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## Historic Districts: Preserving the Old with the Compatible New

Emma Brandt Vignali

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HISTORIC DISTRICTS: PRESERVING THE OLD WITH THE  
COMPATIBLE NEW

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## INTRODUCTION

In the Old and Historic Alexandria District in Alexandria, Virginia, a prominent developer submitted plans for three buildings and a cluster of townhomes to be built on the District's coveted historic waterfront property.<sup>1</sup> The development plans were approved by the Board of Architectural Review in a 4-3 vote,<sup>2</sup> resulting in an outcry from many Alexandria residents. A petition signed by fifty-three residents called the Board's approval "arbitrary and capricious" due to the lack of compatibility between the proposed plans for development<sup>3</sup> and the District's eighteenth- and nineteenth-century townhomes.<sup>4</sup> Many residents argued that the proposed buildings were "too modern and too dense for such a historic area."<sup>5</sup> Wayne Neal, a member of the District's Board of Architectural Review, voted against the new development plans in hopes that the developer could make the "exterior designs ... more compatible with the local architecture and ... the waterfront view more in keeping with Alexandria's past."<sup>6</sup> Vice Mayor Allison Silberberg of Alexandria City also opposed the development plans, stating, "I believe in being careful and having development that fits in, and is to scale, and is respectful of the historic and special character of Old Town Alexandria."<sup>7</sup>

Despite these valid concerns by residents and city officials alike, the massive plans for development on the waterfront were ultimately approved.<sup>8</sup> However, that approval is not the end of the story. Other well-known developers are acquiring the District's

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1. See Vernon Miles, *Alexandria City Council Upholds BAR Approval*, CONNECTION (Dec. 16, 2015), <http://www.connectionnewspapers.com/news/2015/dec/16/alexandria-city-council-upholds-bar-approval/> [<https://perma.cc/X5MB-5VBR>].

2. *Id.*

3. *Id.*

4. See PENNY C. MORRILL, OLD TOWN, ALEXANDRIA 4-22 (1979).

5. Miranda S. Spivack, *On the Potomac, Change Comes to Alexandria's Old Town*, N.Y. TIMES (Aug. 23, 2016), [https://www.nytimes.com/2016/08/24/realestate/on-the-potomac-change-comes-to-alexandrias-old-town.html?\\_r=0](https://www.nytimes.com/2016/08/24/realestate/on-the-potomac-change-comes-to-alexandrias-old-town.html?_r=0) [<https://perma.cc/3CWE-WR6E>].

6. Miles, *supra* note 1.

7. Spivack, *supra* note 5.

8. See Miles, *supra* note 1.

much sought-after waterfront property too.<sup>9</sup> With high property values, close proximity to upscale shopping, and access to parks and the Potomac River, the Old and Historic Alexandria District is particularly appealing to developers.<sup>10</sup> And, despite the fundamental differences between the modern architecture of the proposed development and the Federal Period architecture distinctive of the District,<sup>11</sup> many city leaders welcome the new development, which is estimated to bring close to \$750,000 in annual property taxes to the city.<sup>12</sup> This struggle between the economic benefits of new development and the desire to maintain the original character of an historic district is not limited to Alexandria, Virginia, alone.<sup>13</sup>

Historic districts represent a gateway for the modern American to experience entire communities as they endured in decades past. This experience is made possible by comprehensive historic preservation zoning ordinances and design guidelines, independently established by local governments, which mandate construction and

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9. See Spivack, *supra* note 5.

10. See *id.*; see also Miles, *supra* note 1.

11. See *supra* note 5 and accompanying text.

12. Patricia Sullivan, *Alexandria Officials Approve 120-Room Hotel Along the Potomac River*, WASH. POST (Jan. 25, 2014), [https://www.washingtonpost.com/local/virginia-politics/alexandria-officials-approve-120-room-hotel-along-the-potomac-river/2014/01/25/bdd4236a-8606-11e3-8742-668814928ae4\\_story.html?utm\\_term=.b2d604945912](https://www.washingtonpost.com/local/virginia-politics/alexandria-officials-approve-120-room-hotel-along-the-potomac-river/2014/01/25/bdd4236a-8606-11e3-8742-668814928ae4_story.html?utm_term=.b2d604945912) [<https://perma.cc/J2YK-4426>]. This number is up from the just \$42,000 in annual property taxes the year before. *Id.*

13. See Chelsea Blahut, *Modern Home in Raleigh Overcomes Historic Preservation Challenge*, ARCHITECT (Sept. 12, 2014), [http://www.architectmagazine.com/design/modern-home-in-raleigh-overcomes-historic-preservation-challenge\\_o](http://www.architectmagazine.com/design/modern-home-in-raleigh-overcomes-historic-preservation-challenge_o) [<https://perma.cc/4BB6-U5YK>] (describing a year-long controversy between neighbors in the Historic Oakwood District over “[c]oncern[s] about a lack of consistency in the neighborhood’s style”); Martha Groves, *In Historic District, a Conflict Builds*, L.A. TIMES (Nov. 11, 2007), <http://articles.latimes.com/2007/nov/11/local/me-historic11> [<https://perma.cc/7GYA-QVAK>] (“To some observers, the controversy is emblematic of a larger debate that residents and preservationists have been having throughout the Los Angeles area: Can strikingly contemporary architecture coexist happily with ‘historic’ architecture?”); *Current Preservation Controversies—Development at St. Luke in the Fields, Gowanus National Register District Challenged*, HISTORIC DISTRICTS COUNCIL (Mar. 14, 2014), <http://hdc.org/blog/e-bulletin-3-14-2014> [<https://perma.cc/JP23-VYWH>] (“The complete lack of rapport between these structures and the older houses glaringly illustrates the process of attrition which is taking place and the need for architectural controls for one of the most interesting and historical areas of The Village.”); David Payne, *Appropriate Architecture for Historic Charleston, SC*, TRADITIONAL BUILDING (July 17, 2015), <http://www.traditionalbuilding.com/features/appropriate-architecture> [<https://perma.cc/DRW6-954U>] (noting the demolition of an overly modern 1960s building in favor of a more traditional building).

alteration standards within an historic district's boundaries.<sup>14</sup> When applied to historic structures, these zoning ordinances and design guidelines protect the United States' historic resources from destruction and decay. Still, standards ensuring that new construction remains compatible with historic buildings serve as a second level of protection. When new construction aesthetically relates to protected historic structures, communities create a cohesive story of the past for all who visit.<sup>15</sup>

The prospect of new development constantly challenges historic districts to maintain this cohesiveness. Historic buildings often decay to the point of demolition, and vacant plots represent the opportunity to construct new homes and businesses. In turn, designing new buildings in historic districts poses a challenge to developers, who must present plans that a district's board of architectural review will accept.<sup>16</sup> And, the board is equally challenged to decide whether new buildings will complement or detract from the historic district's preexisting aesthetic scheme.<sup>17</sup> Accordingly, both parties must answer the same question: Which structures will appropriately fill these vacant spaces?

This question is complicated, as every local government retains the power to determine how it will protect its historic resources.<sup>18</sup> It is a question of "compatibility," and there is no nationwide definition or legal test for this term.<sup>19</sup> Historic districts use the term

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14. See J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 666, 669-70 (2012).

15. See Jess R. Phelps, *Moving Beyond Preservation Paralysis? Evaluating Post-Regulatory Alternatives for Twenty-First Century Preservation*, 37 VT. L. REV. 113, 113-14 (2012) (noting that historic districts are the best way of "preserving the *tout ensemble* of an historic area or neighborhood").

16. See Byrne, *supra* note 14, at 670-71.

17. See *id.* (noting that a "Commission" must determine whether new construction is appropriate through an evaluation of the district's already-existing architectural features).

18. See *id.* at 666.

19. See M. Jesse Carlson, *Can Modern Architecture and Historic Preservation Be Reconciled? The Definition and Application of "Compatible" as Used in the DC Historic Preservation Act 3-7* (Apr. 28, 2003) (unpublished manuscript) (on file with Georgetown University Law Center), [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=hpps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=hpps_papers) [<https://perma.cc/7NF3-FT4V>]. Nor should there be any strict definition of compatibility for all historic districts. Each historic district protects unique historic resources. Therefore, it follows that each historic district will likely require its own definition of compatibility in order to adequately protect these resources.

“compatibility” to describe the type of new development that will be permitted to exist among those structures of historic value.<sup>20</sup> It most often refers to a feeling of aesthetic harmony between the exteriors of newly built structures and existing historic buildings.<sup>21</sup> Most historic districts view preservation, including questions of compatibility, as advancing three important objectives: promoting patriotism,<sup>22</sup> protecting and valuing architectural styles,<sup>23</sup> and realizing economic value.<sup>24</sup> However, each district may go about achieving these objectives through different legislative means. What is apparent is that some historic districts are more successful than others at achieving compatibility.<sup>25</sup> Consequently, incompatible new construction continues to threaten historic districts across the country.

Determinations of compatibility are extremely important to the overall success of the United States’ historic districts. An historic district that permits incompatible development may experience negative consequences, including threatened perceived historical character and reduced economic outcomes.<sup>26</sup> Too much incompatible development may ultimately lead to the destruction of the historic structures that the district seeks to protect.<sup>27</sup> Ensuring that new development is compatible with historic buildings is vital for the success of an historic district’s ongoing preservation.

A viable solution to the issue of incompatible new development is currently absent from historic preservation scholarship. It is well established that historic districts do—and should—have the power to establish tailored definitions of compatibility, founded upon each

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20. *See id.* at 4, 7.

21. Compatibility typically only refers to a building’s exterior. *See Phelps, supra* note 15, at 144 n.183.

22. *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479 (1981).

23. *See id.* at 479-80.

24. *See infra* Part I.C.3.

25. *See* Margaret F. England, Note, *Regionalism and Historic Preservation: How History Is Given Greater Weight in Different Regions of the Country*, 8 WIDENER L. SYMP. J. 347, 347 (2002) (“[L]egislation in some areas of the country favors historic preservation while legislation in other regions hinders historic preservation.”).

26. *See* Byrne, *supra* note 14, at 676.

27. *See id.* (claiming repeated exceptions to historic district standards could eventually destroy the value the historic district conferred on individual properties).

district's unique historic resources.<sup>28</sup> However, there are some measures that all historic districts can use to protect historic resources from incompatible development, without sacrificing the autonomy of district-specific definitions of compatibility.<sup>29</sup> This Note assembles the most effective methods of protection used today into a single, uniform framework that communities across the country can apply to their respective historic districts. This framework will continue to be important to the success of the United States' historic districts through the foreseeable future because assuring compatibility between new and historic structures is imperative to achieving the primary objectives of historic preservation.

To that end, this Note proposes a nationally applicable framework that local governments can implement to best protect their historic districts from incompatible new construction. Part I introduces the current historic preservation framework, beginning with background on the historic preservation movement. It also addresses the present relationship between federal, state, and local governments, and presents the objectives that continue to drive preservation efforts at all levels of government. Part II reviews the most common legislative and procedural efforts of historic districts, including the typical structure of local zoning ordinances, the creation and purpose of the board of architectural review, and the process of awarding Certificates of Appropriateness. Part III outlines and critiques the zoning ordinances and design guidelines of three geographically and historically diverse historic districts, including the Old and Historic Alexandria District in Alexandria, Virginia; Pioneer Square Preservation District in Seattle, Washington; and King William Historic District in San Antonio, Texas. Part IV hybridizes the most effective methods from the three historic districts outlined in Part III to create a uniform framework. This framework demands a level of necessary protection that, when applied to historic districts nationwide, will both assure compatibility and further the purposes of historic preservation. Provided that this framework is properly employed, historic districts may apply individualized definitions of compatibility with confidence that their historic resources are adequately protected.

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28. *See id.* at 666.

29. *See infra* Part IV.



## I. THE FOUNDATIONS OF HISTORIC PRESERVATION AND THE LAWS THAT FACILITATE IT

To fully grasp why compatibility is so important, it is critical to recognize why the United States values historic preservation at all. While historic preservation efforts were first privately organized, a vast legislative system emerged throughout the twentieth century to protect the United States' most prized historic resources.<sup>30</sup> First, this Part discusses the shift of the historic preservation movement from private to public efforts. Then it examines how federal, state, and local laws interact to create the comprehensive preservation scheme employed today. Last, it sets forth the major objectives of historic preservation legislation, which are further advanced by the assurance that new development remains compatible.

### A. *From Private to Public*

The historic preservation movement first gained traction around 1850 through private efforts.<sup>31</sup> The preservation of Mount Vernon, George Washington's home in Virginia, is often credited as the first major development in the American historic preservation movement.<sup>32</sup> In the nineteenth century, preservation efforts in the United States lacked the governmental support required to preserve a property as sizable as Mount Vernon.<sup>33</sup> The Commonwealth of Virginia even declined the opportunity to purchase the property for restoration.<sup>34</sup> But in 1859, the Mount Vernon Ladies Association, a private organization, purchased and restored the property to its current glory.<sup>35</sup>

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30. See James E. Smith, Note, *Are We Protecting the Past? Dispute Settlement and Historical Property Preservation Laws*, 71 N.D. L. REV. 1031, 1036-40 (1995).

31. See Phelps, *supra* note 15, at 116-18.

32. See Smith, *supra* note 30, at 1036-37.

33. See Robin D. Rice, Note, *By What We Have Destroyed: Historic Preservation and the Preservation of Individual Property Rights*, 52 U. LOUISVILLE L. REV. 153, 156-57 (2013) (noting that governmental involvement in preservation focused more on conservation of the natural landscape during the nineteenth century).

34. See *id.* at 157.

35. See JACOB H. MORRISON, HISTORIC PRESERVATION LAW 3 (1965).

The restoration of homes belonging to prominent historical figures proceeded to drive the first great American historic preservation movement.<sup>36</sup> Private organizations purchased homes across the country “to memorialize the events and heroes of the American Revolution.”<sup>37</sup>

An event of even greater private preservation effort occurred in 1889 with the creation of the Association for the Preservation of Virginia Antiquities.<sup>38</sup> This organization was the first of its kind: a statewide historic preservation organization.<sup>39</sup> In 1893, the organization acquired Jamestown, which is widely known as “the first permanent English settlement in North America.”<sup>40</sup> Without these private efforts, a piece of the United States’ history may have been lost forever due to erosion from the James River.<sup>41</sup>

During this period, the federal government began to develop an interest in preservation. In 1872 Congress passed An Act to Set Apart a Certain Tract of Land Lying near the Head-Waters of the Yellowstone River as a Public Park,<sup>42</sup> establishing the nation’s first national park.<sup>43</sup> Then, through the passage of the 1889 Sundry Civil Appropriations Act, Congress called for the protection and restoration of the Casa Grande ruins in Arizona.<sup>44</sup> Most notably, in 1894

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36. See Megan M. Carpenter, Note, *Preserving a Place for the Past in Our Future: A Survey of Historic Preservation in West Virginia*, 100 W. VA. L. REV. 423, 427 (1997).

37. *Id.* For instance, in Alexandria, Virginia, the closest city to George Washington during his residence at Mount Vernon, preservation efforts began by preserving the businesses and homes where George Washington often visited during his time in the city. See *Alexandria’s History*, ALEXANDRIA HIST. SOC’Y, <https://alexandriahistoricalsociety.wildapricot.org/history> [<https://perma.cc/P4JK-ARF2>].

38. See *Preserving Virginia’s Historic Places*, HISTORIC JAMESTOWNE, <http://historicjamestowne.org/about/history-of-apva/> [<https://perma.cc/L53W-KE25>]. This organization is now known as “Preservation Virginia.” See *id.*

39. See *id.*

40. *Id.*

41. See *id.*

42. An Act to Set Apart a Certain Tract of Land Lying near the Head-Waters of the Yellowstone River as a Public Park, 17 Stat. 32 (1872).

43. See *Yellowstone National Park Protection Act (1872)*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/management/yellowstoneprotectionact1872.htm> [<https://perma.cc/CN7S-N6UB>].

44. See 15 BUREAU OF ETHNOLOGY ANN. REP. TO THE SECRETARY OF THE SMITHSONIAN INST. 326 (1897) (“Repair of the ruin of Casa Grande, Arizona: To enable the Secretary of the Interior to repair and protect the ruin of Casa Grande ...; and the President is authorized to reserve from settlement and sale the land on which said ruin is situated.”). This protection came at just the right time, as the ruins fell into disrepair after being repeatedly looted by

the federal government exercised eminent domain over the Gettysburg battlefield, preserving it as a national memorial.<sup>45</sup>

### *B. Federal, State, and Local Interplay*

Today, federal, state, and local preservation efforts work together to protect the United States' valuable historic landscape.<sup>46</sup> Federal legislation gives power to statewide preservation programs,<sup>47</sup> allowing local governments to then create historic districts in areas with historic resources worthy of protection.<sup>48</sup>

#### *1. Federal Efforts*

The first formal federal preservation legislation, which officially transitioned preservation efforts from mostly private parties to public entities, was the Antiquities Act of 1906.<sup>49</sup> This Act gave the president the "authoriz[ation] ... to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the [Federal] Government."<sup>50</sup> This Act was monumental to the United States' preservation regime, establishing the preservation of objects, places, and structures as a worthy federal purpose, as well as laying the groundwork for the preservation efforts that were to come in the twentieth century.<sup>51</sup>

The next major federal preservation legislation came in 1935 with the Historical Sites Act.<sup>52</sup> This Act worked in tandem with the Historic American Buildings Survey to identify and protect structures

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railroad travelers. See Rice, *supra* note 33, at 157.

45. See Rice, *supra* note 33, at 157 (citing *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 679-80 (1896)).

46. See Christopher J. Duerksen, *The Local Preservation Regulatory Process*, in REUSING OLD BUILDINGS: PRESERVATION LAW AND THE DEVELOPMENT PROCESS 23 (1984).

47. See 54 U.S.C. § 302301 (Supp. II 2015).

48. See *infra* Part I.B.3.

49. See *Antiquities Act 1906-2006*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/about.htm> [<https://perma.cc/W35D-3JV9>].

50. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended in 54 U.S.C. §§ 320301-320303 (Supp. II 2015)).

51. See, NAT'L PARK SERV., *supra* note 49.

52. See Smith, *supra* note 30, at 1037.

of significant historical value that memorialized the United States' early history.<sup>53</sup> In passing this legislation, Congress declared that "it [was] a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."<sup>54</sup>

The most important piece of federal preservation legislation<sup>55</sup> is the Historic Preservation Act of 1966.<sup>56</sup> The Act states that it is "necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities."<sup>57</sup> The Act recognized the importance of assisting states in effectuating their own preservation programs.<sup>58</sup> "[T]he statute gives deference to the State Historical Preservation Officer ... of each state to determine which property in their respective state is worthy of national historical recognition and preservation."<sup>59</sup> The power of the states was then confirmed by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, in which the Court held "that historic preservation advances are an important public interest and thus fall within the [states'] police power."<sup>60</sup>

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53. See *Timeline: Historic Preservation*, NAT'L PARK SERV., <https://www.nps.gov/resources/timeline.htm?ID=78884F1F-FBD9-3065-39CF9470266C40B8> [<https://perma.cc/SXS5-D7XY>].

54. Historic Sites Act of 1935, Pub. L. No. 292-74, 49 Stat. 666 (codified as amended at 54 U.S.C. § 320101 (Supp. II 2015)).

55. Notably, this is not the last piece of federal preservation legislation as this Act was amended in 1980. See Smith, *supra* note 30, at 1039. However, the amendments to the Act have no bearing on this Note. In addition, Congress has incorporated preservation initiatives into other statutes. See Charlotte R. Bell, *Protecting the Built Environment: An Overview of Federal Historic Preservation Law*, 15 ENVTL. L. REP. 10354, 10354 (1985).

56. See Smith, *supra* note 30, at 1038-39 ("The 1966 Historical Preservation Act ... was the first major piece of federal legislation dedicated to the preservation of all of the nation's historical property." (footnote omitted)).

57. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, *repealed* by An Act to Enact Title 54, United States Code, "National Park Service and Related Programs" as positive law, Pub. L. No. 113-287, 128 Stat. 3094 (2014).

58. See Smith, *supra* note 30, at 1038-39.

59. *Id.* at 1038.

60. J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 317 (2004) (discussing the holding in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978)).

## 2. *State Efforts*

As previously noted,<sup>61</sup> the state police power enables state governments to play an important role in preserving the nation's historic resources.<sup>62</sup> The authority given to the states through the National Historic Preservation Act allows them to establish their own review process for both public and private projects.<sup>63</sup>

States that establish certified preservation programs are qualified to receive grants from the federal Historic Preservation Fund.<sup>64</sup> In order to implement a certified state preservation program, a state governor must appoint a State Historical Preservation Officer to oversee the state's preservation program.<sup>65</sup> In addition, the state must create a state historic preservation review board and provide for public participation in that program.<sup>66</sup> Lastly, an "approved state program[] must ... include a procedure to certify local governments."<sup>67</sup> Once a state fulfills its certification requirements, it can begin transferring federal grant monies to its local governments in order to create and maintain its historic districts.<sup>68</sup>

## 3. *Local Efforts*

After a state executes the requirements of the National Historic Preservation Act, it is up to the local governments to establish zoning ordinances and implement guidelines that will protect the integrity of its historic resources.<sup>69</sup> Accordingly, the majority of the

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61. *See supra* Part I.B.1.

62. *See* Robert E. Stipe, *Some Preservation Fundamentals*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 23, 26 (Robert E. Stipe ed., 2003) ("[The states] retained for themselves, in Amendments 9 and 10 to the Constitution, the basic power to regulate citizens in their personal conduct and the use of their property ... [, which] includes the power to regulate historic buildings.").

63. *See* Smith, *supra* note 30, at 1039.

64. *See* England, *supra* note 25, at 353.

65. *See id.* at 352.

66. *See id.* at 353.

67. *Id.* at 351.

68. *See id.* at 353.

69. *See* Byrne, *supra* note 14, at 666 (noting that local laws regulate the alteration and demolition of historic buildings within many urban real estate markets). This is an exercise of the state power delegated to local governments. *See* Lina Cofresi & Rosetta Radtke, *Local Government Programs: Preservation Where It Counts*, in *A RICHER HERITAGE: HISTORIC*

power to shape the boundaries, concept, and aesthetic nature of an historic district remains at the local level.<sup>70</sup> In 1929, the Supreme Court in *Village of Euclid v. Ambler Realty Co.* recognized that zoning ordinances implemented by local governments are a valid application of the police power.<sup>71</sup> This judicial validation spurred the adoption of local zoning ordinances, and the establishment of the nation's first historic district soon followed.<sup>72</sup>

However, historic districts were not merely created to protect historic structures, but rather to preserve an overall harmonious aesthetic scheme. In *City of New Orleans v. Pergament*, the Louisiana Supreme Court recognized that while the zoning ordinances within the French Quarter protected historic structures, that objective "was merely one facet of a larger goal 'to preserve the antiquity' of the entire area and not just individual buildings."<sup>73</sup> Therefore, regulating a nonhistoric structure was held a proper exercise of the city's police power in order to preserve the aesthetic integrity of the surrounding historic structures.<sup>74</sup>

The power of local governments was further expanded in *Berman v. Parker*.<sup>75</sup> The Supreme Court held that local zoning ordinances could be enacted for purely aesthetic purposes,<sup>76</sup> thus applying an "expansive definition" to what constitutes public welfare.<sup>77</sup> These precedents paved the way for the adoption of historic preservation

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PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 62, at 117, 117.

70. See Duerksen, *supra* note 46, at 23.

71. See Timothy F. Brown, Comment, *Historic Districts and the Imagined Community: A Study of the Impact of the Old Georgetown Act*, 24 SETON HALL J. SPORTS & ENT. L. 81, 86 (2014) (noting that such local ordinances must find their validity in some aspect of the state's police power (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926))).

72. See Rice, *supra* note 33, at 159. "South Carolina[] became the first state in the country to officially institutionalize historic preservation, creating ... the nation's first historic district." *Id.*

73. See *id.* at 159-60 (quoting *City of New Orleans v. Pergament*, 5 So. 2d 129, 131 (La. 1941)).

74. See *id.* at 160 (citing *Pergament*, 5 So. 2d at 131).

75. See Brown, *supra* note 71, at 86-87 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

76. *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.")

77. Brown, *supra* note 71, at 87 (citing *Berman*, 348 U.S. at 33).

programs in every state and hundreds of municipalities across the country.<sup>78</sup>

### *C. Why Preserve Through Historic Districts?*

While the answer to the question “why preserve?” may seem obvious, the purposes behind creating historic districts are rather complex. Preservation through the creation of historic districts has three predominant purposes: (1) promoting patriotism,<sup>79</sup> (2) protecting and valuing architectural styles,<sup>80</sup> and (3) realizing economic value.<sup>81</sup> These objectives are further promoted by ensuring that new buildings remain compatible with protected historic buildings.

#### *1. Promoting Patriotism*

Historic districts endeavor to preserve significant structures in their most historically representative state in order to instill a sense of patriotism in residents and tourists alike.<sup>82</sup> Promoting a sense of patriotism was the driving factor behind many of the major private preservation efforts of the nineteenth century.<sup>83</sup> Early preservationists sought to maintain those structures owned or frequented by notable Americans.<sup>84</sup> For instance, in Alexandria, Virginia, preservationists first focused on restoring Gadsby’s Tavern and the Carlyle House, two locations frequented by George Washington.<sup>85</sup>

As preservation efforts expanded to preserve entire neighborhoods, the promotion of patriotism was not lost. Today, these

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78. See Rice, *supra* note 33, at 161 (noting that “every state and over 500 municipalities ... implemented historic preservation programs” within a decade of the National Historic Preservation Act’s enactment).

79. See Rose, *supra* note 22, at 479.

80. See *id.* at 480.

81. See David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 82-83 (1985).

82. See Rose, *supra* note 22, at 479.

83. See *id.*

84. See *id.* at 479-80; *supra* Part I.A.

85. See Peter H. Smith, *The Beginnings of Historic Preservation in Alexandria—Moving Toward the Creation of the Old and Historic District*, ALEXANDRIA CHRON., Winter 1996, at 1, 2, [https://alexandriahistoricalssociety.wildapricot.org/resources/Documents/The\\_Chronicle/1996\\_Winter\\_Chronicle.pdf](https://alexandriahistoricalssociety.wildapricot.org/resources/Documents/The_Chronicle/1996_Winter_Chronicle.pdf) [<https://perma.cc/Z2Yz-H4A2>].

collections of structures “embody a historical narrative that people in the present value.”<sup>86</sup> Historic districts provide a means for twenty-first century citizens to experience—or at least visualize—how the ordinary American once lived.<sup>87</sup> While historic districts may not always give the viewer a completely accurate view of the past,<sup>88</sup> they are the best alternative to classic two-dimensional artistic re-creations.

Promoting this same sense of patriotism is more difficult when blending new structures with old. New buildings, especially those that lack a certain standard of aesthetic compatibility with historic structures, may detract from or overshadow a district’s historic resources. In addition, a lack of compatibility may stymie the overall historic atmosphere of the district. Because new development is likely inevitable, assuring compatibility is imperative to avoid detracting from the overall sense of patriotism within an historic district.

## *2. Protecting and Valuing Architectural Styles*

Historic districts effectively protect buildings from important historical periods, advancing an appreciation for architectural significance.<sup>89</sup> Under this view, preservation should focus on maintaining the original architectural style of an historic district.<sup>90</sup>

This purpose for preservation greatly impacted the zoning ordinances of historic districts across the country. Historic preservation ordinances function as “architectural controls designed to protect a few well-known old districts.”<sup>91</sup> Some argue that historic districts

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86. Byrne, *supra* note 14, at 679. J. Peter Byrne argues that criteria for inclusion in the National Register of Historic Places embodies this perceived value. *Id.* at 678-79. These criteria single out “places made historically important through association with important events or persons, those with aesthetic or cultural value, and those ... that may provide useful information to the trained eye.” *Id.* at 679.

87. *Cf. id.* at 678 (“[H]istoric districts ... offer a narrative connection with the past.”).

88. *Id.* at 682. Byrne argues that preservation can also be a hindrance to gaining a clear perception of the past. *See id.* (claiming preservation cannot “provide an unproblematic image of the past”). For example, Byrne notes that while some antebellum plantations are beautifully restored, their accompanying “slave quarters have almost entirely disappeared.” *Id.*

89. *See* Rose, *supra* note 22, at 480.

90. *See id.*

91. *See id.* at 484.



“include thousands of utterly undistinguished structures.”<sup>92</sup> Yet many carefully restored historic structures—whether distinguished by famous inhabitants—can still stand together as a place of architectural significance. For instance, the Old and Historic Alexandria District remains well-preserved due to the District’s strict zoning ordinances and design guidelines.<sup>93</sup> The District stands as an impeccable example of Georgian, Federal Period, Colonial, Greek Revival, and Victorian architecture.<sup>94</sup>

In addition, preservationists created legal mechanisms—known as preservation easements—to ensure the long-term preservation of the architectural beauty of historic properties.<sup>95</sup> Preservation easements are “legal agreement[s] whereby the owner of a historic property grants a third-party ... a perpetual non-possessory interest in their property.”<sup>96</sup> The property receives the benefit of perpetual protection in exchange for the owner’s right to make certain modifications or alterations to the property.<sup>97</sup> These easements, which are common throughout historic districts, may be “the most effective mechanism for protecting examples of our architectural history.”<sup>98</sup>

Amid these restored historic structures, new buildings compete for attention. An incompatible new building—perhaps of a markedly different architectural style—may adversely affect a district’s historic resources.<sup>99</sup> First, this architecturally different new structure may draw attention away from historical structures, as an onlooker

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92. See Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, CITY J. (Spring 2010), <https://www.city-journal.org/html/preservation-follies-13279.html> [<https://perma.cc/CP8M-ZX9J>].

93. Cf. *Old and Historic Alexandria District Board of Architectural Review*, CITY OF ALEXANDRIA, <https://www.alexandriava.gov/planning/info/default.aspx?id=33280> [<https://perma.cc/HL49-594V>] (noting the expansion of the historic district’s physical boundaries over time).

94. See generally MORRILL, *supra* note 4, at 4-22 (describing the various historic architectural periods and representative structures within the City of Alexandria).

95. Jess R. Phelps, *Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future*, 91 NEB. L. REV. 121, 128 (2012).

96. *Id.*

97. See *id.*

98. *Id.* at 126.

99. But see Jonathan Flynn, *Productive Preservation and the Reinvention of Industrial America*, 39 URB. LAW. 123, 130 (2007) (“Some progressive municipalities have adopted an open and flexible definition of artistic merit, accepting the possibility of exceptional modern design being compatible with a historic context.”).

may shift focus to a unique modern building. Second, this incompatible architectural style may detract from the overall aesthetic authenticity of the historic district itself.<sup>100</sup> For these reasons, it is in an historic district's best interest to require that new buildings meet a standard of compatibility with surrounding historic buildings. Compatible buildings will not detract from historic buildings, but rather will allow the historic buildings to shine.

### 3. *Realizing Economic Value*

Historic district designation is considered a catalyst to spur economic activity in otherwise struggling neighborhoods.<sup>101</sup> The designation of an historic district can have extreme "intangible" effects by creating "a favorable climate for investment."<sup>102</sup> For example, districting causes homeowners to take a greater interest in maintaining their historic property.<sup>103</sup> It also attracts competitive investment from developers looking to capitalize on the valuable property.<sup>104</sup>

Developers may not wish to follow compatibility standards for new development within an historic district. Yet, requiring new structures to be compatible does not necessarily limit the potential economic benefits of historic districts. Many developers choose to build just outside of the boundaries of these districts, allowing

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100. For example, the Old and Historic Alexandria District states in its design guidelines that while new construction should be similar or compatible to existing structures, direct replicas of already existing buildings are frowned upon. See CITY OF ALEXANDRIA, VA. DEP'T OF PLANNING & CMY. DEV., DESIGN GUIDELINES FOR THE OLD AND HISTORIC ALEXANDRIA DISTRICT AND THE PARKER-GRAY DISTRICT ch. 6, at 2 (1993) [hereinafter OLD TOWN DESIGN GUIDELINES], [https://www.alexandriava.gov/uploadedFiles/planning/info/Historic\\_Preservation/pnz\\_historic\\_designguidelines.pdf](https://www.alexandriava.gov/uploadedFiles/planning/info/Historic_Preservation/pnz_historic_designguidelines.pdf) [<https://perma.cc/TB7C-8XAD>]. What makes an historic district authentic is the presence of old structures, sometimes over one hundred years old, not buildings that just look like old structures.

101. See Fein, *supra* note 81, at 82 (arguing that the designation of economically depressed neighborhoods can help revitalize those communities). *But see* Flynn, *supra* note 99, at 125-26 (arguing that while stringent zoning ordinances are successful in some historic districts, others see them as "expensive, unnecessary, and basically incompatible with progress").

102. See Fein, *supra* note 81, at 82-83.

103. See *id.* at 83.

104. Notably, investment by developers increases housing prices within historic districts. See *id.* at 80-82. This displaces low-income, elderly, and minority residents, while white-collar families receive all the economic benefits that historic districts offer. See *id.* This process is often referred to as "gentrification." *Id.*

residents easy access to the district's amenities without the inflated prices.<sup>105</sup> Ultimately, historic districts and the standards that they impose "spread economic demand to new areas, strengthening the city overall and providing significant windfalls to property owners in the right locations."<sup>106</sup> These windfalls apply to all properties subjected to the district's restrictions.<sup>107</sup> However, just a single developer excused from the district's restrictions could receive a windfall: "He could build large buildings, which would benefit from the attractive context of older smaller buildings, without contributing to the preservation of that context."<sup>108</sup> Therefore, without requiring that all new buildings remain compatible with existing buildings, historic districts may not continue to experience these same balanced economic benefits.

## II. HISTORIC DISTRICTS: LOCAL ZONING ORDINANCES, BOARDS OF ARCHITECTURAL REVIEW, AND AWARDING CERTIFICATES OF APPROPRIATENESS

The National Park Service defines an historic district as "a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development."<sup>109</sup> Historic districts found their start in Charleston, South Carolina, in 1931;<sup>110</sup> today over 2,300 historic districts exist across all fifty states.<sup>111</sup> What allows historic districts to maintain their beauty are the zoning ordinances and design guidelines that govern them. Local governments enact zoning ordinances that give power to an historic district's board of architectural review.<sup>112</sup> This board retains the power to review applications for new construction.<sup>113</sup> The board's decision of whether to accept or

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105. See Byrne, *supra* note 14, at 670.

106. *Id.*

107. See Fein, *supra* note 81, at 79-80 ("[T]he strict controls imposed by historic district regulations benefit and burden all district landowners in an essentially comparable manner.").

108. See Byrne, *supra* note 14, at 676.

109. *National Register of Historic Places Program: Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/nr/faq.htm> [<https://perma.cc/DUR9-W59E>].

110. See Brown, *supra* note 71, at 88.

111. See Phelps, *supra* note 15, at 132.

112. See Flynn, *supra* note 99, at 135 n.53.

113. See *id.* at 135-36.

reject an application is based on design guidelines promulgated by the local government.<sup>114</sup> This common process has greatly affected the preservation landscape of the United States.<sup>115</sup> In fact, “[m]any of the areas set aside by these early zoning ordinances never had any great role to play in history, but ... [are now] indeed important components of an urban picture.”<sup>116</sup>

### A. Local Zoning Ordinances

Historic districts are established through pieces of state-enabling legislation.<sup>117</sup> Authority then passes to local governments to garner community support<sup>118</sup> and to enact ordinances that will best protect the unique historic resources within the community.<sup>119</sup>

Historic district zoning ordinances typically begin by establishing geographic boundaries for the district.<sup>120</sup> These boundaries are extremely important, as new and existing structures just outside of an historic district’s boundaries will likely be afforded much greater flexibility than those within.<sup>121</sup> The zoning ordinances then must expressly outline the locality’s purpose for historic designation, which may include educational, economic, or aesthetic purposes.<sup>122</sup> This purpose statement is meant “to stake out the legal space on which the local government claims the right to regulate.”<sup>123</sup>

Zoning ordinances may also refer to a separate document—the district’s design guidelines—which outlines the specific construction requirements for historic and new structures within the district.<sup>124</sup>

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114. *See id.*

115. *See* Jess R. Phelps, *Preserving Perpetuity?: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World*, 43 ENVTL. L. 941, 953-54 (2013).

116. *See id.* at 954 (quoting 2 CHARLES B. HOSMER, JR., PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926-1949, at 231-32 (1981)).

117. *See* Phelps, *supra* note 15, at 131; *see also supra* Part I.B.2.

118. *See* Phelps, *supra* note 15, at 131.

119. *See* Phelps, *supra* note 115, at 953-54.

120. *See* Brown, *supra* note 71, at 89.

121. *See* Byrne, *supra* note 14, at 670-73, 676-77.

122. *See* Brown, *supra* note 71, at 89-90.

123. *See* David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 294 (2004) (noting that the locality must name some public purpose related “to public health, safety, morals, or general welfare,” leading localities to choose purposes that have previously been approved in other historic districts).

124. *See id.* at 298.

These guidelines place restrictions on all future construction projects, making the guidelines the key to sufficient preservation.<sup>125</sup> These restrictions are usually based on some “visual protection” to the exterior of historic buildings, but also require that new buildings comply with some varying level of compatibility.<sup>126</sup> The design guidelines are exceptionally important to the future of the historic district: they ensure objective decision-making by the board of architectural review and notify residents and developers of the board’s decision-making criteria.<sup>127</sup> Lastly, the zoning ordinances establish a board of architectural review that serves to assure compliance with the historic district’s zoning ordinances and design guidelines.<sup>128</sup>

### *B. The Board of Architectural Review*

Another important aspect of a district’s zoning ordinances is its establishment of a board of architectural review.<sup>129</sup> The board is tasked with enforcing the construction and alteration guidelines promulgated by the zoning ordinances.<sup>130</sup> The board often includes members with several different specialties, including architects, historians, archeologists, builders, real estate professionals,<sup>131</sup> and lawyers.<sup>132</sup>

The board of architectural review is frequently given discretionary power to determine whether new development complies with the district’s design guidelines.<sup>133</sup> These local authorities are then afforded broad discretion by courts in interpreting applications for

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125. See Brown, *supra* note 71, at 90.

126. See Rose, *supra* note 22, at 507-08 (noting that the zoning ordinances and design guidelines applied to historic districts are often much more complex than other nonhistoric localities because they must consider some level of compatibility).

127. See ALICE MERIWETHER BOWSER, DESIGN REVIEW IN HISTORIC DISTRICTS 25 (1978).

128. See Brown, *supra* note 71, at 90.

129. See Duerksen, *supra* note 46, at 23.

130. See Brown, *supra* note 71, at 90.

131. See Rose, *supra* note 22, at 496 (“Presumably, members bring the standards of their professions to the tasks of landmark designation and review of applications to alter historic properties.”).

132. See BOWSER, *supra* note 127, at 14.

133. See Rose, *supra* note 22, at 496. While the district’s design guidelines set codified standards for the board, the true guidelines for the board are the district’s already existing historic buildings. See BOWSER, *supra* note 127, at 25.

building alterations, also known as Certificates of Appropriateness.<sup>134</sup> In most jurisdictions, the board of architectural review must approve plans for new construction before a Certificate of Appropriateness will be issued.<sup>135</sup> However, in other districts, the board merely functions as an advisory committee, giving the decision-making power to one person within the local government.<sup>136</sup>

But that broad authority does not mean that the board has the power to make completely indiscriminate decisions. State law typically allows decisions by a local board of architectural review to be reviewed by the city council and then the local city's court.<sup>137</sup> Zoning ordinances often provide a check on the board by dictating the standards a court should use "to determine whether action by the reviewing body has been arbitrary or discriminatory."<sup>138</sup>

### *C. Certificates of Appropriateness for New Construction*

For a developer or resident to alter an existing building or to build something new in an historic district, that developer must submit the proposed construction plans to the local board of architectural review.<sup>139</sup> To receive the most desirable feedback from the board, an application should include the relevant details of the project.<sup>140</sup> The board of architectural review is then tasked with reviewing the project application in order to determine whether it complies with the district's design guidelines.<sup>141</sup>

The review process varies from district to district, but most review processes involve a public hearing overseen by the board of architectural review.<sup>142</sup> Both proponents and opponents to the

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134. See Duerksen, *supra* note 46, at 27; England, *supra* note 25, at 358. "Historic district review decisions require complex judgments based on knowledge of architecture, history, aesthetics and ... an intimate understanding of community standards." BOWSER, *supra* note 127, at 19.

135. See BOWSER, *supra* note 127, at 15.

136. See *infra* Part IV.B. This is the structure implemented in Pioneer Square Preservation District and King William Historic District. See *infra* Parts III.B-C.

137. See BOWSER, *supra* note 127, at 17.

138. Duerksen, *supra* note 46, at 25.

139. See BOWSER, *supra* note 127, at 59 ("Typical submissions include plans, elevations, specifications, and samples of materials.")

140. See *id.*

141. See *id.* at 60-61.

142. See Phelps, *supra* note 15, at 134.

proposed construction are encouraged to attend this hearing.<sup>143</sup> The board will allow those proposing new construction to present their plans and answer any questions about the project.<sup>144</sup> This presentation is followed by a chance for opponents to voice their concerns.<sup>145</sup> The board of architectural review then deliberates,<sup>146</sup> and the proceeding concludes with a formal written report, complete with “specific factual findings and conclusions of law.”<sup>147</sup>

Ultimately, a developer or homeowner hopes to receive a Certificate of Appropriateness at the end of this process. A Certificate is required before any work can commence on the project and guarantees that the proposed project conforms to the district’s design guidelines.<sup>148</sup> Even if a project does not comport with these guidelines, a developer or homeowner’s application may still be approved by other means.<sup>149</sup> Many historic zoning ordinances include “‘safety valve’ provisions” that ensure procedural fairness in “contested hearing[s]” or that allow for approval of otherwise incompatible construction if the building would “offer unusually important public benefits.”<sup>150</sup> In addition, preservation legislation must also include a loophole in cases in which denial of an application would result in economic hardship.<sup>151</sup> Ultimately, though, a Certificate of Appropriateness signifies to a developer that its plans for construction are compatible with the unique historic resources of that district.<sup>152</sup>

### III. DIFFERING ANALYSES OF COMPATIBILITY

New construction must conform to the surrounding district’s definition of compatibility in order to be awarded a Certificate of

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143. See BOWSER, *supra* note 127, at 63.

144. See *id.*

145. See *id.*

146. See *id.*

147. Phelps, *supra* note 15, at 134-35.

148. See England, *supra* note 25, at 358.

149. See Byrne, *supra* note 14, at 672.

150. *Id.* (describing Washington, D.C.’s “‘special merit’ provision”).

151. See Fein, *supra* note 81, at 64 n.6; Flynn, *supra* note 99, at 136.

152. See England, *supra* note 25, at 358 (“A Certificate of Appropriateness ensures the work to be done complies with the standards established to guarantee preservation of the area.”).

Appropriateness for construction to begin.<sup>153</sup> Compatibility is often defined as “capable of existing together in harmony.”<sup>154</sup> Yet, the determination of what is compatible in the context of historic preservation is not so simple. Some argue that compatible structures should closely resemble a district’s historical structures.<sup>155</sup> Others argue that “the compatibility most people want does not relate to what actually exists, but to what they would like to have existing.”<sup>156</sup> Nevertheless, each historic district is free to determine its own meaning of “compatible.”<sup>157</sup> And historic districts should have the freedom to do so, as each district is tasked with protecting unique historic resources.<sup>158</sup> The unfortunate reality is that some historic districts are unsuccessful at halting blatantly incompatible construction.<sup>159</sup> Therefore, instead of mandating a single definition of compatibility, districts should be required to at least implement baseline safeguards to protect historic resources from incompatible development.

This Part examines the zoning ordinances and design guidelines of Old and Historic Alexandria District, Pioneer Square Preservation District, and King William Historic District, three geographically and historically diverse historic districts. Each utilizes a different preservation system at the purpose, process, and definitional levels to prevent incompatible new development. While they are not individually perfect, a hybrid of the preservation mechanisms used in these districts—as discussed in more detail in Part IV—is a procedural framework suitable for protecting historic districts nationwide.

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153. *See id.*

154. Carlson, *supra* note 19, at 8 (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 300 (10th ed. 2001)).

155. *See* BOWSHER, *supra* note 127, at 38 (noting proponents of “traditional design” in historic districts).

156. Steven Semes, *What’s “Compatible” Architecture?*, ALEXANDRIA PORT PACKET, May 31, 1978, at 11.

157. *See* Rose, *supra* note 22, at 507-08.

158. *Cf.* Carlson, *supra* note 19, at 28 & n.102 (arguing that boards can and should reject buildings as incompatible when they are too similar to surrounding structures).

159. *See* England, *supra* note 25, at 347 (claiming local discretion resulted in “legislation in some areas of the country favor[ing] historic preservation ... [as well as] legislation in other regions hinder[ing] historic preservation”).



### *A. Old and Historic Alexandria District*

The Old and Historic Alexandria District (Old Town), located in Alexandria, Virginia, is an ideal example of eighteenth- and nineteenth-century architecture.<sup>160</sup> Most historic structures in Old Town are residential,<sup>161</sup> and most new construction involves filling the District's few vacant plots that stand adjacent to historical properties.<sup>162</sup> Given Old Town's residential character, the board of architectural review is primarily concerned that future homes remain compatible with adjacent historic structures.<sup>163</sup>

#### *1. Purpose Statement*

Old Town's zoning ordinances include general compatibility as a primary purpose of the District: new construction projects should "be in harmony with their historical and architectural setting and environs."<sup>164</sup> This purpose statement strikes an appropriate balance by including compatibility as an important consideration for future development, while avoiding unneeded specificity in defining what compatibility, or "in harmony," means for Old Town.<sup>165</sup>

#### *2. Decision-Making Process*

Alexandria's zoning ordinances establish a number of requirements for membership on the Old and Historic Alexandria District Board of Architectural Review.<sup>166</sup> Members must be Alexandria residents for at least one year prior to appointment.<sup>167</sup> "Members [must] have a demonstrated interest, experience, or education in history, architecture or historic preservation."<sup>168</sup> Two of the board members

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160. See MORRILL, *supra* note 4, at 4-21.

161. See OLD TOWN DESIGN GUIDELINES, *supra* note 100, ch. 6, at 1.

162. See *id.* ch. 6, at 1-2.

163. See *id.* ch. 6, at 2. The guidelines note that demolition of existing historic structures in favor of new construction is strongly discouraged. *Id.* ch. 6, at 1.

164. ALEXANDRIA, VA., ZONING ORDINANCE § 10-101(G) (2016).

165. See *infra* Part IV.A.

166. See ZONING ORDINANCE § 10-104.

167. *Id.* § 10-104(C).

168. *Id.*

must be architects.<sup>169</sup> Each board member's voice is essential to creating a dialogue that is well-reasoned and sufficiently interested in the outcome.

Old Town requires that a Certificate of Appropriateness be awarded by the Board before beginning construction.<sup>170</sup> The Board's structure ensures procedural fairness: it is comprised of seven members, and a majority vote is required for a final decision.<sup>171</sup> Alexandria's zoning ordinance also includes a safety valve, requiring members of the board to remain impartial, under strict orders to avoid conflicts of interest.<sup>172</sup> This reconciles any issues of allowing residents on the board. Overall, Old Town's decision-making process is favorable for two important reasons: First, Old Town's homeowners are assured a fair process due to varied board-member backgrounds and the safety-valve provision. Second, by placing the decision-making power in the hands of seven equal board members, Old Town is more likely to approve new development that aligns with the District's design guidelines.<sup>173</sup>

### 3. *Defining Compatibility*

Old Town's design guidelines begin by detailing the District's historic resources.<sup>174</sup> The first page of the design guidelines directs developers and homeowners alike to trusted resources on all aspects of Old Town's historic buildings.<sup>175</sup> This method is powerful: if developers can first understand Old Town's historic resources, they are more likely to appreciate the compatibility restrictions on new development.<sup>176</sup>

Old Town translates this historical archive into a foundational definition of compatibility. The Board encourages "compatible development" that balances current architectural design with that of

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169. *Id.*

170. *See id.* § 10-103(A) (requiring the Certificate of Appropriateness to be approved by the District's board of architectural review or the city council on appeal).

171. *Id.* § 10-104(A), (F)(1).

172. *Id.* § 10-104(D).

173. *See infra* Part IV.B.

174. *See* OLD TOWN DESIGN GUIDELINES, *supra* note 100, Design Guideline Reference Materials at 1.

175. *Id.*

176. *See infra* Part IV.C.1.

valued historical resources.<sup>177</sup> Yet “[s]ingular buildings in the latest architectural vocabulary are generally discouraged.”<sup>178</sup> Architectural style should instead reflect what already exists, likely meaning eighteenth and nineteenth century architectural styles.<sup>179</sup> Most importantly, the board favors a passive approach that allows existing “historic[al] structures to maintain ... primary visual importance.”<sup>180</sup>

Old Town’s design guidelines further detail the necessary elements for new residential buildings, such as height, width,<sup>181</sup> fenestration,<sup>182</sup> quality and quantity of architectural detailing,<sup>183</sup> and building materials.<sup>184</sup> Painted homes must conform to a color chart developed by the board of architectural review.<sup>185</sup> Old Town’s exacting design guidelines assure that new construction maintains a uniform appearance, arguably almost identical, to Old Town’s historic structures. This leaves little ambiguity for the uncertain developer.<sup>186</sup>

### *B. Pioneer Square Preservation District*

Pioneer Square Preservation District (Pioneer Square) in Seattle, Washington, officially established in 1970, actually dates back to 1852, and serves as a prime representation of Romanesque Revival style urban architecture.<sup>187</sup> Pioneer Square is positioned just outside

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177. See OLD TOWN DESIGN GUIDELINES, *supra* note 100, ch. 6, at 2.

178. *Id.*

179. See *id.* ch. 6, at 4 (“Designs should complement and reflect the architectural heritage of the City.”).

180. *Id.* ch. 6, at 2.

181. *Id.* ch. 6, at 4. The majority of single family homes in Old Town stand two or three stories, and range from twenty to thirty-five feet in width. *Id.* New residential structures are advised to “reflect this traditional pattern.” *Id.*

182. See *id.* ch. 6, at 5 (defining fenestration pattern as “the relationship of solid to void, such as walls and windows”).

183. See *id.* ch. 6, at 6.

184. Building materials should “reflect” commonly used materials like wood and brick. *Id.*

185. See *id.* (referring to CITY OF ALEXANDRIA, VA, COLOR CHART OF HISTORICALLY ACCURATE PAINT COLORS IN THE OLD AND HISTORIC DISTRICT AND THE PARKER-GRAY DISTRICT (1992)).

186. See *infra* Part IV.C.2.

187. See Seattle Dep’t of Neighborhoods, *Pioneer Square*, SEATTLE.GOV, <http://www.seattle.gov/neighborhoods/programs-and-services/historic-preservation/historic-districts/pioneer-square> [<https://perma.cc/KW8L-L4WJ>].

of Seattle's sports stadiums, which adversely affects the District's historic resources.<sup>188</sup> This made the implementation of a preservation program necessary to protect Pioneer Square's historic resources from ruin.<sup>189</sup>

### *1. Purpose Statement*

Pioneer Square's purpose statement addresses new compatible construction by listing the "improve[ment of] visual and urban relationships between existing and future buildings" as a vital purpose for preservation.<sup>190</sup> Rather than leaving the term "relationship" open to broad interpretation, Pioneer Square could easily improve its purpose statement by directly acknowledging the importance of compatibility between new and old structures.<sup>191</sup>

### *2. Decision-Making Process*

Pioneer Square's board, known as the "Preservation Board," is composed of nine members with varying background and degree requirements.<sup>192</sup> Only one member is required to be a resident of the District.<sup>193</sup> In contrast to Old Town's Board of Architectural Review,<sup>194</sup> the Preservation Board exists merely "to advise the Director of the Department of Neighborhoods."<sup>195</sup> Neither the design guidelines nor the City's municipal code require the Preservation Board

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188. See SEATTLE, WASH., MUNICIPAL CODE § 23.66.100(A) (2015). An article in the Seattle Times refers to Pioneer Square as "the original Skid Road," with "[p]anhandlers with aggressive pitches[,] [r]owdy sports fans[,] [d]runken clubgoers[,] [and] [h]ordes of tourists on walking tours." Tyrone Beason, *Fixing Pioneer Square: Seattle's Original Neighborhood is Starting Over*, SEATTLE TIMES (Feb. 18, 2015, 12:02 PM), <http://www.seattletimes.com/pacific-nw-magazine/pioneer-square-seattles-original-neighborhood-is-starting-over/> [<https://perma.cc/7YBB-JRR7>].

189. See MUNICIPAL CODE § 23.66.100(A).

190. *Id.*

191. See *infra* Part IV.A.

192. See MUNICIPAL CODE § 23.66.110(A). The Preservation Board is required to include two architects, two owners of property in the District, one attorney, one human service representative, one retail business owner in the District, one at-large member, and one historian. *Id.*

193. See *id.*

194. See *supra* Part III.A.2.

195. CITY OF SEATTLE PIONEER SQUARE PRESERVATION BD., RULES FOR THE PIONEER SQUARE PRESERVATION DISTRICT § I (2003) [hereinafter PIONEER SQUARE DESIGN GUIDELINES].

to validate plans before commencing construction.<sup>196</sup> Rather, the Director of the Department of Neighborhoods is solely responsible for issuing Certificates of Approval.<sup>197</sup> This decision-making structure is unfavorable to Pioneer Square, as a single decision maker may be more likely to authorize incompatible development.<sup>198</sup>

This issue was recently addressed in the City of Seattle Hearing Examiner Decision of *In re York Wong*, in which the Director's appraisal of compatibility was overturned in favor of the decision of the Preservation Board.<sup>199</sup> The Director's decision to allow the construction of a twelve-story building was ultimately found to be "arbitrary and capricious," as it failed to meet Pioneer Square's design guidelines and clearly went against the valid reasoning of the Preservation Board.<sup>200</sup>

### 3. Defining Compatibility

Pioneer Square's design guidelines require new construction to "be visually compatible with the predominant architectural styles, building materials, and inherent historic character of the District."<sup>201</sup> Yet, the Secretary of the Interior's Standards for

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196. See *id.* § II.C (limiting the Preservation Board's authority to recommendations); see also MUN. CODE § 23.66.030(A) (requiring any construction project in a preservation district to secure a certificate of approval from the Department of Neighborhoods Director).

197. See Daniel Beekman, *Seattle's Approval of 12-Story Pioneer Square Building Overturned*, SEATTLE TIMES (Feb. 24, 2016, 12:09 PM), <http://www.seattletimes.com/seattle-news/politics/hearing-examiner-overturms-citys-approval-for-12-story-pioneer-square-building/> [<https://perma.cc/EZT2-UNQJ>] (noting the Director's ability to overrule a Preservation Board decision).

198. See *infra* Part IV.B.

199. *York Wong*, City of Seattle Hearing Examiner Files MUP-15-019(W), R-15-005, R-15-006, at 10-11 (2016). Although the Preservation Board decided not to issue a Certificate of Approval for the proposed housing project, the Department of Neighborhoods Director overruled the Preservation Board's decision in favor of the development. See Beekman, *supra* note 197. However, the Deputy Hearing Examiner found the new development to be incompatible with the District's existing structures due to the scale of its facade. See *id.* The Director's decision to overrule the Preservation Board's decision was therefore reversed as it was found to be "arbitrary and capricious." *Id.*; Seattle Dep't of Neighborhoods, *Pioneer Square—Making Changes in the District*, SEATTLE.GOV, <https://www.seattle.gov/neighborhoods/programs-and-services/historic-preservation/historic-districts/pioneer-square> [<https://perma.cc/W7T5-ALAP>] (describing changes that require a Certificate of Approval).

200. *York Wong*, Hearing Examiner Files MUP-15-019(W), at 10-11.

201. PIONEER SQUARE DESIGN GUIDELINES, *supra* note 195, § III. However, the only reference to specific architectural styles is within the City's municipal code, which states that

Rehabilitation which are relied upon in Pioneer Square,<sup>202</sup> provide that new construction be “*differentiated* from the old,” yet still retain a level of compatibility with certain elements of historic structures.<sup>203</sup> This inconsistency could easily confuse developers, as Pioneer Square’s Preservation Board has yet to provide any clarity.

The design guidelines fail to enumerate Pioneer Square’s common architectural and design features in a way that provides developers with sufficient direction. Compatible building materials range from brick and sandstone to terracotta and wood to cast iron store fronts.<sup>204</sup> And building colors should be reminiscent of those commonly found throughout Pioneer Square, but the design guidelines make no firm recommendations of color.<sup>205</sup> This may leave too many alternatives for developers and not enough direction as to which building material or color is most compatible.<sup>206</sup> While a lack of clarity may allow for more architectural creativity,<sup>207</sup> it ultimately creates confusion for developers.<sup>208</sup> The Preservation Board can avoid poring over applications unworthy of approval by more clearly identifying historical features within the District and prioritizing those features from most to least compatible.<sup>209</sup>

### *C. King William Historic District*

The King William Historic District (King William), located just south of downtown San Antonio, Texas, became San Antonio’s first historic district in 1968.<sup>210</sup> The District’s predominant architectural

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Pioneer Square embodies “distinctive characteristics of the Late Victorian Style.” MUN. CODE § 23.66.100(C)(2).

202. See PIONEER SQUARE DESIGN GUIDELINES, *supra* note 195, § III.

203. See *Rehabilitation Standards and Guidelines*, U.S. DEPT INTERIOR (emphasis added), <https://www.nps.gov/tps/standards/rehabilitation.htm> [<https://perma.cc/QE7P-QQYQ>] (outlining the Secretary’s Standards for Rehabilitation). The Standards also require that any new construction be performed in such a way as to avoid harming any historic property or its surrounding environment. *See id.*

204. See PIONEER SQUARE DESIGN GUIDELINES, *supra* note 195, § III.C.

205. *See id.* § III.D.

206. *See infra* Part IV.C.2.

207. *See infra* notes 283-84 and accompanying text.

208. *See infra* Parts IV.C.1-2.

209. *See* Parts IV.C.1-2.

210. Office of Historic Preservation, *King William*, CITY SAN ANTONIO, <http://www.sanantonio.gov/historic/historicsites/HistoricDistricts/KingWilliam> [<https://perma.cc/C6XH->

styles reflect its mid-nineteenth-century history, which includes “Greek Revival, Victorian, and Italianate styles.”<sup>211</sup>

### 1. *Purpose Statement*

San Antonio lists numerous purposes for preservation,<sup>212</sup> and enmeshes compatible new design directly into its zoning code: “To maintain a generally compatible outward appearance of both historic and modern structures through complementary scale, form, color, proportion, texture, and material.”<sup>213</sup> King William’s purpose statement is a quintessential example of a purpose statement—it directly addresses compatibility and forms a basic framework for the District’s compatibility test.<sup>214</sup>

### 2. *Decision-Making Process*

The primary decision maker in San Antonio’s preservation office is the City Historic Preservation Officer (CHPO).<sup>215</sup> The CHPO consults with the Historic and Design Review Commission on all applications for new construction.<sup>216</sup> Ultimately, the CHPO retains the power to approve or deny these applications and issue Certificates

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211. *See id.*

212. In addition to those purposes listed in the Unified Development Code, San Antonio’s Historic Design Guidelines also offer insight into why the City preserves its historic buildings. *See* SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE art. VI (2016) (providing a purpose statement for historic preservation ordinances); Shanon Shea Miller, *Why Preserve?*, *introductory message to OFFICE OF HISTORIC PRES., CITY OF SAN ANTONIO HISTORIC DESIGN GUIDELINES* ch. 4 (2012) [hereinafter SAN ANTONIO DESIGN GUIDELINES] (offering reasons for historic preservation). The design guidelines touch on all three major purposes of preservation discussed in Part I. The design guidelines primarily focus on the economic benefits of preservation, but also note that preservation “provides a sense of belonging, a collective memory, and a sense of pride in our past.” Miller, *supra*.

213. UNIFIED DEVELOPMENT CODE art. VI.

214. *See infra* Part IV.A.

215. *See* UNIFIED DEVELOPMENT CODE § 35-602.

216. *See id.* § 35-602(a). The Historic and Design Review Commission is equivalent to the board of architectural review for the purposes of this Note. *See* SAN ANTONIO, TEX., CODE OF ORDINANCES §§ 2-141 to -145 (2016) (creating and setting out the organization and duties of the Commission).

of Appropriateness.<sup>217</sup> The CHPO is required to “have expertise in archaeology, history, architectural history, historic preservation, or a closely related field.”<sup>218</sup> This decision-making process, like Pioneer Square,<sup>219</sup> may be more likely to result in incompatible outcomes influenced by the biases of a sole decision maker.<sup>220</sup>

### 3. *Defining Compatibility*

San Antonio provides general design guidelines for its many historic districts, meaning that there are no design guidelines that specifically apply to the unique historic resources in King William.<sup>221</sup> San Antonio also fails to offer any archives describing King William’s history or resources.<sup>222</sup> This requires more effort from developers, as they must conduct their own research in order to fairly comprehend how to maintain compatibility within King William.<sup>223</sup>

San Antonio’s design guidelines first establish three “[g]eneral [p]rinciples” for new construction: (1) King William’s historic buildings should maintain primary focus; (2) new construction should not be so dissimilar as to detract from King William’s historical resources; and (3) contemporary materials and architectural details are permitted when the rest of a structure maintains compatibility.<sup>224</sup>

San Antonio’s design guidelines establish a unique test for compatible new construction: the “FRESH test,” an acronym for footprint, roof shape, envelope, skin, and holes.<sup>225</sup> No architectural

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217. See UNIFIED DEVELOPMENT CODE § 35-602(a), (g) (granting CHPO approval and denial authority); *id.* § 35-608 (describing Certificate of Appropriateness review standard).

218. *Id.* § 35-602.

219. See *supra* Part III.B.2.

220. See *infra* Part IV.B.

221. See Office of Historic Pres., *Historic Districts*, CITY SAN ANTONIO, <http://www.sanantonio.gov/historic/historicsites/HistoricDistricts> [<https://perma.cc/QVW6-E4JR>].

222. See *infra* Part IV.C.1.

223. See SAN ANTONIO DESIGN GUIDELINES, *supra* note 212, ch. 4, at 1 (providing only “[g]eneral [p]rinciples” for new construction).

224. *Id.* This is very different from the standards of compatibility in both Pioneer Square and Old Town, where modern architectural materials and elements are discouraged. See *supra* Parts III.A.3, III.B.3.

225. SAN ANTONIO DESIGN GUIDELINES, *supra* note 212, ch. 4, at 5. Footprint refers to the compatibility in size of new buildings to other surrounding structures. *Id.* Roofs of new



or design element is specifically required or prohibited. While the FRESH test is a meritorious grouping system, it creates an ambiguous standard for the District itself.<sup>226</sup> In theory, the CHPO would need to travel to each of San Antonio's historic districts—including King William—to determine how to apply the FRESH test. This creates the risk of subjective interpretation for what constitutes compatible design in King William.<sup>227</sup>

#### IV. BETTER ASSURANCE FOR COMPATIBLE NEW CONSTRUCTION

Compatible new construction further enhances the character and aesthetic appeal of historic districts by fulfilling the three purposes of historic preservation. It promotes patriotism in residents and tourists by creating a visual of the United States' history.<sup>228</sup> Compatible design also fosters appreciation for architecture<sup>229</sup> when new buildings serve as a backdrop and architectural styles of the past can take center stage.<sup>230</sup> Compatible design also bolsters the economic value of historic districts, attracting businesses, tourists, and wealthy residents to these economic centers.<sup>231</sup>

Compatible new construction can only be assured through the work of each individual historic district.<sup>232</sup> Each district has the freedom to create its own design guidelines and define compatibility within its boundaries.<sup>233</sup> This freedom is demonstrated through the varied preservation plans of Old Town, Pioneer Square, and King

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construction should match the roofs of surrounding buildings “in pitch, complexity, and orientation.” *Id.* Envelope refers to the compatibility of structural elements, such as scale, mass, and form. *Id.* The skin or material of new buildings should be visually and physically similar to existing structures. *Id.* Lastly, holes, such as doors and windows, “should mimic the style and pattern of opening [sic] used on surrounding structures.” *Id.*

226. *See infra* Part IV.C.2.

227. *See infra* Part IV.C.3.

228. *See supra* Part I.C.1.

229. *See supra* Part I.C.2.

230. *See* OLD TOWN DESIGN GUIDELINES, *supra* note 100, ch.6, at 2.

231. *See supra* Part I.C.3.

232. *See* George B. Abney, Comment, *Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims*, 25 FLA. ST. U. L. REV. 1017, 1017-18 (1998) (noting that each locality's ordinance is tailored to meet the needs of the community it serves).

233. *See id.*

William.<sup>234</sup> Nevertheless, a nationwide framework at the fundamental purpose, process, and definitional levels will prevent incompatible construction and fulfill the purposes of historic preservation for historic districts alike.

The hybrid framework proposed in this Part integrates the most successful preservation elements of Old Town, Pioneer Square, and King William. This hybrid framework provides ample protection for historic resources while recognizing that historic districts are best able to determine their own definitions of compatibility.

*A. Including Compatible New Construction as a Primary Purpose in Local Zoning Ordinances*

Assuring compatibility for future generations should begin at the zoning ordinance level. Zoning ordinances are the source of overarching power in historic districts.<sup>235</sup> They establish the board of architectural review, mandate the issuance of Certificates of Appropriateness, and give power to an historic district's design guidelines.<sup>236</sup> The purpose section of the zoning ordinance, while often overlooked, is an effective tool for guaranteeing compatibility between new buildings and historic properties. Establishing an historic district—and thus deciding against other preservation schemes—is done with the intention of preserving the overall character of the district.<sup>237</sup> This means compatibility can be expected to be of primary importance for the foreseeable future.<sup>238</sup> Therefore, a city that establishes historic districts should explicitly include compatibility in its purpose statement, proclaiming compatibility as a consideration of the utmost importance. Without such a purpose statement, compatibility may be lost within frequently revised design guidelines. Compatibility should remain at the forefront, as

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234. See *supra* Parts III.A-C.

235. See Cofresi & Radtke, *supra* note 69, at 132 (“[H]istoric district and landmark ordinances are nonetheless the first line of defense at the local government level.”).

236. See *supra* Part II.

237. See *supra* Part I.C.1.

238. This assumption can be made because a locality that does not view compatibility as an issue could simply protect individual historic resources rather than creating such broad protection. See Carlson, *supra* note 19, at 1 (recognizing the possible deleterious effects of historic preservation).

new development continually threatens the overall character of historic districts around the country.<sup>239</sup>

Further, while compatibility should remain at the forefront of an historic district's zoning ordinances, it is best that localities refrain from specifically *defining* compatibility at this level. Simply listing compatibility in a zoning ordinance demonstrates that the locality values the overall character of its historic district. But too much specificity at this level may compromise future development, as a certain level of flexibility is necessary for a locality to function successfully.<sup>240</sup> Recognizing compatibility at the local level without defining it allows a district to forge its unique definition of compatibility over time. A more specific definition of compatibility should be reserved for the more malleable design guidelines.

### *B. Process of Ensuring Compatible Design*

An historic district's decision-making body is the most important determinant for whether new construction remains compatible.<sup>241</sup> As discussed in Part II, granting power to a decision maker is left to the discretion of each local government. Two decision-making structures emerge: either (1) one person holds the final decision-making power;<sup>242</sup> or (2) multiple people (a board of architectural review) maintain the decision-making power.<sup>243</sup> The latter structure should be implemented by historic districts nationwide.

First, the issue posed by a single decision maker is common to many fields of law: the most informed decisions repeatedly stem from the compromise of many people. The advantages of bestowing decision-making to a board are similar to the motives behind the United States' jury system—it introduces the idea of community

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239. *See id.*

240. *See infra* Part IV.C.3.

241. *See supra* Parts III.A.2, III.B.2, III.C.2.

242. *See supra* Parts III.B-C.

243. *See supra* Part III.A.

participation.<sup>244</sup> A board is often composed of both residents<sup>245</sup> and nonresidents from differing specialties and backgrounds.<sup>246</sup> Thus, just like juries, a board of architectural review that receives feedback from people of varied backgrounds will likely come to a more informed decision.<sup>247</sup> A single decision maker will not have this same collective body of knowledge to draw from when making decisions of compatibility.

Second, surrendering decisions of compatibility to a single decision maker is likely to cause other troubles. In colonial America, it was imperative to the colonists that every free man be given the right to a jury trial, as “judges were dependent instruments of the crown.”<sup>248</sup> Similarly, one commissioner who works for the local government could easily be swayed by office politics or self-interest.<sup>249</sup> Commissioners may take factors other than compatibility—such as job-retention—into consideration when deciding whether to approve a project. This self-interest could lead an historic district to unwillingly admit plans for incompatible development.<sup>250</sup> With one decision maker, the risk of arbitrary decisions of compatibility are

244. See Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 34-35 (1994) (“[T]he jury’s primary purpose was to bring community knowledge to the resolution of local disputes.” (citing Justice Seymour Simon, Keynote Address at the Allerton House Conference Proceedings on Civil Jury Trial in Illinois (May 17, 1984), in 73 ILL. B. J. 140, 140-41 (1984))).

245. See *supra* Parts III.A-B.

246. See *supra* Part III.B.

247. See Haddon, *supra* note 244, at 34-35.

248. *Id.* at 41 (quoting Harold M. Hyman & Catharine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 27-28 (Rita J. Simon ed., 1975)).

249. See *id.*

250. See *supra* notes 215-20 and accompanying text. However, it should be noted that while the decision by the Director of the Department of Neighborhoods (DON) in *York Wong* was found to be “arbitrary and capricious,” there was no evidence in the Hearing Examiner Decision that DON’s decision was motivated or influenced by adverse incentives. City of Seattle Hearing Examiner Files MUP-15-019(W), R-15-005, R-15-006, at 10-11 (2016). The Decision simply states:

DON chose not to apply the Code’s requirement that a building façade’s scale be compatible with surrounding structures. This was done even though the Board consistently stated to the applicant and DON that the façade scale did not meet the requirements in SMC 23.66.180, and even though the evidence presented to DON supported the Board’s conclusions, as does the evidence in this record. Under these circumstances, the decision was arbitrary and capricious, and must be reversed.

*Id.*

much greater, and may inevitably lead to buildings that, if truly incompatible, could have long-lasting effects on the character of an historic district.

Third, a single decision maker is more likely to deprive residents of equal treatment:

Equal treatment of applicants required by federal and state constitutions is not always achieved ... [and] failure to follow these procedures not only violates the rights of individual property owners to equal treatment under the law, but also promotes an image of favoritism and arbitrary decision making on the part of local government.<sup>251</sup>

A single decision maker could easily choose to award—or not award—a Certificate of Appropriateness based solely on personal relationships with an applicant. These risks are lessened, and there is a greater chance of equal application of law, with multiple decision makers.<sup>252</sup>

Last, decisions of compatibility should be made by multiple persons because compatibility normally requires subjectivity. Ideally, historic districts could uniformly apply a completely objective test for compatibility.<sup>253</sup> In reality, questions of compatibility will continue to entertain some level of subjectivity, even if fairly strict objective tests are developed. This subjectivity heightens the risk of empowering a single decision maker. Again, there exists a useful comparison to the United States' legal system. The jury decides questions of fact—often lacking clear-cut answers—which require thoughtful discussion in order to be properly evaluated.<sup>254</sup> Each juror provides a different method of reasoning, and the jury's joint answer represents jurors' collective thoughts.<sup>255</sup> However, “[o]ne

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251. See Cofresi & Radtke, *supra* note 69, at 134.

252. Old Town further guards against conflicts of interest through its safety valve protection. See ALEXANDRIA, VA., ZONING ORDINANCE § 10-104(D) (2016) (advising board members to be conscious of and sensitive to potential conflicts of interest).

253. Cf. Timothy L. Binetti, Comment, *Culture Club or the Clash? Historic Preservation, Aesthetic Uniformity and Artistic Freedom*, 13 DEPAUL-LCA J. ART & ENT. L. 313, 331 (2003) (“Appropriate preservation ordinance drafting includes ensuring neutral enforcement commission decisions.”).

254. See Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 388 (1954).

255. See *id.*

man cannot differ with his own judgment.”<sup>256</sup> As a judge risks biased decision-making at trial, a commissioner cannot change his own biased opinion on questions of compatibility.<sup>257</sup> Therefore, “a judgment proceeding from several persons is probably as good or even better than the judgment of one man whose unconscious mental and emotional processes cannot be checked against the reactions of others.”<sup>258</sup> For these reasons, a board of architectural review is the appropriate decision-making body to make determinations of compatibility.

That said, historic districts should be selective when choosing members of such boards.<sup>259</sup> The best results will be achieved when board members embody knowledge from several disciplines.<sup>260</sup> Pioneer Square exemplifies this principle, as the Preservation Board is required to retain members of varying backgrounds, such as attorneys and residents.<sup>261</sup>

### *C. Defining Compatibility: Implementing an Individualized Test for Each Historic District*

While historic districts should not uniformly apply the same design guidelines,<sup>262</sup> historic districts nationwide can benefit from accomplishing three tasks: (1) understanding and documenting the historic resources worth protecting; (2) determining which characteristics are most important to ensuring compatibility and categorizing these characteristics within the design guidelines; and (3) avoiding the inclusion of overly inflexible design elements. Implementing these tasks will ultimately reduce the likelihood of incompatible new development and guarantee a level of necessary flexibility for future generations.

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256. *Id.*

257. *See id.*

258. *Id.* at 389.

259. *See* Cofresi & Radtke, *supra* note 69, at 134 (claiming “that a high standard of personal qualifications should be required for membership on” historic district boards).

260. *See supra* Part III.B.

261. *See supra* Part III.B.

262. *See supra* Part II.A.

1. *Understand and Document the Historic Resources Worth Protecting*

It is essential to first appreciate a city's historic resources worthy of protection in order to fully comprehend how new development can coexist without being incompatible with those historic resources.<sup>263</sup> This principle especially holds true for developers who may not have previous exposure to a district's architectural history.<sup>264</sup> Therefore, every historic district should invest the necessary time and resources to perform a district-wide survey of the historic buildings within the district's boundaries. Relevant inquiries should include: the dates of construction of historic structures, the predominant architectural styles, and the historical significance of the size, color, materials, and style of the buildings.<sup>265</sup> The findings of this survey should be included in the district's design guidelines.<sup>266</sup>

Old Town's design guidelines are an ideal example of this process. Before addressing considerations of compatibility, Old Town's design guidelines reference numerous resources that detail the architectural history of Alexandria, Virginia.<sup>267</sup> These resources include information on common paint colors, roofing, siding, style, and windows.<sup>268</sup> These resources allow developers the opportunity to better grasp how to properly design "background buildings" that will allow historical structures to maintain primary visual importance.<sup>269</sup>

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263. See Semes, *supra* note 156 (claiming Alexandria's historic architecture must first be "understood for what it is").

264. See *supra* Part I.C.2.

265. A similar project was done in 1933 with the creation of the Historic American Buildings Survey (HABS). See *HABS Guidelines*, NAT'L PARK SERV., <https://www.nps.gov/hdp/standards/habsguidelines.htm> [<https://perma.cc/F25V-WJFA>]. This was a federal preservation effort which "combine[d] drawings, history, and photography to produce a comprehensive, interdisciplinary record" of specific historical structures. *Id.* However, this Note recommends that this process be completed on a larger scale, documenting an entire district rather than just one particular structure.

266. See *supra* Parts III.A.3, III.C.3. King William's design guidelines lack any specificity to the locality, making it difficult for Board members and developers alike to fully grasp the District's compatibility standards. See *infra* Part IV.C.1.

267. See OLD TOWN DESIGN GUIDELINES, *supra* note 100, Design Guidelines Reference Materials, at 1.

268. See *id.* Design Guidelines Reference Materials, at 2.

269. See *id.* ch.6, at 2.

Failure to document historic resources, as seen in Pioneer Square and King William,<sup>270</sup> may lead lazy developers to submit poor applications for new construction, wasting the board's time. Or, alternatively, it may lead a lone commissioner to award a lazy developer a Certificate of Appropriateness, introducing incompatible new buildings into the district's boundaries. When important historic resources are documented, the board can better alert developers of the characteristics deemed most important for compatibility. With more clarity, developers will be more likely to incorporate these characteristics into their designs.

### *2. Identify and Prioritize Design Elements Indicative of Compatibility*

Once the district-wide survey is complete, local governments should further their analysis by considering which design elements will lead to compatible development. Many historic districts fail to clearly communicate the elements necessary for compatibility. This deficiency is a result of two problems: (1) the design guidelines include too many design elements for developers to consider; and (2) the design guidelines do not differentiate between these many design elements.<sup>271</sup> Developers are thus left with too many considerations and without much direction on which design elements are of most importance to the board.<sup>272</sup> This may lead developers to submit designs that are exact replicas of existing structures, or to only include a few insignificant design elements in their plans for new construction.

For better results, historic districts should group design elements based on the degree of the element's relation to compatibility.<sup>273</sup>

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270. *See supra* Parts III.B-C.

271. *See* Carlson, *supra* note 19, at 25.

272. *See id.* at 25-27.

273. *Cf. id.* (“[P]rioritizing the values deemed most important puts developers and architects on notice as to what factors are critical and what areas can be interpreted more liberally by the designer.”). M. Jesse Carlson argues that these elements should be “prioritized.” *Id.* However, with so many elements to be considered, it may be hard to form a strict hierarchy of elements that should be favored over others. Rather than suggesting that a board choose whether paint color or use of materials is more important, this Note recommends that a board view those elements (like color and material) as operating within a group of the most important elements. This provides more flexibility to a board when making compatibility decisions. *See infra* Part IV.C.3.



This is similar to King William's FRESH test, which identifies five important design elements: footprint, roof shape, envelope, skin, and holes.<sup>274</sup> In contrast to Old Town and Pioneer Square, King William simplifies the process for developers by plainly pinpointing the elements most essential to compatible new development.<sup>275</sup>

It is recommended that each historic district develop its own compatibility test based on the district's unique historic resources.<sup>276</sup> Some experts suggest that the most important elements of compatibility are choice of building material and overall building scale.<sup>277</sup> These design elements are said to create a cohesive visual aesthetic without completely inhibiting new design.<sup>278</sup> However, districts should be free to identify the elements that most effectively foster compatibility with their historic resources.

Lastly, it should be noted that simply grouping design elements, as seen in King William, is not sufficient. Homeowners and developers often complain that zoning ordinances and design guidelines are too vague, especially in regard to what is considered compatible.<sup>279</sup> Design guidelines should "take ... clear meaning from the observable character of the district to which [they] appl[y]"<sup>280</sup> by including the specific materials, height, and width of historic structures within the district when grouping.<sup>281</sup>

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274. See *supra* note 225 and accompanying text.

275. See *supra* Part III.C.

276. This recommendation accords with the idea that design guidelines should not be uniform at the local level, but rather that local governments should retain the power to make these aesthetic decisions themselves. See Abney, *supra* note 232, at 1017-18; see also *supra* Part I.B.3.

277. See Bob Reed, *Past Best Honored by Emulation, Not Replication*, GAZETTE PACKET, March 4, 1993 at 25; Semes, *supra* note 156.

278. See Reed, *supra* note 277, at 25.

279. See Abney, *supra* note 232, at 1018-19.

280. *Id.* at 1027 (alterations in original) (quoting *Maheer v. City of New Orleans*, 516 F.2d 1051, 1063 (5th Cir. 1975)).

281. See generally OLD TOWN DESIGN GUIDELINES, *supra* note 100 (describing the guidelines in effect in the Old and Historic Alexandria District); PIONEER SQUARE DESIGN GUIDELINES, *supra* note 195 (describing the guidelines in effect in the Pioneer Square District).

### 3. Avoid Overly Inflexible Design Elements

While design guidelines should be specific to the resources of a given district,<sup>282</sup> they must also achieve balance by leaving room for future changes to the preservation scheme. When design guidelines are too specific,<sup>283</sup> a board is constrained from making well-reasoned decisions, and developers are inhibited from producing the best designs.<sup>284</sup> The most effective design guidelines will be specific enough to prevent incompatible construction yet malleable enough to allow architects to flex their artistic muscles.<sup>285</sup> Otherwise, historic districts risk encouraging architectural duplication,<sup>286</sup> thus stunting any artistic growth within the district's boundaries. A lack of flexibility may also inhibit development, as architects may be less inclined to build within historic districts if they are forced to conform to overly strict compatibility standards. Through flexible design guidelines, freedom of expression granted to architects need not compromise compatibility standards.<sup>287</sup> Design guidelines should not deter new development but should work to assure that such development remains aesthetically cohesive with the historic structures around it.<sup>288</sup>

## CONCLUSION

Historic districts should inspire patriotism, foster an appreciation for architecture, and promote economic growth through preservation aimed legislation.<sup>289</sup> Yet, many districts struggle to accomplish these objectives when they permit incompatible buildings to commingle

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282. *See supra* Parts IV.C.2-3.

283. An additional risk of inflexible design guidelines is spot zoning. *See* Abney, *supra* note 232, at 1031 (citing *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18-19 (N.M. 1964)). When zoning ordinances and design guidelines are too specific, current legislation may not account for every future issue. *See id.* Local governments are then forced to constantly amend preservation ordinances and guidelines in order to accommodate these changing circumstances. *See id.* This inconvenience can be avoided by creating flexibility within a district's design guidelines and zoning ordinances.

284. *See id.*

285. *See* Binetti, *supra* note 253, at 348-49.

286. *See* Carlson, *supra* note 19, at 27-28.

287. *See* Binetti, *supra* note 253, at 348-49.

288. *See* Carlson, *supra* note 19, at 1.

289. *See supra* Part I.C.

with prized historic resources. These incompatible structures detract from the aesthetic nature of the historic district and may even threaten the existence of currently protected historic resources. By implementing the basic legislative framework proposed in this Note, historic districts nationwide can prevent the threat of incompatible development.

First, historic districts can plan for the future by addressing compatibility in their zoning ordinances.<sup>290</sup> Second, historic districts should limit decision-making to the boards of architectural review rather than give the power to a single decision maker.<sup>291</sup> Last, local governments should survey historic resources worthy of preservation, group the elements that are most indicative of compatibility, and strike a balance between specificity and flexibility, which will equip them to address questions of compatibility.<sup>292</sup> This nationwide framework will protect historic districts from incompatible new development while allowing each district the freedom to establish its own unique definition of compatibility.

While the clash between promoting economic growth through new development and preserving the rich heritage inherent in preserved historic resources is unlikely to cease in the foreseeable future, cultivating a sense of compatibility between the old and the new allows each to coexist in harmony. Yet, developers without set boundaries may overwhelm an historic district to the point of destruction. New development that is compatible with historic resources—whatever the definition of compatibility may be—is the only way to successfully protect the resources that our nation values most.

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290. *See supra* Part IV.A.

291. *See supra* Part IV.B.

292. *See supra* Part IV.C.

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