilitation or upgrade. An additional concern of note is the need to make



certain that significant state surplus property is only sold with an appropriate preservation restriction.

#### Local Government Property



*High Service Water Tower,  
Lawrence*

Many of the same concerns noted for state property are also true for property owned by municipal government such as deferred maintenance, lack of funding, and disposition of surplus property.

#### State Government Policies

While most state policies and regulations consider their impacts to significant historic resources, some state policies remain that do not adequately take into account historic resources, community character, and neighborhood revitalization. Of particular concern to many communities during this planning cycle was the Massachusetts School Building Authority's Model School Program which encouraged demolition and new construction over additions and rehabilitation.

#### Historic Homeowners

Although historic homeowners own the vast majority of the historic resources statewide, there are few resources to assist them with the stewardship of their property. There are currently no statewide tax credits, loans or grants available to assist private residential historic homeowners. Even more troublesome is the fact that finding qualified contractors sensitive and knowledgeable regarding best practices may be hard to find or entirely unavailable in their geographic area. As a result, homeowners may be left with few preservation options regarding maintenance of their property. Aside from efforts at Historic New England, there is essentially no training in Massachusetts directed to historic homeowners. This is a huge constituency that is not being reached. Additional training for homeowners including topics such as lead paint abatement, window repair, energy efficiency, water infiltration, moisture, architectural details and local history would be highly beneficial.



### **13. Protecting Historic Resources through Education and Public Awareness**

#### Statewide Preservation Coalition

The Statewide Preservation Coalition, made up of preservation partners around the state, was particularly effective at advocating for the Massachusetts Historic Preservation Tax Credit. This broad coalition of local, regional and state preservation partners could achieve additional successes.

#### Utilizing the News Media

While the news media will often publish or broadcast stories related to historic preservation, the news media is not effectively utilized by the historic preservation community. Particularly at the local level, commissions need training and expertise that can help them develop relationships with news media, prepare press releases, and respond to inquiries on historic preservation topics. While MHC prepares press releases for preservation award winners and national register nominations, there are many additional topics that would appeal to news media outlets and their consumers. The fiftieth



anniversary of the Massachusetts Historical Commission in 2013 offers unique opportunities for publicizing statewide historic preservation efforts.

#### Additional Training Needed

There is a great need for additional historic preservation training. Besides local commissions, other groups that would benefit from targeted training include realtors, contractors, and developers.

#### Plaque Programs, Walking Brochures, and Other Local Education Efforts

Challenges related to funding are even impacting such local efforts as plaque programs and walking tour brochures. During this economic downturn, the Bostonian Society was forced to temporarily suspend any additional historical plaques.

#### Municipal Websites

Over the past five years, most municipalities now have an official city or town website. However, a review of municipal websites demonstrated that many do not include a webpage for the local historical commission or the historic district commission even when other boards and commissions are listed. A local commission webpage is a valuable tool for education, outreach, and strengthening historic preservation efforts and needs to be a local commission priority.

#### Massachusetts Historical Commission Website

Improvements to the Massachusetts Historical Commission website are needed including a more user-friendly format for the citizens of Massachusetts. The website as currently constructed assumes a level of historic preservation knowledge most visitors are unlikely to have. While great progress has been made in accessing digitally converted text and photo files of historic property inventory files through the MHC website, this remains a multi-year project to complete the state.

#### Statewide Historic Preservation Conferences

Although annual statewide historic preservation conferences were held from 1999 to 2005, MHC has been unable to maintain this event due to staffing issues. Yet, there is a great need for bringing the volunteer and professional statewide preservation community together for training, networking, and inertia. The continued success of other annual conferences for the land trust community, planning boards, and conservation commissions demonstrates that an annual historic preservation conference for the state would be a great benefit.

#### Massachusetts Historical Commission Newsletter

Staffing changes at MHC have presented numerous challenges to publishing a timely hardcopy newsletter. It has now been several years since the Preservation Advocate, MHC's newsletter has been published. While the e-newsletter has helped fill this gap, there remains a need for a more in-depth bi-annual SHPO newsletter.

#### Basic Historic Preservation Inquiries

Despite educational and outreach efforts, continued confusion over the National Register of Historic Places and Local Historic Districts remains.

### **14. Sustainably Rehabilitating Historic Properties**

#### Historic Buildings are Green Buildings

Historic buildings remain under great threat with the recent focus on green energy-efficient buildings. Yet, new construction built in a completely car dependent outer suburban area will likely be considered a green building. Yet, the historic building located in an urban setting is seen as an energy waster. With the advertising and misinformation about how best to accomplish energy-efficiency, the general public has an imbalanced perspective regarding

historic buildings. This is particularly true for window replacements, deep energy retrofits and where insulation is appropriate. Historic buildings are most often inherently green through their embodied energy, walkable locations, quality construction, and natural materials. By upgrading mechanical systems, sealing air infiltration and insulating appropriate areas, historic buildings can outperform many new buildings. Yet, this message is not getting through effectively by the preservation community even though energy auditors are stating similar conclusions. While the rating system for sustainable buildings, LEED, is now recognizing the inherent sustainability of historic buildings compared to new construction but there is a long way to go towards making the point system an even playing field.

#### Window Replacements

The replacement of historic windows remains a great concern as old growth wood windows, fully capable of rehabilitation and weather sealing, are removed and discarded. With the financial incentives and extensive marketing, property owners will continue to purchase replacement windows even when other strategies have a much better cost benefit analysis for saving energy and money. The preservation community needs a vocal, proactive, and broader message regarding the benefits of retaining original windows.

#### Deep Energy Retrofits

Other concerns include deep energy retrofits. Better documentation and monitoring of the impacts of deep energy retrofits are needed. Some deep energy retrofits are clearly not preservation friendly and do not meet the Secretary of the Interior Standards. Other energy retrofit techniques may be acceptable. However, further research is needed into what short and



long-term damage may result as well as simple cost/benefit analysis.

#### Alternative Energy Systems

Guidelines are also needed regarding alternative energy systems such as accommodating solar panels on historic buildings. The historic preservation community needs to recognize that new installations, while visible, can still meet the Secretary of the Interior Standards.

#### Collaboration with the Energy Community

Too often, historic preservation is pitted against green energy. Yet, recent discussions suggest that there are many common goals and much that can be learned from each other. The historic preservation community must reach out to the green energy community to clarify common ground and then how best to market this message out to the public and policy makers collaboratively.

### **15. Including diverse cultural and ethnic communities in historic preservation.**

#### Native American

With a past stretching back 10,000 years in Massachusetts, Native Americans have a distant past and a recent past that offers perspectives for all residents of Massachusetts to learn and appreciate. Yet, additional efforts are needed that can help to identify, document, and educate regarding the Native American historic and archaeological resources present statewide.

#### Demographics

Massachusetts remains an immigrant state. In fact, if not for the additional immigrant populations entering and residing in Massachusetts, the state would be losing population. In the

last federal census, the percentage of foreign-born persons residing in the state was 12.2%. This offers both opportunities and challenges for historic preservation efforts. As the history of the state is directly tied to immigrant populations arriving here, historic preservation can be brought right into the present. However, while there are some exceptions, the historic preservation community is in general not reaching out to new arrivals. Additional materials and methods are needed that engage specific audiences.

# Statewide Goals and Objectives

After reviewing the major accomplishments over the past five years, considering the current challenges we face, this section looks ahead to the next five years for what needs to be done, who is best suited to accomplish it, and a benchmark for how to reflect on the status of historic preservation five years from now.

These Statewide Goals and Objectives can only be accomplished through the commitment of many local, regional, and statewide organizations involved in historic preservation. Partnerships are essential. So, too, is the recognition that each organization has unique strengths that will collectively bring us closer to reaching these goals. For the first time, this State Historic Preservation Plan identifies the organization(s) responsible or best-suited to accomplish each objective.

It should be noted that some of the Massachusetts Historical Commission objectives found here represent core responsibilities of the Massachusetts Historical Commission. These are included here because the Statewide Goals and Objectives are referred to regularly and, most importantly, form the basis of our Annual Work Programs. Each task included in our Annual Work Program must refer back to the Goals and Objectives of this State Historic Preservation Plan.

## Organization Key

BPA – Boston Preservation Alliance  
BSA - Boston Society of Architects  
CCMHT – Cape Cod Modern House Trust  
CLG - Certified Local Government  
COSTEP – Coordinated Statewide Emergency Preparedness  
CPC – Community Preservation Coalition  
CPC-Community Preservation Committee  
DHCD – Department of Housing and Community Development  
DOCOMOMO – Documentation and Conservation of the Modern Movement  
DAR – Department of Agricultural Resources  
DCR – Department of Conservation and Recreation  
FEMA – Federal Emergency Management Agency  
FOMA – Friends of Modern Architecture  
HBI – Historic Boston Incorporated  
HNE – Historic New England  
LCPC – Local Community Preservation Committee  
LHC – Local Historical Commissions  
LHDC – Local Historic District Commissions  
LT – Land Trusts  
MAAB – Massachusetts Architectural Access Board  
MACDC – Massachusetts Association of Community Development Corporations  
MADOT – Massachusetts Department of Transportation  
MCIA – Massachusetts Commission on Indian Affairs  
MEMA – Massachusetts Emergency Management Agency

MHC – Massachusetts Historical Commission  
 NPO – Non Profit Organization  
 NTHP – National Trust for Historic Preservation  
 PM – Preservation Massachusetts  
 RPA – Regional Planning Agencies  
 THPO – Tribal Historic Preservation Office  
 TPL – Trust for Public Land  
 TTOR – Trustees of Reservations

## 1. Identifying and Documenting Historic and Archaeological Resources

Goal: Support ongoing historic and archaeological resource identification and documentation and its integration into local, regional, and statewide preservation planning.		
Objectives:		Organization
1	Initiate, maintain, update, and expand a community-wide inventories of historic and archaeological resources using MHC guidelines and inventory forms in accordance with NPS standards for the identification and evaluation of cultural resources.	<i>LHC MHC</i>
2	In communities with little or no survey, prepare a community-wide survey plan that targets priority properties for survey, identifies significant historic themes, and establishes a phased approach to completing the identified goals.	<i>LHC MHC</i>
3	Seek local and state funding for professional assistance in preparing survey forms such as local fundraising, municipal funds, community preservation act funds, and survey and planning grants.	<i>LHC</i>
4	Provide technical assistance to cities and towns engaged in initiating, updating, expanding, or maintaining their inventories of historic and archaeological resources.	<i>MHC</i>
5	Deliver the introductory survey training module to local historical commissions on a regularly scheduled basis throughout the state.	<i>MHC PM</i>
6	Complete an update of the Historic Property Survey Manual that reflects changes in survey methods and technologies, including digital photography, GIS mapping, and internet-based research.	<i>MHC</i>
7	Undertake surveys of historic and archaeological resources owned by municipal, state, federal, and non-profit land holding organizations, including regional and local conservation land trusts.	<i>MHC, LHC, NPO State and Federal Agencies</i>
8	Continue to support the use and further refinement of dendrochronology dating as a tool in historic architectural research and building analysis.	<i>MHC</i>
9	Support and sustain an active community of professional survey	<i>MHC</i>



	contractors to undertake projects and maintain high standards of field documentation and research.	
10	Undertake plans and surveys that address the full range of local resources by type, period, theme, and location.	<i>LHC</i> <i>MHC</i>
11	Undertake thematic surveys associated with historic industry-related resources, agricultural resources and rural historic landscapes, transportation and service infrastructure, commercial properties, designed landscapes, resources with ethnic associations, properties associated with African-American history, properties associated with historic Native American history, and mid-20 <sup>th</sup> century resources in general.	<i>MHC</i> <i>HNE</i> <i>FOMA</i> <i>THPO</i> <i>MCIA</i> <i>DOCOMOMO</i> <i>CCMHT</i>

## 2. Evaluating and Registering Historic and Archaeological Resources

Goal: Support ongoing historic and archaeological resource evaluation and registration into local, regional, and statewide preservation planning.		
Objectives:		Organization
1	Evaluate historic property significance through the National Register of Historic Places criteria.	<i>MHC</i> <i>CLG</i>
2	List National Register eligible properties in the National Register of Historic Places.	<i>MHC</i> <i>CLG</i>
3	Assist local commissions in understanding the requirements for national register eligibility opinions.	<i>MHC</i>
4	Assist local commissions in listing eligible properties in the National Register.	<i>MHC</i>
5	Improve documentation for pre-1986 National Register nominations.	<i>MHC</i>
6	Encourage National Register nominations that develop contexts for 20 <sup>th</sup> -century resources.	<i>MHC</i>
7	Encourage National Register nominations that develop contexts for resources associated with the state's ethnic history including Native Americans, African Americans, and other groups.	<i>MHC</i>
8	Improve the capacity of the Massachusetts Historical Commission to edit and forward National Register nominations to the National Park Service promptly.	<i>MHC</i>
9	Inform the public about the benefits of the National Register program.	<i>MHC, PM, LHC, NTHP</i>
10	Prepare nominations through volunteer efforts or with professional assistance.	<i>LHC</i>
11	Seek funding sources for professional assistance in preparing national register nominations.	<i>LHC</i>

### 3. Protecting Historic & Archaeological Resources through State & Federal Regulations

Goal: Improve the effectiveness of federal and state regulations protecting significant historic and archaeological resources.		
Objectives:		Organization
1	Review projects with state and/or federal involvement for their impact on historic and archaeological resources.	<i>MHC</i>
2	Investigate additional methods for increasing public information regarding procedures for state and federal reviews.	<i>MHC</i>
3	Develop and revise programmatic agreements with federal and state agencies that will reduce staff commitments while still providing adequate review to protect historic resources.	<i>MHC</i> <i>State Agencies</i> <i>Federal Agencies</i>
4	Increase the capacity of the Massachusetts Historical Commission to review, comment, and approve preservation restrictions.	<i>MHC</i>
5	Encourage the use of incentive programs such as the donation of preservation restrictions or conservation easements for significant properties.	<i>MHC</i>
6	Monitor properties on which MHC holds a preservation restriction.	<i>MHC</i>
7	Develop a manual and guidelines for submitting preservation restrictions to the MHC.	<i>MHC</i>
8	Develop creative and sensitive accessibility solutions for historic properties.	<i>MHC</i> <i>MAAB</i>
9	Provide technical assistance regarding the state building code as it relates to historic properties.	<i>MHC</i>

### 4. Protecting Archaeological Sites

Goal: Strengthen initiatives for the protection of significant archaeological resources.		
Objectives:		Organization
1	Provide public information regarding the importance of saving archaeological sites.	<i>MHC</i>
2	Adopt archaeological review bylaws for the protection of significant archaeological sites.	<i>Municipalities</i>
3	Identify significant sites and initiate outreach to property owners as a first step towards developing long-term preservation plans for site protection.	<i>MHC</i>
4	Encourage land conservation tools that can also preserve significant archaeological sites.	<i>MHC</i>
5	Computerize the MHC archaeological data files through databases and GIS mapping.	<i>MHC</i>
6	Initiate thematic historical archaeological surveys to locate and identify sites associated with women, children, African Americans, and other groups for which documentation is unrepresentative or inaccurate, and for periods and site types that are well-suited to historical archaeological study.	<i>MHC</i>
7	Coordinate with the Massachusetts Historical Commission on known and potential archaeological sites.	<i>LHC</i>

8	Prepare comprehensive, community-wide archaeological surveys with qualified consultants and in partnership with the MHC.	<i>LHC</i>
9	Collaborate on identifying and protecting significant Native American sites.	<i>THPO, MCIA, MHC, LHC</i>
10	Develop archaeological national register nominations where archaeological potential is high.	<i>MHC</i>

### **5. Protecting Historic Resources through Financial Support**

Goal: Provide adequate levels of funding and incentives to support historic preservation activities across the state.		
Objectives:		Organization
1	Administer, support, and publicize the preservation of significant historic properties under non-profit and municipal ownership through the Massachusetts Preservation Projects Fund (MPPF).	<i>MHC</i>
2	Administer, support, and publicize the Survey and Planning Grant program for Certified Local Governments and, when funding is available, for Non-Certified Local Governments.	<i>MHC</i>
3	Utilize federal transportation enhancements to fund eligible historic preservation projects.	<i>RPA MADOT</i>
4	Administer, support, and publicize the federal investment tax credit and the state historic rehabilitation tax credit programs.	<i>MHC</i>
5	Seek the expansion of the state historic tax program through significantly increasing or removing the annual cap.	<i>PM</i>
6	Assist cities and towns in adopting the Community Preservation Act.	<i>CPC</i>
7	Revise the Community Preservation Act to provide increased financial incentives to urban areas.	<i>CPC</i>

### **6. Protecting Historic Resources through Assisting Local Governments**

Goal: Assist local governments, particularly historical commissions, historic district commissions, and community preservation committees in protecting their significant historic resources through technical expertise and effectiveness.		
Objectives:		Organization
1	Encourage and assist communities in adequately identifying and documenting their historic resources, planning for their protection, and advocating for protective mechanisms.	<i>MHC</i>
2	Provide technical assistance to cities and towns interested in establishing a local historic district, demolition delay bylaw, architectural preservation district, and other local protection mechanisms.	<i>MHC</i>
3	Provide regional workshops to local commissions on preservation planning, local historic districts, demolition delay, and other topics as needed.	<i>MHC</i>
4	Facilitate peer information exchange among local commissions.	<i>MHC</i>
5	Administer, support, and publicize the Certified Local Government Program.	<i>MHC</i>

6	Amend the State Historic Districts Act (M.G.L. Ch. 40C) to make its structure more useable and to clarify key technical and procedural areas.	<i>MHC</i> <i>PM</i> <i>LHDC</i>
7	Educate local historical commissions, historic district commissions, and community preservation committees about the effectiveness of preservation restrictions.	<i>MHC</i>
8	Establish a statewide association of local historical and historic district commissions.	<i>LHC</i> <i>LHDC</i>

## **7. Protecting Historic Resources through Local Government Actions**

Goal: Establish outreach, policies and regulations at the local level recognizing that the strength of historic preservation is at the local level.

Objectives:		Lead Organization
1	Protect significant properties through the passage of local historic districts, demolition delay, architectural preservation districts, and other preservation local bylaws and ordinances.	<i>LHC</i> <i>LHDC</i>
2	Administer the demolition delay bylaw to best protect significant historic resources.	<i>LHC</i>
3	Administer regulatory design review within local historic districts to best protect significant historic resources and areas.	<i>LHDC</i>
4	Attend training workshops offered by the Massachusetts Historical Commission, Preservation Massachusetts, and other organizations.	<i>LHC</i> <i>LHDC</i>
5	Revise zoning bylaws and ordinances that will encourage concentrating development, discourage sprawl, and revitalize commercial centers.	<i>LHC</i>
6	Integrate historic preservation concerns into the planning and development process.	<i>LHC</i>
7	Undertake public information programs such as walking tours, neighborhood brochures, preservation awards, websites or DVDs to heighten public awareness of historic resources.	<i>LHC</i>
8	Adopt the Community Preservation Act in order to fund historic preservation projects.	<i>LHC</i>
9	Fund historic preservation projects through the Community Preservation Act.	<i>CPC</i>
10	Apply for status as a Certified Local Government through the Massachusetts Historical Commission when the minimum requirements to become a CLG are met.	<i>LHDC</i>
11	Apply for funding through the Survey and Planning Grant program for survey, national register nominations, planning projects, and public education projects.	<i>LHC</i> <i>LHDC</i>

## **8. Protecting the Rural Historic Landscape**

Goal: Strengthen efforts for the preservation of Massachusetts's rural historic landscapes.

Objectives:		Lead Organization
1	Acquire landscapes that have significant historic resources or associations.	<i>Land Trusts</i> <i>TTOR, TPL, CPC</i>

2	Acquire agricultural preservation restrictions on significant historic farmland.	<i>DAR CPC</i>
3	Partner with the land trust community to preserve open space, rural landscapes, and historic structures.	<i>MHC, CPC Land Trusts</i>
4	Advocate for the preservation of rural historic landscapes.	<i>MHC, PM, DCR, DAR, CPC</i>
5	Restart the Heritage Landscape Inventory Program.	<i>DCR</i>

## **9. Protecting Historic and Archaeological Resources from Detrimental Natural Processes**

Goal: Heighten the state's ability to address the effects of natural processes on historic and archaeological resources and its preparedness for responding to natural and other disasters impacting Massachusetts's historic and archaeological resources.

Objectives:		Lead Organization
1	Educate organizations regarding the need for disaster planning.	<i>FEMA, MEMA COSTEP</i>
2	Participate in the Massachusetts COSTEP Advisory Group to foster a statewide disaster preparedness planning process for cultural resources including historic properties and sites that addresses disaster mitigation, preparedness, response and recovery.	<i>FEMA, MEMA MHC, COSTEP</i>
3	Support training to raise the awareness of the emergency management community of the needs of historic properties and sites in disaster situations, and to raise the awareness of stewards of historic properties and sites of the disaster response framework and concerns of the emergency management community.	<i>FEMA, MEMA COSTEP</i>
4	Encourage organizations that have stewardship of historic properties and sites to develop formal, written disaster plans and to file copies of their plans with their municipal emergency management director.	<i>FEMA, MEMA COSTEP</i>
5	Encourage and support ongoing dialog between organizations that have stewardship of historic properties and sites and their local, municipal emergency management director to develop protocols for procedures and communication in the event of a local disaster.	<i>FEMA, MEMA COSTEP</i>
6	Encourage local historical commissions to take a lead role in strengthening relationships between historic property and site stewards, municipal authorities and emergency managers.	<i>FEMA, MEMA COSTEP</i>

## **10. Revitalizing and Protecting Historic Urban and Industrial Areas**

Goal: Incorporate specific historic preservation objectives in community revitalization and economic development efforts.

Objectives:		Lead Organization
1	Provide federal and state historic tax credits that rehabilitate urban and industrial areas.	<i>MHC</i>
2	Coordinate revitalization policies, tax credits, grants, and community development plans so that projects can have the largest impact throughout the community.	<i>MHC MACDC DHCD</i>
3	Provide economic development strategies that discourage greenfield development and encourage the rehabilitation of historic industrial	<i>DHCD</i>



	properties.	
4	Increase the use of CDBG fund for historic preservation purposes.	<i>DHCD, LHC</i>
5	Provide resources that help to clean up brownfield sites.	<i>DEP CPC</i>
6	Demonstrate that investing in small and large cities offers the best method of encouraging sustainable development.	<i>DHCD, MHC</i>
7	Revise local zoning to encourage adaptive re-use in urban neighborhoods or underutilized buildings.	<i>LHC</i>
8	Provide technical assistance on downtown revitalization and economic development.	<i>DHCD</i>

### **11. Encouraging Historic Preservation through Heritage Tourism**

Goal: Increase heritage tourism to Massachusetts and recognize it as an integral component of the travel and tourism industry and the state's economy.		
Objectives:		Lead Organization
1	Market statewide historic and cultural resources to both residents and out of state visitors.	<i>MOTT</i>
2	Organize the many small historic and cultural institutions into larger heritage tourism efforts.	<i>MOTT</i>
3	Demonstrate the need for additional infrastructure that will support heritage tourism.	<i>MOTT</i>

### **12. Strengthening the Public Stewardship of Historic and Archaeological Resources**

Goal: Increase the care provided to historic and archaeological resources by property owners and interested parties.		
Objectives:		Lead Organization
1	Educate state agencies, municipalities, and non-profit organizations as to their historic preservation responsibilities.	<i>MHC</i>
2	Minimize the impediments to historic preservation within existing state policies and regulations.	<i>All State Agencies</i>
3	Seek local, state, and other funding sources that can adequately maintain municipally owned property.	<i>LHC</i>
4	Provide training to homeowners regarding best preservation practices.	<i>MHC, HNE, LHC PM</i>
5	Partner with statewide, regional, and local organizations on historic preservation initiatives.	<i>Various</i>

### **13. Protecting Historic Resources through Education and Public Awareness**

Goal: Heighten public awareness, understanding, and appreciation of the state's historic and archaeological resources and their methods of preservation.		
Objectives:		Lead Organization
1	Develop public information regarding the identification, evaluation, and protection of historic properties.	<i>MHC</i>
2	Organize Preservation Award programs to highlight significant accomplishments, achievements, and best practices	<i>MHC, PM, LHC, other local and Regional organizations</i>

3	Provide public and private schools with material on local history so that it can be incorporated into the curriculum.	<i>LHC</i>
4	Promote Archaeology Month to educate the public about the importance of preserving archaeological resources in the state.	<i>MHC</i>
5	Develop public information efforts such as walking tours, newspaper articles, neighborhood architectural brochures, preservation awards or cable access programming to heighten public awareness of historic preservation activity in their communities.	<i>LHC</i>
6	Collaborate with building owners and managers on the best practices for rehabilitation of 20 <sup>th</sup> Century buildings.	<i>BSA BPA</i>
7	Improve the website of the Massachusetts Historical Commission by making it more user-friendly to the general public and by increasing the content of information available.	<i>MHC</i>
8	Continue development of the Massachusetts Cultural Resources Information System (MACRIS) including ongoing data entry and to expand its GIS capabilities with a public interface.	<i>MHC</i>
9	Continue efforts to scan and make the digitally converted text and photo files of its historic properties inventory fully accessible through its MACRIS web interface	<i>MHC</i>
10	Reinstate the annual statewide historic preservation conference.	<i>MHC, PM</i>
11	Provide municipal departments, staff, boards, and the general public with secure access to the local inventory.	<i>LHC</i>
12	Organize activities focused on the fiftieth anniversary of the Massachusetts Historical Commission.	<i>MHC</i>

#### **14. Sustainably Rehabilitating Historic Properties**

Goal : Educate the Public that Historic Properties are inherently sustainable.		
Objectives:		Lead Organization
1	Present workshops around the state regarding the sustainability of historic properties.	<i>MHC HNE NTHP</i>
2	Collaborate with energy saving organizations on determining best practices that are sustainable, eco-friendly, and preserve significant resources.	<i>BPA, MHC, NTHP HNE</i>
3	Investigate research methods that will gather data on the cost benefit analysis and reversibility of energy retrofits.	<i>HNE, BPA</i>
4	Collaborate on energy and building code issues as they relate to significant historic resources.	<i>MHC</i>
5	Encourage sustainable development that includes revitalizing urban neighborhoods and the construction of infill development.	<i>MHC DHCD MACDC</i>

#### **15. Including diverse cultural and ethnic communities in historic preservation.**

Goal: Provide opportunities for diverse cultural and ethnic communities to participate in and contribute to historic preservation activities.		
Objectives:		Lead Organization
1	Connect with diverse communities to learn how historic preservation	<i>BPA</i>

	could improve quality of life, community and economic opportunities.	<i>HBI</i>
2	Provide opportunities for historic preservation that can reflect a broader range of cultures, traditions, and ethnicity.	<i>HBI, MACDC</i>

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# HISTORIC HOUSING FOR ALL: HISTORIC PRESERVATION AS THE NEW INCLUSIONARY ZONING

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“The real world of human action is too varied and complex to be captured by any set of categorical structures . . . . [L]ife’s diversity and complexity cannot be contained within square corners.”<sup>1</sup>

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## INTRODUCTION

When Americans celebrated the 100th anniversary of Jane Jacobs's birth this year, they reflected on her tireless advocacy for vibrant, diverse cities in the face of widespread urban renewal.<sup>2</sup> Jacobs championed an animated streetscape of unique buildings, old and new; an eclectic array of merchants; and colorful, if chaotic, sidewalk activity—essentially “an oasis with an irresistible sense of intimacy, cheerfulness, and spontaneity.”<sup>3</sup> Although urban renewal cut a path of destruction through the heart of many cities during the mid-twentieth century, Jacobs's ideas lived on to shape the historic preservation movement and many other progressive policies that have influenced modern planning.<sup>4</sup>

But Jacobs's fight is far from over. Ironically, the renewed interest in urban living—and urban pioneering—that was sparked by her theories has reignited the same tensions that divided Jacobs and her contemporaries back in the 1950s: preservation versus demolition, old versus new, rich versus poor.<sup>5</sup> At the core of these tensions is an affordable housing crisis. Consequently, the strides Jacobs made and the policies she advanced—particularly historic preservation—are being criticized by housing advocates as obstructing affordable housing development.<sup>6</sup>

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2. See, e.g., Roberta Brandes Gratz, *The Jane Jacobs Century*, CITYLAB (May 4, 2016), <http://www.citylab.com/design/2016/05/happy-100th-birthday-jane-jacobs/481035> (reflecting on Jane Jacobs's lasting impacts on urban culture and planning).

3. Jane Jacobs, *Downtown is for People*, FORTUNE (Sept. 18, 2011), <http://fortune.com/2011/09/18/downtown-is-for-people-fortune-classic-1958/>.

4. See Libby Nelson, *Jane Jacobs Believed Cities Should Be Fun—and Changed Urban Planning Forever*, VOX (May 4, 2016 4:30 PM), <http://www.vox.com/2016/5/4/11583342/jane-jacobs-100th-birthday> (“Jacobs argued [that urban renewal] ignored everything that made cities great: the mixture of shops, offices, and housing that brought people together to live their lives. And her vision triumphed.”).

5. See Peter Moskowitz, *Bulldoze Jane Jacobs*, SLATE (May 4, 2016), [http://www.slate.com/articles/business/metropolis/2016/05/happy\\_100th\\_birthday\\_jane\\_jacobs\\_it\\_s\\_time\\_to\\_stop\\_deifying\\_you.html](http://www.slate.com/articles/business/metropolis/2016/05/happy_100th_birthday_jane_jacobs_it_s_time_to_stop_deifying_you.html) (arguing that Jacobs's vision of urbanism had shortcomings that today are being realized, as once-diverse neighborhoods have become “all-white, aesthetically suburban playground[s] for the rich”).

6. See, e.g., Conor Dougherty, *In Cramped and Costly Bay Area, Cries to Build, Baby, Build*, N.Y. TIMES (Apr. 16, 2016), <https://nyti.ms/2kmANOG> (reporting on a pro-development renters group in San Francisco, the SF Bay Area Renters' Federation, or SFBARF, which argues that the city needs as much new development as possible, no matter the consequences). “You have to support building, even

Thus, on Jacobs's 100th birthday, the question on the minds of many was: on which side of the affordable housing debate would Jacobs fall?<sup>7</sup> Would she side with affordable housing development or the preservation of historic districts?<sup>8</sup> It is impossible to answer this question, and not just because Jacobs is no longer around to opine on the issue, but because it is the wrong question. We should be asking: how can historic preservation be used to further affordable housing goals?

The main argument from housing advocates is twofold: that the only way to create enough affordable housing to meet the demand is to build as much housing as possible, and that historic districts prevent development, thereby obstructing affordable housing growth.<sup>9</sup> This Article proposes that historic preservation is not the problem and that preservation is a necessary tool for creating and maintaining quality, affordable housing.

Part I of this Article provides a background on the tension between historic preservation and affordable housing, and lays out the argument against historic preservation. Part II examines the flawed assumptions on which the argument is premised, and explains why preservation is not the problem. Part III illustrates how historic preservation can, in fact, further affordable housing goals. Finally, Part IV explores ways in which historic preservation laws and policies can be strengthened to create more higher-

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when it's a type of building you hate," said the head of SFBARF. *Id.*; see also Gabriel Metcalf, *What's the Matter with San Francisco?*, CITYLAB (July 23, 2015), [http://www.citylab.com/housing/2015/07/whats-the-matter-with-san-francisco/399506/?utm\\_source=SFFB](http://www.citylab.com/housing/2015/07/whats-the-matter-with-san-francisco/399506/?utm_source=SFFB) (explaining that progressive policies developed to respond to blight and urban disinvestment during the twentieth century are not effective in dealing with modern-day problems of rapid population growth and high housing costs).

7. Kriston Capps, *Whose Side in the Housing Wars Would Jane Jacobs Take Up Today?*, CITYLAB (May 4, 2016), <http://www.citylab.com/work/2016/05/would-jane-jacobs-be-a-nimby-or-yimby-bob-dylan/481269>.

8. *Id.*

9. See Dougherty, *supra* note 6 (discussing the tension between Bay Area progressives that pits preservation of the City's historic beatnik charm against the accommodation of affordable housing through increased construction); Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, CITY J. (Spring 2010), <http://www.city-journal.org/html/preservation-follies-13279.html> (arguing that historic district restrictions on new construction reduce housing supply and drive up real estate costs, "mak[ing] those districts exclusive enclaves of the well-to-do, educated, and white"); Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, CITYLAB (Jan. 29, 2016), <http://www.citylab.com/housing/2016/01/why-historic-preservation-districts-should-be-a-thing-of-the-past/431598> (arguing that historic districting is "protectionist single-family zoning" that "thwart[s]" access to desirable neighborhoods); Matthew Yglesias, *Legalize Skyscrapers*, SLATE (Apr. 18, 2012 4:26 PM), [http://www.slate.com/articles/business/moneybox/2012/04/d\\_c\\_s\\_height\\_restrictions\\_on\\_buildings\\_are\\_hurting\\_america\\_.html](http://www.slate.com/articles/business/moneybox/2012/04/d_c_s_height_restrictions_on_buildings_are_hurting_america_.html) (arguing that affordability problem in D.C. "could be ameliorated" by removing height restrictions and building taller).

quality affordable housing, while at the same time encouraging preservation.

## I. BACKGROUND

### A. Local Historic Preservation Controls

Local governments have implemented a variety of zoning regulations that restrict or condition development, but historic preservation has received the brunt of the criticism in the affordable housing debate. The reason for this heavy criticism is that historic preservation is perceived as little more than an exclusionary tool for the elite, keeping out low-income, multi-family development.<sup>10</sup> Before considering the strength of this argument, it is important to understand the structure of historic preservation laws and how they do or do not restrict development.

#### 1. National Register Historic Districts

The National Register of Historic Places formally recognizes the historic and architectural significance of properties and districts but exercises no regulatory control; designation is merely honorary.<sup>11</sup> As the National Park Service states: “National Register listing places no obligations on private property owners. There are no restrictions on the use, treatment, transfer, or disposition of private property.”<sup>12</sup> Properties listed on the National Register may, however, benefit from state and federal tax incentives and preservation grants.<sup>13</sup> With over 11,000 National Register

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10. See, e.g., J. Peter Byrne, *Historic Preservation and its Culture Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 668 (2012) (discussing economist Edward Glaeser’s critique of preservation laws as “legal tools by which the wealthy and powerful exclude high-rise developments from their cozy historic districts”); Todd Schneider, Note, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. POVERTY L. & POL’Y 257, 258 (2001) (“[Critics] accuse preservationists of being elitists who manipulate the preservation process to keep ‘undesirables’ (i.e., the poor and minorities) out of their neighborhoods.”). See generally David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64 (1985) (tracing the evolution of historic districting while noting perceived connections between designations and development).

11. See *National Register of Historic Places Program: Fundamentals*, NAT’L PARK SERV., [https://www.nps.gov/nr/national\\_register\\_fundamentals.htm](https://www.nps.gov/nr/national_register_fundamentals.htm) (last visited Apr. 28, 2017) (outlining the process, benefits, and lack of restrictions associated with a National Register designation).

12. *Id.*

13. *Id.*

Historic Districts containing over 850,000 buildings, the potential benefits are vast.<sup>14</sup>

## 2. Local Historic Districts

The local historic district is the strongest preservation tool. To create an historic district, the local government adopts an ordinance providing for the formation of the district, the criteria for establishing the district, and the guidelines for review.<sup>15</sup> Before property owners can make exterior alterations, demolish existing buildings, or construct infill development, they must obtain a certificate of appropriateness from the commission, certifying that the work satisfies the guidelines.<sup>16</sup> Typically, preservation ordinances incorporate the Secretary of the Interior's Standards and Guidelines for Rehabilitation,<sup>17</sup> but local governments may adopt more or less restrictive guidelines based on the community's preservation or other planning goals.<sup>18</sup> Even the more restrictive guidelines remain flexible; they are merely guidelines and cannot prevent change or halt new development.<sup>19</sup>

The first local historic district was established in Charleston, South Carolina in 1931.<sup>20</sup> Nearly a century later, there are over 2,300 local historic districts in all 50 states.<sup>21</sup> Historic districts are found in rural areas, suburban neighborhoods, and city centers; they may be comprised of small clusters of buildings or encompass hundreds of acres of urban land; and they may reflect a range of architectural styles, development patterns, and historical trends.<sup>22</sup> Regardless of the location, size, or level of significance, the recognized benefits of historic districts—economic development,

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14. DONOVAN RYPKEMA, HISTORIC PRESERVATION AND AFFORDABLE HOUSING: THE MISSED CONNECTION 11 (2002), <http://www.placeeconomics.com/wp-content/uploads/2016/08/placeeconomicspub2003b.pdf>.

15. Jess R. Phelps, *Moving Beyond Preservation Paralysis? Evaluating Post-Regulatory Alternatives for Twenty-First Century Preservation*, 37 VT. L. REV. 113, 132–33 (2012).

16. *Id.* at 134.

17. The Secretary of the Interior's Standard and Guidelines for Rehabilitation are discussed further in Part II.

18. *Creating & Using Design Guidelines: Role They Play*, NAT'L PARK SERV., <https://www.nps.gov/tps/education/workingonthepast/roletheyplay.htm> [hereinafter *Role They Play*] (last visited Apr. 28, 2017).

19. *Creating & Using Design Guidelines: What They Can and Cannot Do*, NAT'L PARK SERV., <https://www.nps.gov/tps/education/workingonthepast/canandcannot.htm> [hereinafter *What They Can and Cannot Do*] (last visited Apr. 28, 2017).

20. Phelps, *supra* note 15, at 122.

21. *Id.* at 132.

22. See *National Register of Historic Places Program: Research*, NAT'L PARK SERV., <https://www.nps.gov/nr/research> (last visited Apr. 28, 2017) (database of National Register properties).



sustainability, stabilized property values, and social and psychological well-being—remain constant.<sup>23</sup>

### 3. Neighborhood Conservation Districts

A neighborhood conservation district is an aesthetic zoning regulation typically implemented in neighborhoods that do not qualify for historic district designation, due to their lack of historical significance or loss of historic fabric, but have distinct characteristics that are worthy of protection.<sup>24</sup> Often referred to as “historic districts lite,” conservation districts “have less stringent regulatory hurdles and more flexibility in implementation [than do local historic districts] . . . .”<sup>25</sup> While conservation districts range in their level of regulatory control, many focus more on preventing teardowns and encouraging the rehabilitation of existing buildings, rather than preserving individual architectural details.<sup>26</sup>

Cambridge, Massachusetts created the first neighborhood conservation district in 1983, and a number of other cities followed suit, including Nashville, Dallas, Miami, Boise, and Chapel Hill.<sup>27</sup> Currently, there are an estimated 165 neighborhood conservation districts in 35 states.<sup>28</sup> While there is little documentation on the benefits (or shortcomings) of these districts, anecdotal evidence suggests that they provide benefits similar to those conferred by historic districts, while providing property owners more flexibility for change.<sup>29</sup>

### 4. Height of Buildings Act of 1910

Building height restrictions are one of the more controversial growth controls. While many of these restrictions have been lessened or eliminated

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23. *People Protecting Community Resources: Summary of Benefits*, NAT'L PARK SERV., <https://www.nps.gov/tps/education/workingonthepast/benefits.htm> (last visited Apr. 28, 2017).

24. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1533 (2015).

25. *Id.* at 1534 (alteration in original) (quoting Adam Lovelady, Comment, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147, 148 (2008)).

26. Lovelady, *supra* note 25, at 155.

27. Lemar, *supra* note 24, at 1532.

28. *Id.*

29. See Rebecca Lubens & Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs*, 21 PRES. L. REP. 1001, 1040–41 (2002–03) (concluding that “[w]hile meaningful studies on the effectiveness of conservation districts as a neighborhood conservation tool have yet to come, initial reports are promising,” and discussing benefits conferred in several districts).

over time,<sup>30</sup> one notable example has remained in full force for over 100 years: the Height of Buildings Act of 1910.<sup>31</sup> The Act provides that, in Washington, D.C., no building shall exceed in height the width of the street, plus 20 feet; no building shall exceed 130 feet in any business district, with some exceptions on Pennsylvania Avenue for buildings not exceeding 160 feet; and no building in a residential district shall exceed 85 feet.<sup>32</sup> While adoption of the Act was motivated in part by fire safety concerns,<sup>33</sup> preservationists have embraced the height restrictions as protective of L'Enfant's plan and the monumentality of the nation's seat of government.<sup>34</sup> The height restrictions also prevented skyscrapers from consuming Washington, D.C.—the fate of many inner-ring suburbs surrounding the city.<sup>35</sup>

### B. The Affordable Housing Problem

Low-income families have always struggled with securing safe, sanitary, and affordable housing. More than a century ago, the poor and immigrant classes crowded into tenement houses lacking sanitation, fire safety, and adequate light and ventilation.<sup>36</sup> In the mid-twentieth century, low-income African-American families were warehoused in substandard public housing high rises, many of which were segregated from the rest of the city by highways and other physical and psychological barriers.<sup>37</sup> Fortunately, law and policy progressed over the past century. Today, health and safety regulations (when enforced) protect tenants from substandard housing conditions, and inclusionary zoning policies seek to abate the

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30. See, e.g., Benjamin M. Gerber, “No-Law” Urban Height Restrictions: A Philadelphia Story, 38 URB. LAW. 111, 112–13 (2006) (discussing elimination of Philadelphia’s height restriction).

31. Act of June 1, 1910, ch. 263, 36 Stat. 452.

32. *Id.* at 453–54.

33. See *id.* at 452–53 (providing for fireproofing and other fire safety mechanisms).

34. See ACHP Comments to U.S. House Oversight Committee on D.C. Height Act, ADVISORY COUNCIL ON HISTORIC PRESERVATION, [http://www.achp.gov/news\\_20131212\\_heights.html](http://www.achp.gov/news_20131212_heights.html) (last visited Apr. 28, 2017) (emphasizing that “the Height Act has been an essential element in protecting the historic character of the city in its entirety”).

35. See Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 455 (1998) (noting that Maryland and Virginia suburbs, which have less restrictive regulations, are consumed by “clump[s] of towers” and “maze[s] of . . . ugly buildings”).

36. See Elizabeth M. André, *Fire Escapes in Urban American: History and Preservation* 75 (2006) (unpublished M.S. thesis, University of Vermont), <http://www.uvm.edu/histpres/HPJ/AndreThesis.pdf> (detailing conditions of tenement life in turn-of-the-century New York City).

37. See Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1295 (1995) (explaining how public housing projects were isolated “in the least desirable parts of town”).

publically funded segregation of the twentieth century (albeit with mixed results).<sup>38</sup> Nonetheless, cities still struggle to meet the demands of providing quality affordable housing, particularly in tight markets where population growth limits housing supplies.<sup>39</sup>

### *C. The Perceived Tension Between Preservation and Affordable Housing*

Many housing advocates believe there is only one viable solution to the affordability problem—more housing—and to achieve that goal, cities with tight housing markets need to eliminate their growth controls and add greater density.<sup>40</sup> This is where historic preservation is perceived as an obstacle: historic districts prevent new construction, thereby gentrifying those districts as enclaves for the wealthy, reducing the supply of housing in the city, and decreasing the availability of affordable housing.<sup>41</sup> This fight against historic preservation is particularly persistent in San Francisco, New York City, and Washington, D.C., where there is no longer room to expand outward, only upward, all while the populations continue to grow and exert pressure on already tight housing markets.<sup>42</sup>

## II. PRESERVATION IS NOT THE PROBLEM

Housing advocates who criticize historic preservation as an obstacle to affordable housing premise their arguments on several unfounded assumptions: (1) that the actual cost of housing is the only factor that impacts a family's ability to afford housing; (2) that historic districts prevent development; (3) that historic preservation causes gentrification and displaces residents; and (4) that housing is fungible and increasing the overall supply will meet the affordable housing demand. These assumptions are, at best, overstated. At worst, they are completely false.

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38. The scholarship debating the merits of inclusionary zoning is myriad. For one example, see Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585 (2015).

39. See BARRY L. STEFFEN ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS: 2015 REPORT TO CONGRESS 11–19 (2015) [https://www.huduser.gov/portal/Publications/pdf/WorstCaseNeeds\\_2015.pdf](https://www.huduser.gov/portal/Publications/pdf/WorstCaseNeeds_2015.pdf) (detailing the scope of the affordable housing problem across geographic regions).

40. See *supra* comments and sources accompanying note 9 (advocating for the elimination of historic preservation protections in favor of increased construction to accommodate affordable housing).

41. See Glaeser, *supra* note 9 (“This preservation is freezing large tracts of land, rendering them unable to accommodate the thousands of people who would like to live in Manhattan but can’t afford to.”).

42. Dougherty, *supra* note 6; Glaeser, *supra* note 9; Yglesias, *supra* note 9.

*A. Factors Impacting Affordability*

The first assumption is that the actual cost of housing is the only factor that impacts a family's ability to afford housing.<sup>43</sup> Before addressing this assumption, it is necessary to define "affordable housing." According to the U.S. Department of Housing and Urban Development (HUD), a family is considered "cost burdened" if it pays more than 30% of its income for housing,<sup>44</sup> and a family is "severely cost burdened" if it pays more than 50% of its income for housing.<sup>45</sup> This ratio "is the most widely used and the most conventional measure of housing affordability . . . and has shaped views [on] who has affordability problems, the severity of the problems, and the extent of the problems."<sup>46</sup>

As a measure of housing affordability, the housing-income ratio is problematic on many fronts. First, the ratio is not adjusted based on household income. A household earning \$100,000 per year that is paying 50% of its income on housing may not be as severely cost burdened as a household earning \$30,000 per year and spending the same percentage on housing. While housing affordability is a very real problem for many families, this ratio does not accurately reflect the housing needs of low-income families. As is obvious, "severe rental burdens disproportionately impact poor families."<sup>47</sup> And families with the lowest incomes, "those earning less than 50 percent of the area median income [and] pay[ing] more than half their income [o]n rent," often live in substandard housing.<sup>48</sup>

Why is this distinction important? Because the affordable housing problem cannot adequately be addressed without accurate information on the families with the greatest need—those with the lowest incomes and the most severe rental burdens. Building more housing units may decrease the shortage of affordable units *to an extent*, but ensuring that those newly created units are affordable *and available* to the lowest income families is critical. Currently, "higher income renters occupy substantial shares of units

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43. See *Rental Burdens: Rethinking Affordability Measures*, U.S. DEP'T HOUSING & URB. DEV. (Sept. 22, 2014), [https://www.huduser.gov/portal/pdredge/pdr\\_edge\\_featd\\_article\\_092214.html](https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html) [hereinafter *Rental Burdens*] (critiquing the presumption that housing affordability is directly tied to cost).

44. *Affordable Housing*, U.S. DEP'T HOUSING & URB. DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing) (last visited Apr. 12, 2017).

45. *Rental Burdens*, *supra* note 43.

46. Melanie D. Jewkes & Lucy M. Delgadillo, *Weaknesses of Housing Affordability Indices Used by Practitioners*, 21 J. FIN. COUNSELING & PLAN. 43, 46 (2010) (citation omitted).

47. *Rental Burdens*, *supra* note 43.

48. *Id.*

that would be affordable to the lowest income renters,” further exacerbating the affordability problem.<sup>49</sup>

The second major problem with the affordable housing ratio is that it does not account for the other myriad variables that drive housing decisions and impact household expenditures.<sup>50</sup> For example, a household with children will certainly have greater expenses than one without.<sup>51</sup> Furthermore, many households make trade-offs, foregoing more affordable housing options to live in close proximity to public transit or within walking distance to jobs, schools, stores, and other amenities.<sup>52</sup> The savings on transportation costs and medical bills (which a walkable lifestyle may reduce) can offset higher housing costs—or even provide a financial bonus to households.<sup>53</sup> This is particularly relevant for historic districts, which are often located in transit-oriented, walkable neighborhoods and are desirable for this very reason.<sup>54</sup>

Finally, the ratio does not consider other external factors that impact household income. Lack of jobs, low wages, and the high cost of other necessities, such as health care, child care, and food are all factors that impact a household’s ability to afford housing—the less income one has for housing after factoring in other expenses, the greater the need for affordable housing.<sup>55</sup> These are all important factors to consider because they help inform local governments about the best way to achieve affordable housing goals.

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49. STEFFEN ET AL., *supra* note 39, at 2.

50. Jewkes & Delgadillo, *supra* note 46, at 46; *Rental Burdens*, *supra* note 43.

51. *Rental Burdens*, *supra* note 43.

52. *Id.*; Jewkes & Delgadillo, *supra* note 46, at 48.

53. See generally AM. PUB. HEALTH ASS’N, HIDDEN HEALTH COSTS OF TRANSPORTATION 1–9 (2010), <http://www.railstotrails.org/resourcehandler.ashx?id=4546> (describing health and monetary benefits of transit-oriented, walkable communities); Todd Litman, *Evaluating Affordable Housing Development Strategies*, PLANETIZEN BLOG (Mar. 23, 2016, 6:00 AM), <http://www.planetizen.com/node/85106/evaluating-affordable-housing-development-strategies> (“[A] cheap house is not truly affordable if its isolated location leads to high transportation costs, and a more costly house may be more affordable overall if located in an accessible, multi-modal neighborhood where transport costs are minimized.”). See also Jewkes & Delgadillo, *supra* note 46, at 50–51 (emphasizing that transportation costs are significant percentage of household expenses and that increase in commute time “usually outweighs the savings on housing” one might obtain from living farther from work and transit).

54. See RYPKEMA, *supra* note 14, at 12–13 (explaining that historic neighborhoods are already transit-oriented and walkable).

55. See Jewkes & Delgadillo, *supra* note 46, at 46 (noting that the HUD ratio fails to consider a range of factors affecting household expenses); STEFFEN ET AL., *supra* note 39, at 25 (concluding that a contributing factor in reduction in “worst case needs” households was an increase in income).

*B. Development in Local Historic Districts*

The second assumption is that local historic districts are exclusionary and prevent development.<sup>56</sup> This statement demonstrates a fundamental misunderstanding of historic preservation law and the extent to which historic district regulations impact housing affordability. First, historic district guidelines are not designed to prevent development or obstruct change.<sup>57</sup> In fact, they *cannot* “[l]imit growth, or regulate where growth takes place.”<sup>58</sup> Rather, they ensure the appropriateness of new development and building alterations—i.e., that the changes do not compromise the integrity of the historic and architectural qualities that contribute to the district’s significance.<sup>59</sup> The Secretary of the Interior’s Standards, on which many local historic district guidelines are modeled, expressly provide for compatible new additions, exterior alterations, and new construction, as long as the “character-defining features are not radically changed, obscured, damaged, or destroyed.”<sup>60</sup> Not only is the inherent flexibility of the guidelines evidenced by the use of the word “compatible,” but also the measure of compatibility as defined in the guidelines—*radical change*—is far from restrictive. The process itself is also flexible, as it encourages applicants to work with commissioners to achieve a balanced result.<sup>61</sup> Importantly, preservation ordinances often contain provisions that make concessions for undue financial hardship<sup>62</sup> or for projects that have “important public benefits,” including “social or other benefits having a high priority for community services.”<sup>63</sup>

Undoubtedly, some property owners in historic districts attempt to use their ordinance as an exclusionary tool to keep out undesirable development, but the historic district commission as an administrative body

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56. See Fein, *supra* note 10, at 88–89 (presuming a correlation between prior zoning manipulations and potential historic districting abuses).

57. Byrne, *supra* note 10, at 670–71. See also *Role They Play*, *supra* note 18 (“Design guidelines are not, in and of themselves, mandatory like the ordinance and should not be confused with the ordinance. In most cases, guidelines are just that—helpful, interpretive, explanatory recommendations.”).

58. *What They Can and Cannot Do*, *supra* note 19 (emphasis added).

59. Byrne, *supra* note 10, at 670.

60. *Secretary’s Standards for Rehabilitation*, NAT’L PARK SERV., <https://www.nps.gov/tps/standards/rehabilitation/rehab/guide.htm> (last visited Apr. 28, 2017).

61. See Phelps, *supra* note 15, at 134 (“[A]n impacted homeowner will typically engage in pre-discussions with either professional staff working within the jurisdiction or the commission members to gauge reaction to the proposal and to see if changes can be made to comport with the district’s review standards.”).

62. *Id.* at 133.

63. Byrne, *supra* note 10, at 672 (quoting D.C. CODE § 6-1102(11) (2001)).



plays a neutral role in adjudicating certificates of appropriateness.<sup>64</sup> The commission's role is to further the interests of the public, as articulated in the preservation ordinance.<sup>65</sup> While commissioners are not all immune from the vagaries of the political process, or of outside influence, the (slight) threat of bias should not be used to undermine the value of historic preservation laws and their ability to balance the protection of significant resources with the need for change. And again, nothing in the Secretary of the Interior's Standards prevents infill construction, accessory uses, or multi-family buildings, all of which provide an excellent vehicle for integrating affordable housing into historic districts.<sup>66</sup> Neighbors' outcries against such development should go unheeded.<sup>67</sup>

Those who characterize historic preservation as exclusionary possess a very limited understanding of historic districts and their residents. Historic districts are often portrayed as enclaves for wealthy urbanites who moved in and pushed longtime residents from their homes, or as refuges for suburbanites who escaped the city for large single-family homes on sprawling lots. But the reality is that many historic districts house low-income residents: roughly 60% of the 850,000 buildings protected by historic districts are located in census tracts with a poverty level of 20% or more.<sup>68</sup> Residents in these census tracts are more likely to embrace changes that bring new housing and economic development opportunities.<sup>69</sup>

### C. Gentrification

The third assumption is that historic preservation causes gentrification and displaces residents.<sup>70</sup> Indeed, gentrification remains a polarizing term in the urban planning context,<sup>71</sup> but a growing body of research indicating that historic district designation can have a positive effect on low-income

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64. See *id.* at 673 ("Most commissioners can be expected to favor preservation rather than the incidental interests of well-heeled neighbors.").

65. *Id.*

66. *What They Can and Cannot Do*, *supra* note 19.

67. See Byrne, *supra* note 10, at 671 (describing high-density development projects that were approved in historic districts in New York, Philadelphia, and Washington, D.C., despite neighborhood opposition).

68. RYPKEMA, *supra* note 14, at 11.

69. See Ryan Howell, Note, *Throw the "Bums" Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 561 (2008) (highlighting the benefits afforded to neighborhood residents as a consequence of historical designation).

70. See *id.* at 542 n.9 (citing John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 450 (2003)) as an example of such critics.

71. *Id.* at 555.

residents undermines much of the previous discourse on the issue.<sup>72</sup> As this research shows, historic preservation does not necessarily cause gentrification, and even where gentrification does occur, it does not necessarily displace residents.<sup>73</sup>

A 2016 study commissioned by the Historic District Council looked at the effects of historic districts on affordable housing in New York City, using data on changes in median income, rent, and rental burdens in each borough between 1970 and 2010.<sup>74</sup> Brooklyn was the only borough with any statistically significant relationship between historic district designation and an increase in median income.<sup>75</sup> In no borough did historic district designation or timing of designation have any statistically significant relationship with an increase in rent or rental burden.<sup>76</sup> “While the average rental burden . . . in historic district census tracts rose from 1970-2010, it increased at a slower rate than all census tracts in New York City.”<sup>77</sup>

This data reinforces the findings of an earlier 2002 study by the Citizens Housing and Planning Council, in which researchers analyzed renter mobility in both gentrifying and non-gentrifying neighborhoods.<sup>78</sup> The findings revealed that, when controlling for other factors, disadvantaged residents in gentrifying neighborhoods were 17% less likely to move than those in non-gentrifying neighborhoods.<sup>79</sup> And increases in rent in gentrifying neighborhoods were associated with a *lower* probability of moving, even when controlling for other factors affecting mobility.<sup>80</sup> “The probability of a poor household or a non-college graduate moving from a unit declined as the rate of rent inflation in their neighborhood increased.”<sup>81</sup>

The conclusion drawn from this research is that gentrification can improve housing and neighborhood conditions, and encourage stability in

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72. See, e.g., RYPKEMA, *supra* note 14, at 14 (rebutting the argument that historic districts negatively impact low-income residents).

73. *Id.*

74. HISTORIC DISTRICT COUNCIL, THE INTERSECTION OF AFFORDABLE HOUSING AND HISTORIC DISTRICTS 8, 27 (2016), [hdc.org/wp-content/uploads/2016/05/Intersection-of-Affordable-Housing-Historic-Districts.pdf](http://hdc.org/wp-content/uploads/2016/05/Intersection-of-Affordable-Housing-Historic-Districts.pdf).

75. *Id.* It is important to note that “a finding of ‘significance’ does not imply *causation*” but “merely suggests that changes in [two] variables (while holding other variables constant) are happening in a similar way . . . .” *Id.* at 4.

76. *Id.* at 27.

77. *Id.* at 8.

78. Citizens Hous. & Planning Council, *Gentrification and Displacement*, 8 THE URB. PROSPECT 2 (Jan. / Feb. 2002), [http://chpcny.org/wp-content/uploads/2011/01/UP\\_Gentrification\\_Displacement.pdf](http://chpcny.org/wp-content/uploads/2011/01/UP_Gentrification_Displacement.pdf).

79. *Id.* at 3–4.

80. *Id.* at 4.

81. *Id.*

low-income households.<sup>82</sup> It is important to keep in mind that in most circumstances, pre-gentrification neighborhoods are economically disadvantaged.<sup>83</sup> They suffer from the effects of segregation, concentrated poverty, loss of employment opportunities, low-performing schools, and crime.<sup>84</sup> When wealthier households invest in disadvantaged neighborhoods, they bring local tax dollars, which can be used to maintain affordable housing; spend money on local goods and services, spurring the establishment of new local businesses and other jobs; and create economic and racial diversity.<sup>85</sup> And, over time, these neighborhoods see a reduction in crime and an improvement in public schools.<sup>86</sup>

While gentrification is not the panacea for all the ills of inner-city blight, it is certainly one of the best solutions.<sup>87</sup> Urban renewal dealt a sweeping blow to inner-city neighborhoods; gentrification, on the other hand, is an incremental process, particularly when it occurs through historic preservation.<sup>88</sup> As neighborhoods slowly revitalize, local governments, land trusts, community development groups, and other housing advocacy organizations can implement policies to maintain housing affordability and limit displacement.<sup>89</sup> In fact, it is difficult to see how economic and racial diversity can be achieved without some degree of gentrification. As long as gentrification is demonized and avoided, affordable housing will continue to be concentrated in areas of poverty.

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82. *Id.*

83. Ebenezer O. Aka, *Gentrification and Socioeconomic Impacts of Neighborhood Integration and Diversification in Atlanta Georgia*, 35 NAT'L SOC. SCI. J. 1, 1 (2010) ("In the simplest form [gentrification] can be explained as the upgrading of devalued or deteriorated urban property . . .").

84. See J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 415–19 (2003) (describing decline in inner-city neighborhoods since 1945); Justin Graham, *Playing "Fair" with Urban Redevelopment: A Defense of Gentrification Under the Fair Housing Act's Disparate Impact Test*, 45 ARIZ. ST. L.J. 1719, 1731–32 (2013) (same).

85. See Byrne, *supra* note 84, at 419–24 (describing economic, political, and social improvements in gentrified neighborhoods).

86. *Id.* at 423–24.

87. See Graham, *supra* note 84, at 1734–35 (noting that "gentrification 'represents one of the most encouraging trends in city life since the 1960s'" (quoting J. Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 HOW. L.J. 491, 491 (2003))).

88. Byrne, *supra* note 10, at 674; DONOVAN D. RYPKEMA, *THE ECONOMICS OF HISTORIC PRESERVATION* 22 (1994).

89. See, e.g., Byrne, *supra* note 10, at 674 (describing the successful renovation of a substandard apartment complex into mixed-income condominiums and rentals in a gentrifying historic district in the District of Columbia).

*D. Housing Fungibility: Supply and Demand*

The final assumption is that all housing is fungible—i.e., that one house is like the next, and thus the only thing motivating an individual's choice of housing is its availability and affordability.<sup>90</sup> Accepting a theory that housing is fungible leads inevitably to the conclusion that increasing the supply of housing overall will reduce or eliminate the affordable housing problem. But housing supply and demand is more nuanced than this unitary theory,<sup>91</sup> and the scholars who have advanced this theory have relied solely on a narrow set of observations that do not accurately reflect the realities of the housing market.<sup>92</sup>

## 1. Filter Theory

The traditional housing supply and demand theory is rooted in the “filter theory” that was proposed in the 1960s as a market-driven solution to housing shortages and contributed to the housing disparity we have today.<sup>93</sup> The filter theory posited that low-income households would benefit from the construction of high-end units through a “trickle-down” process.<sup>94</sup> When a family at the top of the income ladder upgrades to a new housing unit, it leaves the old unit vacant. The next family down the income ladder will upgrade into that vacated unit, leaving another unit vacant. This continues down to the lowest-income family. When that family abandons its housing unit, that unit will be demolished.<sup>95</sup>

The filter theory drove the housing policies of the 1970s and 1980s that perpetuated the extreme economic and racial segregation that began during the middle-class suburban migration and urban renewal of the 1950s and

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90. Arnold King, *What Is Bernanke Saying about Housing*, LIBR. ECON. & LIBERTY (Feb. 22, 2012), [http://econlog.econlib.org/archives/2012/02/what\\_is\\_bernank.html](http://econlog.econlib.org/archives/2012/02/what_is_bernank.html) (showing that housing can be seen as fungible, since properties depend on their availability on the market, and are subject to typical supply and demand rules).

91. See Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 43–44 (1996) (rejecting “unitary market” for housing, and observing that consumers bid “not against everybody, but against particular peers interested in particular types of spaces”).

92. See *id.* at 44–45 (explaining that supply and demand housing theories ignore nuances of the housing market).

93. See *id.* at 43 (explaining that filtering has been blamed for “abandonment, gentrification, the concentration of poverty, and the perpetuation of racial segregation”) (footnotes omitted); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 797, 808 (1993) (detailing how filtering led to disinvestment in urban neighborhoods).

94. Aoki, *supra* note 93, at 798; Dietderich, *supra* note 91, at 43.

95. Aoki, *supra* note 93, at 798; Dietderich, *supra* note 91, at 43.

1960s.<sup>96</sup> During the era of filtering, there were “record numbers of new luxury housing starts” alongside a “swelling homeless population and drastic shortages of affordable housing.”<sup>97</sup> Wealthier families were able to upgrade to suburban homes or segregate themselves into more affluent urban neighborhoods, while the poor African-American families remained in the inner-city neighborhoods the wealthier families left behind.<sup>98</sup> The result was concentrated, entrenched poverty, high crime, poor schools, loss of business, and declining property values.<sup>99</sup> While several other factors, including the impacts of deindustrialization, racial prejudice, and redlining and landlord milking contributed to neighborhood decline and segregation, the filter model failed to account for these factors, thereby exacerbating them.<sup>100</sup>

## 2. Applying the Lessons of Filtering to Today’s Housing Market

Today, inner-city neighborhoods in San Francisco, New York City, and Washington, D.C. are burgeoning with newcomers, and buildable land is scarce.<sup>101</sup> But the lessons we learned from filtering 30 years ago are equally applicable to today’s housing market. First, housing choices are driven by several factors, and no unitary theory can be applied.<sup>102</sup> Second, affordable housing is not market-driven; it must be either mandated or incentivized, particularly in areas of high demand.<sup>103</sup> And finally, the end result of filtering is that low-income families are segregated into areas of concentrated poverty and substandard housing.<sup>104</sup>

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96. See Aoki, *supra* note 93, 798–800 (“The[] inadequacies [of the filtering model] had emerged by the late 1980s, and policies premised on the simplistic assumptions of the filtering model began seeming implausible at best and malevolent at worst, insofar as these policies negatively impacted on the inner cities and allowed those at the high-end to deny complicity in urban decline.”).

97. *Id.* at 799.

98. See *id.* at 800–01, 829 (observing that “mixed pattern of gentrification and abandonment occurred” as professionals upgraded to luxury housing and other neighborhoods were left to “entrenched poverty, despair, and homelessness”).

99. See Steven J. Knox, *Reconstructing an End to Concentrated Poverty*, 16 J.L. Soc. 223, 227–28 (discussing impacts of concentrated poverty).

100. See Aoki, *supra* note 93, at 800–08 (noting that filter theory “fail[ed] to account for these numerous housing market imperfections and distortions”).

101. Edward L. Glaeser, *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & Econ. 331, 334 (2005).

102. See Dietderich, *supra* note 91, at 43–44 (showing that a “unitary market” theory ignores the many factors that influence housing production).

103. See Aoki, *supra* note 93, at 799 (explaining that housing remained unaffordable even during the building boom); John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn’t It More Affordable?*, 18 J. Econ. Persp. 191, 205 (2004) (observing that construction of high-quality housing for wealthier families is more profitable than lower-quality, low-income housing).

104. See Knox, *supra* note 99, at 227–28 (discussing impacts of concentrated poverty).

Applying these lessons to the current housing crisis, it is clear that initiating another building boom will not create the necessary supply of affordable housing. Populations in cities like San Francisco, New York City, and Washington, D.C. continue to grow and put pressure on the housing market, and job growth in these metropolitan regions, particularly the San Francisco Bay Area, attracts new residents from other regions in the country and abroad.<sup>105</sup> To a large extent, the new housing constructed in these cities will serve those new professionals. For the market to create affordable housing, there must be an *oversupply* of housing, far more than necessary to serve the growing population of educated, affluent jobseekers. This is an unlikely prospect, and one that does not necessarily make good financial or planning sense.

Because the market will not supply enough, or any, affordable housing, it must be either mandated or incentivized. At present, developers in cities with mandatory inclusionary zoning laws are typically required to set aside around 10–20% of their units as affordable housing.<sup>106</sup> While developers can apply for incentives, like the low-income housing tax credit (LIHTC), to create additional affordable units, they are less likely to do so in areas where they can receive a market rate for the unit that is substantially higher than the tax credit offset.<sup>107</sup> And given the high cost of new construction—particularly with large development projects—developers will need to either absorb the costs of creating affordable housing, which they are not likely to do, or pass these costs on to the tenants, decreasing affordability overall.<sup>108</sup> Moreover, studies on LIHTC effectiveness reveal that a large proportion of affordable housing projects are concentrated in areas of high poverty and racial segregation: 73.9% of inner-city units are located in census tracts with more than 50% low-income households, and 48% are

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105. See, e.g., Kathleen Pender, *Bay Area Building Boom May Not End Housing Shortage*, S.F. CHRONICLE (Apr. 2, 2016), <http://www.sfchronicle.com/business/network/article/Bay-Area-building-boom-may-not-end-housing-7223711.php> (explaining that, even with the recent housing boom, San Francisco's housing supply cannot keep up with population growth and in-migration).

106. See, e.g., CITY & CTY. OF S.F., *Inclusionary Housing Program*, <http://sfmohcd.org/inclusionary-housing-program> (last visited Apr. 28, 2017) (requiring developments with ten or more units to pay an affordable housing fee, or set aside 12% of units onsite or 20% of units offsite as affordable to low- and moderate-income families); *Inclusionary Zoning Affordable Housing Program*, D.C. DEP'T HOUSING & COMMUNITY DEV., <http://dhcd.dc.gov/service/inclusionary-zoning-affordable-housing-program> (last visited Apr. 28, 2017) (requiring residential developments containing ten or more units to set aside 8–10% of floor area as affordable housing).

107. Cf. Benjamin Powell & Edward Stringham, “*The Economics of Inclusionary Zoning Reclaimed*”: *How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471, 483–85 (2005) (rejecting the notion that developers will absorb costs of inclusionary zoning when it is not profitable to do so, and noting that density bonuses “are of little value and come nowhere close to making up for the costs of the program”).

108. *Id.*



located in tracts with more than a 50% minority population.<sup>109</sup> In short, there is a limit to how much affordable housing a developer will be willing or able to create in high-demand areas when building new construction from the ground up.

Given this backdrop, two things can be expected to happen if historic district controls in high-demand neighborhoods are removed and developers can add substantially more height. The first scenario is that developers continue to build more market-rate housing and less affordable housing, pushing even more low-income residents out of the neighborhood and into areas of poverty, which was the consequence of the filter model.<sup>110</sup> The second scenario is that, as new high-rise construction consumes the neighborhood and the desirable elements of the neighborhood are lost—the historic character, human scale, walkability, and social and psychological connections—the affluent residents that “gentrified” the area in the first place will no longer find it attractive and leave.<sup>111</sup> This is intuitive when looking at historic districts, which attract residents based on a range of qualitative factors. The current supply and demand theory fails to account for this and other non-quantitative factors driving housing decisions, the very flaw in the filter model. In either scenario, the poor end up concentrated into areas of poverty.

#### IV. HISTORIC PRESERVATION FURTHERS AFFORDABLE HOUSING GOALS

In its infancy, the preservation movement focused on restoring buildings of great national importance, but modern-day preservationists have increasingly viewed preservation as “an effective tool for a wide range of public goals,” including affordable housing, neighborhood revitalization and stabilization, and economic development.<sup>112</sup> While historic preservation alone cannot eradicate the affordable housing crisis, it can—and should—play a central role in a comprehensive, long-term plan to increase the availability *and quality* of affordable housing; protect the affordability of that housing; and create vibrant, mixed-income neighborhoods that improve the standard of living for low-income families. As this Part explains: (1) rehabilitation of existing buildings is more cost effective than new construction; (2) historic preservation creates jobs and boosts the local

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109. Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAW. 869, 884 (2004).

110. MIRIAM ZUK & KAREN CHAPPLE, HOUSING PRODUCTION, FILTERING AND DISPLACEMENT: UNTANGLING THE RELATIONSHIPS 4 (2016).

111. *Id.*

112. DONOVAN RYPKEMA & CAROLINE CHEONG, MEASURING ECONOMIC IMPACTS OF HISTORIC PRESERVATION 1 (2011).

economy; (3) historic buildings improve quality of life; and (4) historic districts can preserve smaller, cheaper housing, and prevent displacement of residents.

*A. Historic Preservation is Cost-Effective*

The prevailing belief that rehabilitation is costlier than new construction has been repudiated by empirical data.<sup>113</sup> While each individual project has its own unique costs, the evidence demonstrates that rehabilitation is, at least, a competitive option—and often a more affordable one.<sup>114</sup> This is particularly true when creating affordable housing because the level of rehabilitation need not be substantial to make the housing livable.

A recent study from Harvard University is worth highlighting for its applicability to affordable housing.<sup>115</sup> In 2013, a team of researchers studied the business models of investors who purchased foreclosed properties in Cleveland, Ohio to see if renovating the vacant properties would be a more cost-effective alternative to demolition.<sup>116</sup> At the time of the study, an estimated 8,300 vacant homes in Cleveland were slated for condemnation.<sup>117</sup> The cost of demolition was \$10,000 per home.<sup>118</sup> In the alternative, each house renovated through the HUD Neighborhood Stabilization Program was eligible for a \$90,000 subsidy.<sup>119</sup> The research team was tasked with determining how Cleveland should best spend its limited subsidy: by renovating the vacant buildings or demolishing them.<sup>120</sup>

The study found that in five out of six neighborhoods, rehabilitation was more cost effective than demolition when the rehabilitation was limited to making the house livable (as opposed to bringing the house up to modern

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113. FRANK FORD ET AL., *THE ROLE OF INVESTORS IN THE ONE-TO-THREE FAMILY REO MARKET: THE CASE OF CLEVELAND* 56 (2013).

114. Maya Brennan et al., *Comparing the Costs of New Construction and Acquisition-Rehab in Affordable Multifamily Rental Housing: Applying a New Methodology for Estimating Lifecycle Costs* 1 (Ctr. for Housing Policy, Working Paper, 2013) (“[O]ur findings are consistent with other data suggesting that acquiring and rehabilitating existing multifamily rental housing may be significantly more cost-effective than new construction.”).

115. FRANK FORD ET AL., *supra* note 113, at 8; Thomas A. Jorgensen, *Harvard Study Compares Demolition to Rehabilitation*, PRESERVATION LEADERSHIP F. BLOG (March 19, 2015, 3:44 PM), <http://forum.savingplaces.org/blogs/special-contributor/2015/03/19/study-compares-demolition-rehabilitation>.

116. FORD ET AL., *supra* note 113, at 3.

117. *Id.* at 4.

118. *Id.*

119. *Id.*

120. *Id.* at 52.

green building standards).<sup>121</sup> Notably, the study looked at the cost of *demolition alone*, rather than demolition plus new construction.<sup>122</sup> Adding in the cost of new construction invariably tips the scale in favor of rehabilitation and allows additional room for substantial rehabilitation beyond mere code compliance.

Similar studies reinforce this conclusion. A 2001 HUD-sponsored study found that it would cost \$75,000 to repair an older home with *severe* physical problems, and \$25,000 for one with *moderate* problems.<sup>123</sup> The study further found that only 11% of the older housing stock suffered from severe or moderate physical problems, meaning that only a small percentage of homes would require the full \$75,000 for repairs.<sup>124</sup> Importantly, “the \$75,000 figure is comparable to the most cost effective of Federal housing programs and significantly cheaper than some programs,”<sup>125</sup> making rehabilitation of even the most deteriorated housing stock a competitive option.

Of course, quality of construction is always a factor to be considered in the preservation-versus-new-construction debate. To achieve affordability without “massive subsidies,” developers may use cheaper, lower-quality building materials, which adds costs over the long term and reduces the quality of the unit.<sup>126</sup> On the other hand, historic buildings have already withstood the test of time, largely because of their higher-quality, old-growth wood, load-bearing masonry construction, and overall superior workmanship.<sup>127</sup> These older buildings will remain durable, helping to preserve the affordability and quality of the housing over time.<sup>128</sup> Even when new construction costs are cheaper compared to rehabilitation costs,

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121. *Id.* at 59; Jorgensen, *supra* note 115.

122. FORD ET AL., *supra* note 113, at 4, 52.

123. RYPKEMA, *supra* note 14, at 10 (citing DAVID LISTOKIN ET AL., BARRIERS TO THE REHABILITATION OF AFFORDABLE HOUSING (2001)).

124. *Id.*

125. *Id.*

126. *See id.* at 4 (stating that the market cannot produce affordable housing “without either massive subsidies or very low quality units”); *id.* at 16 (explaining that “very low cost housing . . . would fail the quality test”).

127. *See* WBDG Historic Preservation Subcomm., *Historic Preservation*, NAT’L INST. OF BUILDING SCI., [https://www.wbdg.org/design/historic\\_pres.php](https://www.wbdg.org/design/historic_pres.php) (last updated Oct. 11, 2016) (noting that historic building materials, such as old-growth wood, are durable and high-quality); Julia Rocchi, *Six Practical Reasons to Save Old Buildings*, NAT’L TR. FOR HISTORIC PRESERVATION (Nov. 10, 2015), <http://savingplac.es/2ku2YPk> (“Buildings of a certain era, namely pre-World War II, tend to be built with higher-quality materials such as rare hardwoods . . . . Prewar buildings were also built by different standards. A century-old building might be a better long-term bet than its brand-new counterparts.”).

128. WBDG Historic Preservation Subcomm., *supra* note 127; Rocchi, *supra* note 127.

the added factor of building quality will inevitably tip the scale in favor of rehabilitation.<sup>129</sup>

Rehabilitation becomes even more competitive with the availability of tax incentives. When property owners undertake substantial rehabilitation, state and federal rehabilitation investment tax credits are available to help defray the costs. The federal government offers a tax credit for 20% of the rehabilitation costs on income-producing properties (this excludes owner-occupied residences) that are listed or eligible for listing on the National Register of Historic Places and are rehabilitated in compliance with the Secretary of the Interior's Standards.<sup>130</sup> A 10% credit is available for properties built before 1936 that are not eligible for listing.<sup>131</sup> While the tax credit is limited for properties producing only passive income (e.g., rental income), where the property owner is a real estate professional, he or she may be eligible for the full credit.<sup>132</sup> States administer an even wider range of credits to piggyback on the federal credit. Many offer a 25% credit, allow full credit for passive activity and owner-occupied residences, and require a lower minimum investment.<sup>133</sup>

Developers of affordable housing can also piggyback the low income housing tax credit (LIHTC) on top of their federal and state rehabilitation tax credits.<sup>134</sup> The LIHTC is available for new construction as well as the adaptive reuse of existing buildings,<sup>135</sup> and the ability to piggyback the tax credits gives developers working with historic buildings a financial windfall over those constructing new units.

### *B. Historic Preservation Boosts the Local Economy*

Many variables impact housing affordability that cannot be addressed simply by building new housing. Low wages, lack of jobs, high taxes, and many other factors directly impact household income and housing

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129. See RYPKEMA, *supra* note 14, at 10 (comparing the costs of repair between new and older construction while highlighting the resulting quality).

130. NAT'L PARK SERV., HISTORIC PRESERVATION TAX INCENTIVES 3–5, 9–10 (2012), <https://www.nps.gov/tps/tax-incentives/taxdocs/about-tax-incentives-2012.pdf>.

131. *Id.* at 3.

132. Mark Primoli, *Claiming the Credit*, NAT'L PARK SERV. (Oct. 2000), <https://www.nps.gov/tps/tax-incentives/before-apply/irs.htm>.

133. NAT'L TR. CMTY. INV. CORP., FIRST ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT 31–32 (2010), <http://www.kiplinger.com/members/taxlinks/100319/Historic-tax-credit.pdf>.

134. *Id.* at 11.

135. *Id.* at 29.

affordability.<sup>136</sup> By looking at the impacts of rehabilitation projects made possible by state and federal tax credits, researchers have gathered empirical evidence on the economic benefits of historic preservation.

“Dollar for dollar, historic preservation is one of the highest job-generating economic development options available.”<sup>137</sup> Rehabilitation work is significantly more labor intensive than new construction, the impacts of which have a ripple effect through the local economy because the construction workers and other laborers hired locally will spend their money at local businesses.<sup>138</sup> And general contractors undertaking rehabilitation work are more likely to purchase materials from local vendors.<sup>139</sup> For every \$1,000,000 spent on rehabilitation versus new construction, rehabilitation will result in \$120,000 more staying within the community; five to nine more construction jobs; 4.7 more jobs elsewhere in the community; \$107,000 more in household income; and over \$100,000 more in retail sales.<sup>140</sup> Clearly, as household incomes increase, families have more money to spend on housing.

Rehabilitation work has additional benefits beyond job creation, including tourism, new business growth, additional private investment, and increased property and sales taxes, to name a few.<sup>141</sup> Again, these benefits significantly impact household income. For example, as the city’s tax base increases, it can provide more services to the community—e.g., public transit, childcare, better schools—which can improve the quality of life of the residents and reduce their household expenses.<sup>142</sup>

### *C. Historic Buildings Improve Quality of Life*

In light of the substandard public housing of the twentieth century, there is an increasing recognition that housing cannot be merely affordable, it must also improve the quality of the life of the residents and the larger community. In the quest to build ourselves out of an affordable housing shortage, we may be building ourselves into unlivable communities.

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136. See Jewkes & Delgadillo, *supra* note 46, at 46 (noting that the HUD ratio fails to consider the range of factors affecting household expenses).

137. RYPKEMA, *supra* note 88, at 13.

138. *Id.* at 14.

139. *Id.* at 15.

140. *Id.* at 14.

141. *Id.* at 15.

142. See Howell, *supra* note 71, at 559–61 (highlighting how an increased tax base can improve municipal services and schools); Graham, *supra* note 84, at 1734 (noting that gentrification can increase the tax base and thus increase the “availability and quality” of services).

The type of density most housing advocates are seeking is high-rise construction, as this is the only way to add significantly more density in tight markets. But when it comes to affordable housing, this type of density has been proven harmful, particularly for children growing up in poverty.<sup>143</sup> And as the public housing projects of the twentieth century have shown us, there is a greater risk of segregation and concentrated poverty in high rises than in the mixed-use, lower-density, human-scale neighborhoods.<sup>144</sup>

Affordable housing should be located in diverse, mixed-income, walkable, transit-oriented neighborhoods close to shopping, schools, parks, and other amenities. Historic neighborhoods possess many, if not all, of these qualities, and creating historic districts preserves and enhances those qualities.<sup>145</sup> Placing incompatible high rises in the middle of historic districts degrades the quality of life that makes these places livable and desirable. The result is that we are destroying the things we value, so that *nobody* can enjoy them, when we should be figuring out how to bring the things we value to a wider audience, so that *everybody* can enjoy them. Historic preservation, when part of a comprehensive housing plan, can achieve this goal.

#### *D. Historic Districts Protect Affordable Housing*

The strongest argument for maintaining historic districts is that they *protect* affordable housing. There is a misconception that historic districts are home to only affluent households.<sup>146</sup> But the data does not support this. Sixty percent of the 850,000 buildings listed in historic districts are located in census tracts with a poverty level of 20% or more,<sup>147</sup> and 32% of households below the poverty line live in older and historic homes.<sup>148</sup> Data on the effectiveness of the LIHTC indicates that many older buildings already serve low-income families, and when developers construct new

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143. See Schill & Wachter, *supra* note 37, at 1293 (“High density apartment buildings are now generally thought to be inappropriate for poor families with children. Elevators break down as a result of heavy usage and insufficient maintenance. In addition, parents find it difficult to monitor the activities of their children when recreation spaces are located at a distance from their apartments. Furthermore, the large volume of residents fosters anonymity, making it difficult for tenants to maintain security and a sense of community. All of these factors combine to promote vandalism, which further undermines the quality of life in public housing.”) (footnotes omitted).

144. See *id.* at 1293–94 (describing concentrated poverty in high density, residential towers that characterized public housing and observing that “these types of projects often generated a series of problems that led to their abandonment by all but the poorest and least mobile tenants”).

145. RYPKEMA, *supra* note 14, at 8–9.

146. *Id.* at 11.

147. *Id.*

148. *Id.* at 5.



affordable housing with the tax credit, it often replaces older buildings already serving that purpose.<sup>149</sup> Since the late 1970s, nearly a third of the over 500,000 housing units completed under the auspices of the federal historic preservation tax credit were affordable to low- and moderate-income families,<sup>150</sup> a figure that is “noteworthy when compared with some better-known affordable housing production programs.”<sup>151</sup> While the need to create new affordable housing is critical, the need to protect existing historic housing is even more critical.

When historic district guidelines recommend against demolition of existing buildings, incompatible additions, or out-of-scale infill development, they protect the smaller homes that, by their size alone, are made more affordable. Because many historic neighborhoods are located in desirable neighborhoods, the land is more valuable than the building itself.<sup>152</sup> New, more affluent residents moving into these neighborhoods often try to maximize their square footage with large additions that double the size of the home, second story “pop tops” on single-story homes, or new McMansions squeezed onto narrow lots.<sup>153</sup> Inevitably, these larger homes drive up property values and make the neighborhoods unaffordable—the exact problem critics claim historic districts create.

This is particularly relevant in suburban neighborhoods, which housing advocates claim are constrained by too many exclusionary zoning regulations to allow affordable housing growth. It is true that many newer suburbs are zoned only for single-family homes and mandate strict minimum lot sizes and minimum setbacks. But many historic suburbs, particularly those built pre-World War II, were designed with smaller lots and setbacks, allowing greater density (as compared to more modern suburbs with minimum lot sizes), and many of the properties boast

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149. Leviner, *supra* note 109, at 876–77.

150. NAT’L PARK SERV., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FY 2014, at 5 (2015).

151. NAT’L TR. CMTY. INV. CORP., *supra* note 133, at 28.

152. See, e.g., David Matthews, *140-Year-Old Gold Coast Cottage Set to Be Torn Down*, DNAINFO (June 21, 2016, 5:45 AM), <https://www.dnainfo.com/chicago/20160621/gold-coast/140-year-old-gold-coast-cottage-set-be-torn-down>. In Chicago’s wealthy Gold Coast neighborhood, the last extant nineteenth-century worker cottage may be slated for demolition. *Id.* The property owner applied for a demolition permit, but, thanks to the 90-day demolition delay required for historic buildings, the cottage could still be saved. *Id.* The other worker cottages have all been lost to mansions and high rises. *Id.* As the listing agent for the property stated, “[t]he cottage ‘is a special place, but it’s sitting on a gold mine.’” *Id.*

153. See, e.g., Kate Anderson Brower, *Teardowns: Tearing Apart or Building Up the Neighborhood?*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/realestate/the-charm-of-an-old-house-clashes-with-allure-of-a-garage-and-mudroom/2015/06/24/6fed1fb2-09fe-11e5-95fd-d580f1c5d44e\\_story.html](https://www.washingtonpost.com/realestate/the-charm-of-an-old-house-clashes-with-allure-of-a-garage-and-mudroom/2015/06/24/6fed1fb2-09fe-11e5-95fd-d580f1c5d44e_story.html) (describing the phenomenon of tearing down older, more modest homes and replacing them with larger, more luxury homes, which drive up property values).

secondary structures, like carriage barns or shops, that can easily be transformed into accessory living spaces.<sup>154</sup> In fact, many of the larger, older homes themselves were long ago divided into apartments for boarders or other family members, and may be grandfathered in in areas otherwise zoned only for single-family dwellings.<sup>155</sup>

It is important to keep in mind that zoning regulations that prohibit multi-family housing are not tied to historic preservation laws. Historic districts do not regulate interior alterations and cannot prevent a property owner from converting a single-family home into apartments.<sup>156</sup> Local governments interested in creating affordable housing can loosen other zoning restrictions while keeping historic district regulations in place. This will protect neighborhoods from teardowns but allow flexibility for adding density. And larger historic homes are very adaptable.<sup>157</sup> Their divided interior spaces (as opposed to the open floor plans common in modern homes) can easily be broken up into small apartments or condos, or converted back to single-family living if the needs of the neighborhood change.<sup>158</sup>

Finally, while it is important to add density to curb sprawl and generate diversity and affordability, limiting the amount of development in certain high-demand neighborhoods can be beneficial on a wider metropolitan, regional, or national perspective. While cities with the tightest markets, like San Francisco and New York City, have little buildable land, many other cities still contain swaths of vacant land and abandoned buildings that need redevelopment.<sup>159</sup> As pressure increases in key, high-demand areas, these disadvantaged communities continue to struggle with extreme poverty,

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154. NAT'L PARK SERV., HISTORIC RESIDENTIAL SUBURBS: GUIDELINES FOR EVALUATION AND DOCUMENTATION FOR THE NATIONAL REGISTER OF HISTORIC PLACES 8–13 (2002), <https://www.nps.gov/Nr/publications/bulletins/pdfs/Suburbs.pdf> (describing landscape features of historic residential suburbs).

155. *Id.* at 9 (explaining that historic residential subdivisions contained both single- and multiple-family housing). This statement and the previous statement are also supported by the author's own experience growing up in Chicago's North Shore suburbs. The author's great-grandmother's house was a small, one-and-one-half-story, wood-frame house built in the late 1890s. It had a second-story apartment where a number of family members had lived over the years, and a lawnmower shop and secondary dwelling unit located to the rear. When the house was torn down in the early 2000s, it was replaced with a large single-family home more than double the size of the old home.

156. *What They Can and Cannot Do*, *supra* note 19 (emphasizing that guidelines cannot "[c]ontrol how space within a building is used").

157. STEWART BRAND, *HOW BUILDINGS LEARN* 190–93 (1994) (illustrating how San Francisco's Victorian row houses are highly adaptable to subdivision into multiple apartments).

158. *Id.*

159. See Elizabeth M. Tisher, Note, *Re-Stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio's Rust Belt*, 15 VT. J. ENVTL. L. 173, 176–80 (2013) (detailing population loss in rust belt cities and rise in vacant and abandoned buildings).

disinvestment, and declining populations. Incentives can lure businesses and developers into these areas, but placing a cap on growth in already-overpopulated areas can further encourage revitalization of underpopulated communities.<sup>160</sup> This should be happening at both the regional and national levels. For example, many older industrial cities in the Northeast are crippled with disinvestment while New York City keeps growing. And rust belt cities in the Midwest are suffering from extreme decline while drought-stricken cities in the West and Southwest are booming. Limits on overbuilding in tight markets can stimulate the growth necessary in those areas currently lacking investment.<sup>161</sup>

#### V. FURTHERING AFFORDABLE HOUSING THROUGH PRESERVATION

Many programs are dedicated to creating and maintaining affordable housing, including land trusts, grants, and tax incentives, and many local governments have mandatory inclusionary zoning policies to help achieve their goals. The purpose of this Part is not to discuss the strengths and weaknesses of those programs, but to recommend new approaches to affordable housing that should be adopted by the preservation community. Preservationists should raise awareness about the intersection between preservation and affordable housing, and demonstrate positive ways preservation can be used to further those dual goals.

##### *A. Top-Down Approach*

The most effective way to integrate affordable housing into historic preservation is for the National Park Service (NPS) and State Historic Preservation Offices (SHPO) to encourage or mandate certain activities through the grants and technical assistance that they provide to local governments. This can occur through the Certified Local Government (CLG) Program, cost-share programs between SHPOs and local governments, matching preservation grants, and downtown revitalization programs.

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160. Edward Glaeser argues that “[t]he social costs of binding development restrictions lie in the misallocation of consumers by having them live in less productive, less attractive places.” Glaeser, *supra* note 101, at 335. What Glaeser is essentially arguing is that we should let the undesirable areas further decline, while the more attractive areas continue to grow. This would arguably lead back to segregation and isolation of the poor in areas of concentrated poverty—less productive, less attractive places—exactly the thing that Glaeser claims is a result of exclusionary historic districts.

161. With climate change and the threat of rising sea levels, the idea that we should encourage growth in the interior and away from at-risk coastal areas is not unfounded.

### 1. Certified Local Government Program

The CLG program, jointly administered by the NPS and SHPOs, provides funding and technical assistance to local governments undertaking preservation activities.<sup>162</sup> To be certified, a local government must meet a set of minimum goals: establish an historic preservation commission; enforce state or local legislation for the designation and protection of historic properties, typically through a preservation ordinance; maintain a system to survey and inventory historic resources; facilitate public participation in local preservation; and follow any other procedures established by the states.<sup>163</sup> States receive annual appropriations from the Federal Historic Preservation Fund and must pass at least 10% of their funding along to CLGs for surveys, National Register nominations, rehabilitation work, design guidelines, educational programs, training, structural assessments, feasibility studies, and a host of other activities.<sup>164</sup>

To integrate affordable housing into the CLG program, the federal and state governments should add an affordable housing goal as a condition of certification, and offer additional funds to CLGs with significant affordable housing needs. This would require local preservation officers or commissions to work with planners and housing advocates to identify affordable housing needs, an important first step in integrating affordable housing into local preservation activities. An important component to this planning process is identifying the affordable housing needs by neighborhood and flagging those that are “high need”—e.g., tight housing markets and rising real estate prices—“moderate need”—e.g., some multi-family rentals mixed with pricier single-family homes—or “low need”—e.g., plenty of affordable housing that should be maintained. This initial step should focus on only the housing needs; not the preservation goals.

The next step would be for the CLG to include an affordable housing goal within the purpose statement of its preservation ordinance. This purpose statement should not only articulate the goals of creating and maintaining affordable housing, but also it should explain how that goal is to be carried out. Once a proper ordinance is drafted, the CLG can decide which preservation activities will best address both its affordable housing needs and its important preservation objectives. The focus of this step

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162. *Certified Local Government Program & Local Preservation Tools*, NAT'L PARK SERV., <https://www.nps.gov/clg> (last visited Apr. 28, 2017).

163. *Become a Certified Local Government (CLG)*, NAT'L PARK SERV., <https://www.nps.gov/clg/become-clg.html> (last visited Apr. 28, 2017).

164. *Certified Local Government Program & Local Preservation Tools*, *supra* note 162.

should be to balance the dual goals of preservation and affordable housing in a way that achieves a positive result for both.

The next activity a CLG should undertake is the survey and inventory of historic buildings. States routinely require this activity of its CLGs, as it provides information for preservation planning purposes and facilitates with National Register listing, review under Section 106 of the National Historic Preservation Act, review of tax credit projects, and many other activities. While many communities target, or at least prioritize, the most significant buildings for survey, states should require their CLGs to survey all historic buildings (those over 50 years in age) and to perform this in a systematic way that prioritizes the most threatened buildings or neighborhoods. Through the survey process, CLGs should consider neighborhoods that are in need of affordable housing, or that contain affordable housing in need of protection, and should highlight properties that are suitable for multi-family use or low-cost rehabilitation. This inventory of historic resources can be useful at the regional and state levels as a means of identifying where affordable housing growth should occur, and it can also be used by the CLG to plan for historic districts and other local preservation activities.

The most important activity for a CLG is the designation of properties to the National Register of Historic Places or local landmark registers. And key here is the local historic district, which can be used to create or maintain affordable housing. First, CLGs should be required to create historic districts in low-income areas, particularly those with small, vernacular buildings, as these areas are often overlooked by local historic preservation commissions. A neighborhood that is eligible under traditional criteria—e.g., that buildings retain their historic and architectural significance—should be protected as a traditional historic district with guidelines that adhere to the Secretary of the Interior's Standards. A neighborhood that has lost its integrity, either through individual building alterations or overall loss of building stock, but nonetheless merits protection—e.g., at least 50% of its building stock remains intact or the buildings have lost architectural detail but retain their historic footprint and envelope—can be protected as a neighborhood conservation district. The guidelines for the conservation district should be more flexible, focusing on preventing teardowns, oversized additions, or out-of-scale infill development. The conservation district is important, as it protects more low-income or potentially affordable properties from being replaced by higher-end housing, and the more flexible guidelines allow for less costly renovations. For both the historic and neighborhood conservation districts, the ordinance should mandate strong demolition delays, particularly in neighborhoods with high land values and smaller homes, and should also

contain mechanisms to discourage demolition and incentivize rehabilitation, such as impact fees, exactions, or transferable development rights.

In addition to planning for the creation of affordable housing, CLGs should design educational programs that train property owners and local builders on performing rehabilitation work that does not compromise the quality of the construction or destroy energy-efficient features. This is an important addition to the survey and landmark designation activities because it ensures that the properties are not just affordable, but also safe, sanitary, and durable.

Finally, the NPS and SHPOs should provide technical assistance to CLGs in designing and carrying out these projects. This should include sample historic and conservation district guidelines for neighborhoods targeted as “high” or “moderate need”; sample criteria for designating neighborhood conservation districts; guidelines for identifying properties well-suited for affordable housing; and guidelines for crafting a strong preservation ordinance.

## *2. Cost-Share Programs*

Through cost-share programs, state and local governments partner to undertake preservation survey and inventory projects. The state and local governments share costs, while the state administers the program—hiring consultants, reviewing the work, and ensuring completion of the final product—which is typically a comprehensive survey report detailing the findings and providing recommendations for stewardship.<sup>165</sup> Like the surveys undertaken by CLGs, discussed above, these surveys should identify buildings suitable for affordable housing and the condition of those buildings, and provide recommendations on how the housing goals can be incorporated into larger preservation goals.

## *3. Matching Grants*

Other preservation matching grants are available to local governments on a competitive basis for the rehabilitation and repair of historic buildings.<sup>166</sup> States should give preference to projects involving the rehabilitation or repair of affordable housing, particularly in areas where the

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165. See, e.g., *Survey & Planning*, VA. DEP'T HISTORIC RES., <http://dhr.virginia.gov/survey/Survey1.htm> (last updated Oct. 17, 2016) (describing the process of surveying historic properties).

166. See, e.g., *Historic Preservation Grants*, VT. AGENCY COM. & COMMUNITY DEV., <http://accd.vermont.gov/historic-preservation/funding/historic-preservation-grants> (last visited Apr. 28, 2017).



need for housing is great. States should also increase their share of the matching grants for projects based on how much affordable housing will be created.

#### 4. Downtown Revitalization

The National Main Street Center, a subsidiary of the National Trust for Historic Preservation, maintains a network of local downtown revitalization organizations (“Main Street programs”); provides technical assistance, training, and workshops; and has created an organizing framework—the Main Street Four Point Approach—that the local Main Street programs implement to achieve their revitalization goals.<sup>167</sup> Many states have coordinating programs that work with the local communities to carry out the Four Point Approach.<sup>168</sup> As Main Street programs are located in central business districts, their primary focus is on business growth, but most central business districts also contain housing. As this housing is centrally located and typically in the form of rentals, the affordable housing opportunities are significant. Economic development certainly has ripple effects into the residential community, and Main Street programs should take the reins to promote rehabilitation of housing and ensure that housing remains affordable, even as property values begin to rise. This can be achieved through a revised Four Point Approach that expressly addresses the residential component of the downtown, as well as training and workshops on how to incorporate affordable housing goals into an economic development plan.

In addition to the Main Street program, states should adopt an Elm Street program for revitalization of residential neighborhoods bordering central business districts.<sup>169</sup> In many cases, these neighborhoods have suffered population loss and disinvestment, and they often boast large historic homes that have already been divided into multi-family rentals. As the central business district revitalizes, these residential neighborhoods may feel pressure from developers. One goal of an Elm Street program should

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167. *The Main Street Approach - Main Street America*, MAIN STREET AM., <http://www.mainstreet.org/main-street/about-main-street/main-street-america/the-main-street-approach.html> (last visited Apr. 28, 2017).

168. *See, e.g., Downtown Designation*, VT. AGENCY COM. & COMMUNITY DEV., <http://accd.vermont.gov/community-development/designation-programs/downtowns> (last visited Apr. 28, 2017).

169. *See Elm Street*, PA. DOWNTOWN CTR., <http://www.padowntown.org/programs-services/elm-street> (last visited Apr. 28, 2017). Pennsylvania launched the first Elm Street program in 2004. *Id.* The program is now statewide. *Id.*

be to preserve both the historic character and affordability of these neighborhoods.

### *B. Enhanced Tax Incentives*

Another way preservationists can drive affordable housing development is by advocating for enhanced federal rehabilitation tax credits. Currently, several limitations in the federal tax credit hinder its use for affordable housing projects, particularly small ones undertaken by individual property owners. For example, the requirement that properties be income-producing precludes rehabilitation of owner-occupied properties; limits on income from passive activity make it difficult for property owners to use the tax credit to create rental housing; and the substantial rehabilitation requirement (\$5,000 or the adjusted basis, whichever is greater) makes small projects infeasible.

The solution is a second federal tax credit for affordable housing projects. The requirement that properties be listed or eligible for listing on the National Register of Historic Places would remain, as would the requirement that the completed work satisfy the Secretary of the Interior's Standards, albeit in a modified form that would grant more flexibility to the property owner.<sup>170</sup> First, removing the requirement that properties be income-producing opens the tax credit to a wider range of projects that could provide affordable housing. And second, eliminating the substantial rehabilitation requirement would make feasible both small projects that involve bringing a building up to code, and larger projects that would not generate as much profit for the developer (e.g., rehabilitating a former industrial building to be used for low-income housing).

Maintaining affordability is as important as creating affordable housing. For large projects of ten units or more, an additional, smaller credit should be available for every 5 years the units are maintained at an affordable rate for low-income families, up to 30 years. For example, the developer could receive an initial 20% credit and an additional 5% every 5 years up to 30 years, for a total credit of 50% of the rehabilitation costs. This will encourage substantial rehabilitation of large historic buildings for affordable housing when such a project would not otherwise be economically feasible, and it would help stabilize the neighborhood by ensuring that the units remain affordable over a generation.

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170. See ADVISORY COUNCIL ON HISTORIC PRES., AFFORDABLE HOUSING AND HISTORIC PRESERVATION (2006) (providing modified guidelines to be applied in Section 106 review of affordable housing projects).

## CONCLUSION

So what would Jane Jacobs do today if faced with the question of how to address the affordable housing shortage? We can say with confidence that she would still advocate for an animated streetscape of unique buildings, an eclectic array of merchants, and colorful sidewalk activity. We can also say with confidence that she would advocate for better-quality housing for low-income families, and more integrated and diverse neighborhoods. Knowing that, the answer to the question is simple: Jacobs would support historic districts. Jacobs saw historic districts as a way to preserve city life for both the wealthy and disadvantaged. And they still serve that purpose today. Historic districts are inherently inclusionary because they are varied, adaptable, and unique places that people love. They confer benefits on everyone. New construction will always be necessary, but it should supplement—not supplant—historic preservation.

Taylor, Bernice

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**From:** marie elena saccoccio <saccocciom@yahoo.com>  
**Sent:** Thursday, August 3, 2023 11:26 AM  
**To:** City Clerk; City Council; City Manager; Sullivan, Charles M.  
**Cc:** William Dines; Francesca Gordini; Suzanne Blier; Marilee Meyer; Betty Lee Saccoccio; Charles Hinds; John Whisnant; Joan Pickett; Fabrizio Gentili; Audrey Cunningham; jmspera@comcast.net; 'John Pitkin'; John Hanratty; Phil Wellons; Heather Hoffman; alan greene; Elizabeth Gombosi; Vickey Bestor; Fritz Donovan; Bob (ovidia) Sinha; Elizabeth Houghteling; Madeleine Aster; Pamela Winters  
**Subject:** Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"  
**Attachments:** Document 163.docx; Bagalay v Avon Hill Neighborhood Conservation District Commission 2004 MBAR 532 Mass Super 2004 (1) (2).pdf; Hancock Village I LLC v Town of Brookline (1) (2).pdf; massachusetts\_state\_historic\_preservation\_plan\_021411.pdf; Jane Jacobs and NCD's vs Affordable housing.pdf

**Mayor, Councilors, City Manager, CHC Executive Director:**

**I see no reason to amend my prior missives to this deliberative body. I am forwarding to you what hopefully you have considered before, though not one Councilor replied to any submission or even noted any of the issues. I find it most insulting that players incredibly divisive and disruptive at all the meetings of ECNCD were at the table and yet, the many residents who worked for years, even prior to the Petition of the East Cambridge Neighborhood Conservation District, were excluded.**

**Respectfully submitted,**

**Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141  
BBO#552854**

**From:** marie elena saccoccio <saccocciom@yahoo.com>  
**Date:** June 26, 2023 at 1:10:33 PM EDT  
**To:** City Clerk <cityclerk@cambridgema.gov>, City Council <citycouncil@cambridgema.gov>, CityManager@cambridgema.gov  
**Cc:** Marilee Meyer <mbm0044@aol.com>, Betty Lee Saccoccio <bsaccoccio@comcast.net>, Joan Pickett <jpickett7@yahoo.com>, Vickey Bestor <vickeybestor@gmail.com>, John Pitkin <john\_pitkin@earthlink.net>, William Dines <wdines@gmail.com>, John Whisnant <jwwhisnant@gmail.com>, Francesca Gordini <francesca.gordini@gmail.com>  
**Subject:** **Fw: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"**

Dear Council Members and Mayor:

Please find below and attached my prior submissions on this issue. I did attend the last meeting on this issue at which no public comment was allowed under the guise that this was a continuation of the prior meeting. A bit of leger de main. LOL Let me add that at the last meeting, over and over, I heard the age of Charles Sullivan and his length of tenure introduced as if the real necessity for this butchering is his age. To say it was insensitive is an understatement. Age was used like a hammer to justify the goal of the proponents. Let me also note that the proponent and author carry the burden. They need to justify their chosen language based on their research and knowledge. Instead, the Executive Director was ordered to review 40 years of cases in which petitions were denied or granted. Any Councilor should

have recognized that the burden rests with the proponents and the breath of this request was nonsensical.

Respectfully submitted, Marie Elena Saccoccio, Esquire  
----- Forwarded Message -----

From: marie elena saccoccio <saccoccio@cambridgema.gov>  
To: City Clerk <cityclerk@cambridgema.gov>; City Council <citycouncil@cambridgema.gov>; citymanager@cambridgema.gov <citymanager@cambridgema.gov>; Charles M. Sullivan <csullivan@cambridgema.gov>; Bruce Irving <irving@compass.com>  
Sent: Tuesday, June 20, 2023 at 09:37:58 AM EDT  
Subject: Fw: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"

City Councilors,

Quite suddenly posted to the City Calendar is notice of upcoming Ordinance Meeting on the Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks." No further information is posted. No link for public comment. No proposed text other than a reference to amended language from meeting of April 2023, though if memory serves me that was the formal meeting in which the proposed language not only was not publicly posted, it was not even previously shared with the Cambridge Historic Commission. I am submitting my prior opposition with attachments. I note that the chief proponents of the gutting of historical protections for this city will no longer be with us. One is relocating happily out of state and the other, after flagrantly violating Plan E strictures, is stepping down. Can we please take a breath. What is being proposed is not even lawful procedurally or substantively.

Respectfully,  
Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141  
BBO#552854

----- Forwarded Message -----

From: marie elena saccoccio <saccoccio@cambridgema.gov>  
To: City Council <citycouncil@cambridgema.gov>; City Clerk <cityclerk@cambridgema.gov>; citymanager@cambridgema.gov <citymanager@cambridgema.gov>; Charles M. Sullivan <csullivan@cambridgema.gov>; Bruce Irving <irving@compass.com>  
Sent: Monday, May 29, 2023 at 12:25:56 PM EDT  
Subject: Submission in Opposition to Amendment to Chapter 2.78, entitled "Historical Buildings and Landmarks"

Madam Clerk:

Could you kindly submit my attached opposition, case law and journal articles for consideration of the upcoming Ordinance Committee meeting on deliberation of proposed changes to the Historic and Landmark Ordinance?

Thank you for your time and assistance.

Marie Elena Saccoccio, Esquire  
55 Otis Street  
Cambridge, MA 02141