



TOWN OF FRONT ROYAL

SPECIAL JOINT WORK SESSION BOARD OF ARCHITECTURAL REVIEW AND PLANNING COMMISSION

April 8, 2025 – 5:30 PM

102 East Main Street, 2nd Floor East Conference Room

AGENDA

- I. CALL TO ORDER**
- II. DISCUSSION**
 - Board of Architectural Review proposed text amendment.
- III. ADJOURNMENT**

Text Amendment Request:

In an effort to further maintain the historic character of Front Royal’s historical district, we are writing to formally request a zoning text amendment to limit all new construction in the residential portion of the district to only single-family homes and preserve all existing single-family homes as single-family homes.

Proposed Amendment Language:

1. New Construction in the Residential Historic District:

All new construction within the boundaries of Front Royal’s Historic District shall be limited to single-family residential structures. Multi-family or commercial developments shall not be permitted in the residential portion of this district.

2. Preservation of Existing Single-Family Homes:

Any existing single-family home within Front Royal’s Historic District shall be preserved as a single-family home. The conversion of any existing single-family dwelling into a multi-family dwelling, commercial property, or any other non-residential use shall be prohibited.

HISTORIC DISTRICT OVERLAY AREAS

(Adopted 10-23-78; Amended Entire Section 4-13-92 and 3-22-93)

175-82 STATEMENT OF INTENT (Historic District)

A. The intent of this Article is to promote and protect the health, safety, comfort, recreation, prosperity and general welfare of the community through the identification, preservation and enhancement of buildings, structures, neighborhoods, landscapes, places and areas which have special historical, cultural, artistic, architectural or archaeological significance as provided by §15.2-2306 of the Code of Virginia, as amended.

(Amended VA Code Reference 9-25-00-Effective Upon Passage)

B. It is hereby recognized that the deterioration, destruction or alteration of said buildings, structures, places and areas may cause the permanent loss of unique resources which are of great value to the people of Front Royal, Warren County, the State of Virginia and the nation and that the special controls and incentives are warranted to ensure that such losses are avoided when possible.

C. The purposes of establishing historic resource overlay areas are:

1. To preserve and improve the quality of life for residents of the Town of Front Royal by protecting familiar and treasured visual elements in the area.
2. To promote tourism by protecting historical and cultural resources attractive to visitors and thereby supporting local business and industry.
3. To stabilize and improve property values by providing incentive for the upkeep and rehabilitation of older structures and by encouraging desirable uses and forms of economic development.
4. To educate residents on the local cultural and historic heritage as embodied in the Historic District Overlay Areas and to foster a sense of pride in this heritage.

- 60
- 61 5. To promote local historic preservation efforts and to encourage the identification and
62 nomination of qualified historic properties to the National Register of Historic Places and the
63 Virginia Landmarks Register.

- 64
- 65 6. To prevent the encroachment of additions or new buildings and structures that are
66 architecturally incongruous with their environs within areas of architectural harmony and
67 historic character.

68 **175-83 DEFINITIONS (Historic District)**

69 As used in this Article, the following terms shall have the meanings indicated:

70

71 **ALTERATION** - Any change, modification or addition to a part of or all of the exterior of any
72 building or structure.

73

74 **BUILDING** - Any enclosed or open structure which is a combination of materials to form a
75 construction for occupancy or use.

76

77 **CERTIFICATE OF APPROPRIATENESS (C of A)** - The approval statement signed by the
78 Secretary of the Board of Architectural Review (BAR) and the Zoning Administrator that certifies
79 approval by the BAR of the appropriateness of a particular request for the construction, alteration,
80 reconstruction, repair, restoration, demolition or razing of all or a part of any building within an
81 historic district overlay area, subject to the issuance of all other permits needed for the matter
82 sought to be accomplished.

83

84 **CONTRIBUTING PROPERTIES** - Properties so designated on the inventory map of landmarks
85 and contributing properties, which is adopted as a part of this Article, being generally those
86 properties which, by reason of form, materials, architectural details and relation to surrounding
87 properties, contribute favorably to the general character of the part of the historic district in which
88 they are located but, by reason of recent age, lack of historic significance or other factors, are not
89 designated as local historic landmarks under the criteria of this Article.

90

91 **DEMOLITION** - The dismantling or tearing down of all or part of any building and all operations
92 incidental thereto.

93

94 **EXTERIOR FEATURES (ARCHITECTURAL APPEARANCE)** - The architectural style,
95 general design and general arrangement of the exterior of a building or other structure, including
96 the color, the kind and texture of the building material and the type and style of all windows, doors,
97 light fixtures, signs, other appurtenant fixtures and other natural features, such as trees and
98 shrubbery, that are subject to the public view from a public street, public way or other public places.

99

100 **HISTORIC DISTRICT OVERLAY AREA or HISTORIC DISTRICT** - Any area delineated
101 by the Town Council and consisting of public or private property within the Town, containing one
102 (1) or more historic landmarks as established by the Virginia Department of Historic Resources,
103 or one (1) or more areas, neighborhoods, sites, places, structures, objects, artifacts or buildings in
104 which historic events occurred or reflecting significantly the lives of historic personages or great
105 ideas or ideals of the people, having special public value because of notable architectural,
106 economic, ethnic, military, natural, political, religious or social factors, such landmarks, buildings,
107 structures or areas having been designated by the Council as being of such historic, architectural
108 or cultural interest and significance as to warrant conservation and preservation. Such designated
109 district or districts shall not extend farther than the property line of the land pertaining to such
110 historical landmarks, sites, buildings, signs, appurtenances, structures or objects.

111

112 **LOCAL HISTORIC LANDMARK** - Any site (including significant trees or other plant life
113 located thereon), building or structure of particular historic significance. "Landmarks" include
114 sites, buildings or structures where the cultural, political, archaeological, spiritual, economic,
115 social or artistic history of the community, state or nation is reflected or exemplified or which are
116 identified with historic personages or with important events in local, state or national history or
117 which embody the distinguishing characteristics of an architectural specimen, inherently valuable
118 for a representation of a period, style or method of construction or a notable work of construction
119 or a notable work of a master designer or architect whose individual genius influenced his age.
120 Listing on the Virginia Landmarks Register and the National Register of Historic Places is
121 encouraged for all "local historic landmarks."

122

123 **NEW CONSTRUCTION** - Any construction within an historic district overlay area that is
124 independent and exclusive of an existing building or structure or part thereof.

125

126 **NONCONTRIBUTING PROPERTIES** - Properties with little historic or architectural value and
127 with little or no contribution to the historic character of the district because of their recent age or
128 alteration in such a way as to destroy their architectural integrity.

129

130 **RECONSTRUCTION** - Any or all work needed to remake or rebuild all or a part of any building
131 to a sound condition but not necessarily of original materials.

132

133 **REPAIRS** - Any work or all work involving the replacement of existing work with equivalent
134 material for the purpose of maintenance but not including any addition, change or modification in
135 construction.

136

137 **RESTORATION** - Any or all work connected with the returning to or restoring of a building or a
138 part of any building to its original condition through the use of original or nearly original materials.

139

140 **REVIEWING BODIES** - All individuals, boards or elected/appointed bodies, given review
141 authority under this Article, including the Zoning Administrator, Board of Architectural Review
142 and Town Council, upon appeal.

143

144 (Added 10-27-97-Effective Upon Passage)

145

146 **SIGNIFICANT CHANGE** - A permanent change that alters the general appearance (architectural
147 character) of a building.

148

149 (Added 10-27-97-Effective Upon Passage)

150

151 **STRUCTURE** - Anything man-made, including but not limited to main buildings, outbuildings,
152 fences, walls, lampposts, light fixtures, signs, signposts, billboards and paving.

153

154 **SUBSTANTIAL EXTERIOR ALTERATION** - Any change, other than incidental repairs, to the
155 supporting members of a building or portion thereof, such as the addition, removal or alteration of
156 bearing walls, columns, beams, girders, roofs or foundations, that are visible on the exterior of the
157 structure.

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159

175-84 BOARD OF ARCHITECTURAL REVIEW (Historic District)

A. Establishment and Terms of Office:

1. A Board to be known as the "Board of Architectural Review (BAR)" is hereby established and shall consist of five (5) voting members who shall be appointed by the Town Council. All members shall have a demonstrated interest competence or knowledge in historic preservation. One (1) member shall be a property owner/resident of an historic district overlay area and one (1) shall have professional training or equivalent experience in architecture, history, American studies, architectural history, archaeology or planning. All members shall be residents of Warren County, with knowledge of and demonstrated interest in the historic character of the Town. These members shall serve terms of four (4) years each. (Amended 10-27-97, 1-8-01, 1-12-04-Effective Upon Passage)
2. BAR members may be reappointed for consecutive terms.
3. The BAR shall elect from its own membership a Chairman and Vice Chairman, who shall serve annual terms as such and who may succeed themselves. The Board shall appoint a Secretary who shall serve at its pleasure.
4. When a vacancy occurs, a new appointment shall be made by the Town Council for the unexpired terms within sixty (60) days after the vacancy occurs. The Town Council shall publicly announce and solicit qualified candidates for Board of Architectural Review vacancies.
5. Any appointed member of the BAR may be removed from office by the Town Council for inefficiency, neglect of duties or malfeasance. An appointment to fill a vacancy shall be only for the unexpired term on the vacancy.
6. Members shall make every effort to attend at least one (1) training session annually sponsored by the Department of Historic Resources, the Preservation Alliance of Virginia or other organizations that are involved with historic preservation issues, design and review standards or other work of the BAR.

B. Duties, powers and responsibilities: The Board of Architectural Review shall have the power and authority for issuing or denying certificates of appropriateness for construction, reconstruction, substantial exterior alteration, razing or relocation within the historic district overlay area. In addition, the Board shall have the following duties:

1. To assist and advise the Town Council, the Planning Commission and other Town departments, agencies and property owners in matters involving historically significant sites and buildings or other properties in historic districts, such as but not limited to appropriate land usage, parking facilities and signs.
2. To continuously evaluate conditions and to advise owners of historic landmarks or contributing structures or other properties in historic districts on problems of preservation.
3. To conduct studies deemed necessary by the Town Council or the Planning Commission concerning location of historic districts and means of preservation, utilization, improvement and maintenance of historic assets in the Town.
4. To propose additional historic districts or additions or deletions to districts.
5. To adopt standards for review to supplement the standards set forth in this Article.
6. To establish an appropriate system of markers for selected historic sites and buildings, including proposals for the installation and care of such historic markers, and to invite each owner of a building of historical significance to display the marker thereon.
7. To cooperate with and enlist assistance from the Virginia Department of Historic Resources, the National Trust for Historic Preservation and other interested parties, both public and private, in its efforts to preserve, restore and conserve local historic landmarks, buildings, sites or areas within the Town.
8. To prepare and adopt specific guidelines, illustrated as necessary, for those historic districts which have special characteristics and architectural features that are peculiar to the district and which should be preserved and to make these guidelines available to property owners

225 within each historic district and to the general public. After these historic districts are
226 approved, specific guidelines shall be adopted for such historic districts as may require
227 specific guidelines.

- 228
- 229 9. To sponsor public information activities, when deemed appropriate, publicizing historic
230 preservation efforts, which activities may include, but not be limited to, speaking
231 engagements, handouts, press releases and films.

- 232
- 233 10. To hold public meetings as often as necessary to fulfill the responsibilities assigned by this
234 Article.

235

236 C. Organization and Meetings:

- 237
- 238 1. The Chairman shall conduct the meetings of the BAR.

- 239
- 240 2. The Secretary shall keep the minutes of the meetings and a permanent record of all
241 resolutions, motions, transactions and determinations.

- 242
- 243 3. All members of the BAR, except for advisory members, shall be entitled to vote; and the
244 decisions of the BAR shall be determined by a majority vote.

- 245
- 246 4. A quorum of three (3) voting members present is required before the BAR may take any
247 official action.

- 248
- 249 5. The BAR shall meet within twenty (20) days after notification by the Zoning Administrator
250 of an application for a certificate of appropriateness or a permit requiring action by the
251 BAR.

- 252
- 253 6. The Board of Architectural Review shall have regularly scheduled meetings at least four
254 (4) times a year. The meetings of the BAR shall be open to the public, and a full and

impartial hearing shall be granted. All regularly scheduled meetings shall be conducted in the evening hours for the convenience of the public.

7. The BAR shall vote and announce its decision on any matter properly before it not later than forty-five (45) days after the conclusion of the hearing on the matter, unless the time is extended with the written consent of the applicant.

8. In matters covering the procedures for meetings not covered by this document, the BAR may establish its own rules, provided that they are not contrary to Town policy or the intent of this Article.

D. Authority to Receive Funding and Advisory Services:

1. All persons interested in the preservation of historic buildings or historic sites in the Town are invited to make gifts, devises and bequests to the Town to be used for that purpose. All such donations, other than money, shall be subject to acceptance by the Town Council. All donations of money shall be made through the Department of Finance, and it is hereby authorized and directed to receive such donations and to deposit them in a special fund to be known as the "Historic Buildings and Sites Trust Fund, " and shall be used only for the purpose of preserving and promoting the preservation of historic buildings and sites in the Town. Expenditures from such fund shall be made by the Town Manager as authorized, from time to time, by the Town Council.

2. The BAR may seek federal, state or private grants or funding to assist in the performance of its duties as herein defined.

3. Within the limits of funds that may be made available to the BAR for the performance of its work, the BAR may obtain services of qualified persons to advise and assist the BAR as required.

4. Upon request of the BAR, with approval by the Town Manager, the departments, boards, commissions, offices and agencies of the Town government shall furnish to the Board such

available information and render such service as may be required for the exercise of the powers and performance of the duties of the BAR.

175-85 CREATION OF HISTORIC DISTRICTS AND LANDMARKS

A. The Board of Architectural Review shall prepare and recommend for adoption as part of this Article a district boundary map and an inventory map covering the area or areas to be considered for inclusion in an historic district overlay area. These maps, when adopted in accordance with the provisions of the Code of Virginia Section 15.2-2285, shall be as much a part of this Article as if fully described herein and shall be filed as a part of this Article by the Clerk of the Town of Front Royal. The inventory map shall delineate local historic landmarks, contributing properties and noncontributing properties. The inventory and district boundary maps may be amended, from time to time, in the same manner as the Zoning District Map.

(Amended VA Code Reference 9-25-00-Effective Upon Passage)

B. The Board of Architectural Review may propose to the Planning Commission and the Town Council such amendments as deemed appropriate, including the establishment of historic districts or revision to existing historic districts. Upon receipt of said proposal, the Council may initiate such amendment pursuant to Section 175-146. The Board of Architectural Review shall prepare and submit simultaneously with said proposal a report to substantiate establishment of a historic district or a proposed amendment. Such report shall establish and define the historic district boundaries, as delineated upon an appropriate map, as well as describe the historic and/or architectural significance of the buildings, structures or sites to be protected, and the special characteristic, qualities and/or fabric to be preserved, and shall describe present trends and conditions, current and long-range planning and desirable public objectives for preservation. The report may also include plans for public action in or adjoining a district that is likely to affect its character or development.

C. Applications for the creation or expansion of an historic district or for the designation of landmarks or landmark sites may also be filed by the Planning Commission, the Town Council, the owner, the contract purchaser with the owner's written consent or the owner's agent or sixty percent (60%) of the owners of all buildings within a proposed historic district. All requests shall be made in the same manner as other zoning amendments, as provided for in Section 175-146.

D. Any historic district and any historic district map which have been created and adopted by the Front Royal Town Council prior to the amendment of this Article shall not be repealed but shall remain intact and in effect, subject now to the provisions of this amended Article.

E. Any historic district created and adopted by the Front Royal Town Council after February 1, 1993, shall remain in effect, except as amended or modified pursuant to the regulations herein, for an initial maximum period of ten (10) years from the date of its adoption. Subsequent action by the Front Royal Town Council shall be made to continue the district beyond the initial ten-year period.

F. Upon the presentation of a request to withdraw from an adopted subarea within the historic district overlay area, with such request having been duly executed by at least sixty-seven percent (67%) of the owners of taxable parcels (with a vote for each separate tax parcel) within the designated historic subarea, the Town Council, at its next meeting, shall take appropriate action to remove the historic district designation. This provision shall be applicable only where the historic resource overlay area shall have been in place for a period of not less than two (2) years.

175-86 CRITERIA FOR SELECTION OF HISTORIC DISTRICTS OR LANDMARKS

Criteria for evaluating the merits of a given structure or space shall be based on architectural features as well as historic factors. Certain buildings or areas, although not associated with an historic personage or event, may be valuable examples of the Town's physical and cultural heritage. Structures of local significance shall be evaluated, as well as those of state and national significance, and any structures individually listed upon the National Register of Historic Places or the Virginia Landmarks Register shall be designated upon the Town Register. In addition, such evaluation shall be based on the following specific matters:

A. Architectural and landscape style: The evaluation shall respect the qualities of each architectural and landscape style and shall judge a structure's merit on how well it exemplifies the distinguishing characteristics of said style. Consideration will be given to:

1. The significance of the architectural design.
2. The scale and/or interrelationships of the structures and/or environmental features.
3. The significant patterns of development.
4. The quality of workmanship.

5. The amount of surviving original fabric.
6. The original location and use.
7. The remaining outbuildings or dependencies.
8. The surrounding environment; gardens, landscaping and walks.
9. The aesthetic quality.
10. The original integrity of the structure and its details.

B. Historical and/or cultural significance:- Structures or spaces relating to one (1) or more of the following criteria will be considered historically or culturally valuable:

1. Association with an historic personage.
2. Association with an historic event.
3. Work of the leading architect or master craftsman.
4. Site or structure of cultural significance.

C. In addition, sole or infrequent surviving building types and structures not historic in themselves but adding to the character of an historic district need to be looked at as potentially deserving preservation.

175-87 BOUNDARIES OF HISTORIC DISTRICTS OR LANDMARKS

A. The boundaries of an historic district or overlay area shall, in general, be drawn to include areas containing buildings or places in which historic events occurred or having special public value because of notable architectural or other features relating to the cultural or artistic heritage of the community of such significance as to warrant conservation and preservation. The district may include either individual buildings or places of such character and a reasonable distance beyond, or it may include areas or groupings of structures which have significance relative to their patterns of development or social and economic or architectural interrelationships even though some structures in the area might not possess significant merit when considered alone. In any case, the location of the district shall be based upon careful studies that describe the characteristics of the area and support the purposes of conservation and preservation.

B. The boundaries of an historic district shall conform to the boundaries of individual lots of record. Where a street is proposed as an historic district boundary, the edge right-of-way adjoining the district shall be deemed the district boundary.

385

386 C. Historic districts are created as special overlay districts to be superimposed on other zoning
387 districts contained in these regulations, and are to be so designated on the Official Zoning Map.
388 The uses, housing types, minimum lot requirements, minimum yard requirements, maximum
389 height and accessory uses and accessory signs shall be determined by the regulations applicable to
390 the other districts over which the historic districts superimposed, except as these other districts
391 may be modified by application of the regulations in the historic district.

392

393 D. A map delineating the adopted boundaries of each historic district shall be maintained in the
394 office of the Zoning Administrator.

395 **175-88 CERTIFICATE OF APPROPRIATENESS REQUIRED (Historic**
396 **District)**

397 A. No building or structure within the Chester Street and downtown business areas of the Historic
398 Front Royal District shall be erected, reconstructed, altered or restored unless and until an
399 application for a certificate of appropriateness shall have been approved under the provisions of
400 this Article.

401

402 B. No building or structure within the downtown residential area of the Historic Front Royal
403 District or property designated as a local historic landmark shall be erected, reconstructed or
404 undergo substantial exterior alteration unless and until an application for a certificate of
405 appropriateness shall have been approved under the provisions of this ordinance.

406

407 C. No building existing in any designated historic district shall be demolished or removed, in whole
408 or in part, unless and until an application or a certificate of appropriateness shall have been
409 approved by the Board of Architectural Review.

410

411 D. No application for a certificate of appropriateness to demolish a building in any historic district
412 shall be considered by the BAR until a public hearing has been held thereon, pursuant to the notice
413 of public hearing as required in Section 15.2-2204, Code of Virginia, as amended.

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415 **(Amended VA Code Reference 9-25-00-Effective Upon Passage)**

175-89 BOARD REVIEW OF MAJOR ACTIONS (Historic District)

A. The following major actions and any other actions not specifically exempted by the terms of this ordinance or which, in the opinion of the Administrator, may constitute a major permanent and detrimental change to the character of an historic district shall be approved only after a public meeting and favorable action by a majority vote of the Board of Architectural Review:

1. The razing, demolishing or moving of a designated landmark or contributing structure.

2. Construction of any new main building, or an accessory building which exceeds five hundred (500) square feet in size within a designated historic district or on a site adjacent to a designated landmark site.

3. Any addition to or substantial alteration of a designated landmark or structure on a contributing property, which increases the square footage of the structure or otherwise alters substantially its size, height, contour or outline.

4. Any significant change or alteration of the exterior architectural style of a designated landmark or contributing property.

5. Any addition to a non-contributing structure, which alters substantially the size height, contour or outline by increasing the square footage and/or volume of the structure by one hundred percent (100%) or more of the original structure.

6. Any fence or sign that is not in conformance with the design guidelines adopted in accordance with this Article.

7. Any other major actions not specifically covered by the terms of this section but which would have a substantial effect on the character of the Historic District.

B. The Board of Architectural Review shall be guided in its review by the guidelines and criteria established in Section 175-91. The BAR shall have authority to request modifications in order to comply with the guidelines and criteria.

448

449 C. The Board of Architectural Review shall not disapprove an application except with respect to
450 the criteria and guidelines set forth in Section 175-91. The BAR shall give reasons for its decisions,
451 shall act promptly on applications before it and shall coordinate its procedures with those of other
452 agencies and individuals charged with the administration of this Article. The BAR shall be strict
453 in its judgment of plans for those structures designated as landmarks and contributing properties
454 but shall be lenient in its judgment of plans for non-contributing properties. For plans involving
455 new construction the Board's concern shall focus on whether such plans are compatible with and
456 enhance the historic or architectural value of surrounding structures or the surrounding area.

457

458 D. In all final decisions rendered pursuant to this Article, the BAR shall briefly state its findings
459 in writing, and in the case of disapproval, it may make recommendations to the applicant with
460 respect to the design, texture, material, color, line, mass, dimension or lighting of the alteration or
461 the improvement involved. The requirements of this section shall be deemed to have been satisfied
462 if such findings and recommendations, if any, are set forth in the regularly maintained minutes of
463 the BAR.

464

465 (Amended/Added "C & D" 10-27-97-Effective Upon Passage)

466 **175-89.1 ACTIONS REQUIRING ADMINISTRATIVE REVIEW (Historic**
467 **District)**

468 A. The following actions will require administrative review by the Zoning Administrator:

469

470 1. The razing, demolishing, or moving of a non-contributing structure or a structure which is
471 substantially damaged to the point of being completely uninhabitable.

472

473 2. Construction of a new accessory structure less than five hundred (500) square feet in size
474 within a designated historic district or on a site adjacent to a designated landmark site that
475 is generally in keeping with the character of the historic district and its surroundings.

476

477 3. Substantial alteration of a non-contributing structure.

478

4. Any addition to a non-contributing structure, which increases the size (square footage and/or volume) of the structure by less than one hundred percent (100%) of the original structure.

5. Landscaping, fences and signs in conformance with the design guidelines adopted in accordance with this Article.

B. The Zoning Administrator shall be guided in his decisions by the standards and guidelines adopted by the Board of Architectural Review and shall have authority to request modifications of specific proposal in order that the proposal may comply with said standards and guidelines. In any case where the Administrator is uncertain of his authority to act on a particular application under this section or in any case where the Administrator and the applicant cannot agree on changes in the proposal, the application shall be referred to the Board of Architectural Review for action by said Board. In case of disapproval by the Administrator, the applicant may appeal the Administrator's decision within thirty (30) days thereof to the Board of Architectural Review. The Administrator shall keep a record of his decisions under this section and shall report such decisions to the Board of Architectural Review at its next regular meeting.

(Amended Entire Section 10-27-97-Effective Upon Passage)

175-90 EXEMPTIONS FROM REVIEW (Historic District)

Certain minor actions which are deemed not to permanently affect the character of the historic district are exempted from review for architectural compatibility. Such actions shall include:

1. Repainting resulting in the same or a similar color. (Original painting of masonry surfaces is not exempted from review.)

(Amended to add "*similar*" 6-22-15-Effective Upon Passage)

2. Repair or construction in kind, resulting in no significant changes in appearance or form.

3. Addition or deletion of storm windows and doors, window gardens, awnings, temporary canopies or similar appurtenances and window air conditioners.

4. Addition or deletion of television or radio antennas, skylights or solar collectors in locations not visible from a public place.

5. Installation of plant materials but not including landscape treatment which substantially alters the contour of a contributing property or involves landscaping or construction of fences, pools and the like that affect the appearance of a contributing property.

6. Permitted outside storage in a residential or commercial district that does not require structural changes.

7. Improvements, alterations and renovations that can be accomplished without obtaining a building permit, except fences, signs, and window replacement.

8. Any changes to a structure that are not visible from a public street, alley or public place.

9. Temporary window signs. **(Amended Entire Section 10-27-97-Effective Upon Passage)**

175-90.1 AUTHORITY TO STOP WORK (Historic District)

The Zoning Administrator shall have authority to order that work be stopped and that an appropriate application be filed or reviewed in any case where, in his opinion, the action may produce arresting and spectacular effects, violent contrasts or materials or colors and intense and lurid colors or patterns or a multiplicity of incongruous details clearly inconsistent with the character of the present structures or with the prevailing character of the surroundings and the historic district or when it appears that the work does not conform to the list of administrative review or exempted actions stated herein and, in fact, is more extensive than originally represented.

(Added 10-27-97-Effective Upon Passage)

175-91 GUIDELINES AND CRITERIA FOR REVIEW (Historic District)

A. All reviewing bodies shall be guided by the following guidelines and criteria:

1. The historic archaeological or architectural value and significance of a structure and its relationship to the historic value of the surrounding area.

542

543 2. The age and character of the historic structure, its condition, and its probable life expectancy
544 and the appropriateness of the proposed changes to the period or periods during which the
545 structure was built.

546

547 3. The general compatibility of the site plan and the exterior design arrangement, texture and
548 materials proposed to be used.

549

550 4. The view of the structure or area from a public street or road, present or future.

551

552 5. The present character of the setting of the structure or area and its surroundings.

553

554 6. The probable effect of proposed construction on trees, wooded areas or historic sites.

555

556 7. Any other factors, including aesthetic factors, which the reviewing bodies deem to be
557 pertinent.

558

559 8. The appropriateness of the exterior architectural features of such building or structure to the
560 compatibility with the exterior architectural features of landmarks, buildings or structures in
561 the district, taking into consideration the following:

562

563 a. General design.

564 b. Character and appropriateness of design.

565 c. Form.

566 d. Proportion and scale.

567 E. Mass.

568 f. Configuration.

569 g. Arrangement.

570 h. Texture.

i. Material

j. The permanent color of exterior materials (excluding paint).

k. The relationship of such elements to similar features of structures in the immediate surroundings.

l. Congruity with the character of the Historic District.

B. The reviewing bodies shall not adopt or impose any specific architectural style in the administration of this Article.

C. The reviewing bodies shall also be guided by the purposes for which landmarks, landmark sites and historic districts are designated and by the particular standards and considerations contained in the Secretary of the Interior's Standards for Rehabilitation.

(Amended Entire Section 10-27-97-Effective Upon Passage)

175-92 ISSUANCE OF CERTIFICATE OF APPROPRIATENESS (Historic District)

A. Within fifteen (15) days of approval for construction or alteration pursuant to 175-88, a certificate of appropriateness signed by the Zoning Administrator and bearing the date of issuance but subject to the provisions of 175-92B, shall be made available to the applicant.

B. Any certificate of appropriateness issued pursuant to 175-88 shall expire of its own limitations twelve (12) months from the date of issuance if the work authorized by said certificate has not commenced and, further, if any such work is suspended or abandoned for a period of twelve (12) months after being commenced. Any period or periods of time during which the right to use any such certificate is stayed pursuant to this Article shall be excluded from the computation of the twelve- month period.

(Amended Entire Section 10-27-97-Effective Upon Passage)

175-93 BUILDING DEMOLITION AND RELOCATION (Historic District)

A. No historic landmark, building or structure within any historic district shall be razed, demolished or moved until the razing, demolition or movement thereof is approved by the Board of Architectural Review or approved on appeal as provided herein.

B. Notwithstanding the provisions of Subsection A, the owner of a historic landmark, building or structure shall, as a matter of right, be entitled to raze or demolish such a building or structure, provided that:

1. He has applied to the Town Council for such right;

2. The owner has, for the period of time set forth in the time schedule hereinafter contained and at a price reasonably related to its fair market value, made a bona fide offer to sell such building or structure and the land pertaining thereto to any person, firm, corporation, government or agency thereof or political subdivision or agency thereof which gives reasonable assurance that it is willing to preserve and restore the building or structure and the land pertaining thereto. In order to demonstrate the making of a bona fide offer to sell, the owner shall file a notice with the Zoning Administrator identifying the property and stating the offering price and the name of the real estate agent, if any. No time period set forth herein shall begin to run until said notice has been filed. Within five (5) days of receipt, copies of the notice shall be delivered by the Zoning Administrator to the members of the Town Council, the members of the Planning Commission and the Town Manager; and

3. No bona fide contract, binding upon all parties thereto, shall have been executed for the sale of any such building or structure and the land pertaining thereto prior to the expiration of the applicable time period set forth in the time schedule hereinafter contained. Any appeal from the decision of the BAR, whether instituted by the owner or by any other proper party, notwithstanding the provisions herein pertaining to a stay on appeal, shall not affect the right of the owner to make the bona fide offer to sell. No offer to sell shall be made more than one (1) year after the final decision of the BAR, but thereafter the owner may renew his request to the BAR to approve the razing or demolition of the historic landmark, building or structure. The time schedule for offers to sell shall be as follows:

OFFERING PRICE

MINIMUM OFFER-TO-SELL

Period (Months)

Less than \$25,000.00	3
\$25,000.00 to \$39,999.99	4
\$40,000.00 to \$54,999.99	5
\$55,000.00 to \$74,999.99	6
\$75,000.00 to \$89,999.99	7
\$90,000.00 or more	12

4. For the purpose of this Article, a bona fide offer to sell shall be defined as a selling price not greater than ten percent (10%) more than the fair market value appraisal of a certified land appraiser employing appropriate, recognized appraisal criteria for the area in question. The Town shall retain the right to contest the bona fide nature of the offer as follows: the reasonable relationship of the offering price to the fair market value of the historic landmark, building or structure, by filing injunctive proceedings in the Warren County Circuit Court, whenever the Town obtains an appraisal of the property in question by a certified land appraiser at a value at least ten percent (10%) below the offering price asked by the owner, regardless of any conflicting appraisal obtained by the property owner.

175-94 APPEALS (Historic District)

A. Any applicant aggrieved by a final decision of the Board of Architectural Review may appeal said decision to the Front Royal Town Council, provided that such appeal is filed, in writing, with the Town Clerk within ten (10) days after the final decision is rendered by the BAR. The Town Council will hear the matter at its next regularly scheduled meeting and will render its decision on the appeal at the following regularly scheduled meeting. The Council, in its discretion, may consider additional evidence and submissions during the period between meetings and at the second regularly scheduled meeting prior to rendering its decision.

B. Any applicant aggrieved by a final decision of the Board of Architectural Review following the decision rendered on appeal to the Front Royal Town Council, may appeal said decision to the Circuit Court of Warren County, Virginia, by filing a petition at law setting forth the alleged illegality of the BAR's action, provided that such petition is filed with the Circuit Court within thirty (30) days after the appealed decision of the Front Royal Town Council. The filing of said petition with the Circuit Court shall stay the decision of the BAR pending the outcome of the appeal, except that the filing of such petition shall not stay the decision of the BAR if such

668 decision denies the right to raze or demolish an historic landmark, building or structure. The
669 Circuit Court may reverse or modify the decision of the BAR, in whole or in part, if the Court
670 finds, upon review, that the decision is arbitrary and constitutes an abuse of discretion. The Circuit
671 Court may also affirm the decision of the BAR.

672 175-95 MAINTENANCE, PUBLIC SAFETY AND PERMITTED USES 673 (Historic District)

674 A. Nothing in this Article shall allow the BAR to prevent the routine maintenance or repair of any
675 exterior elements of any building or structure so long as there is no change in form or materials;
676 nor shall anything in this Article be construed to prevent the construction, reconstruction, alteration
677 or demolition of any exterior elements that the authorized municipal officers shall certify as
678 required by public safety.

680 B. Nothing in this Article shall be construed to prevent any use of any land, building or structure
681 permitted by the regulations prescribed in this Chapter for the district in which such land, building
682 or structure is otherwise located. Due to peculiar conditions of design and construction in historic
683 neighborhoods where buildings and structures are often built close to the lot lines, it is in the public
684 interest to retain a neighborhood's historic appearance by granting variances to normal yard
685 requirements, where appropriate and where it is deemed that such a variance will not adversely
686 affect neighboring properties. The BAR may recommend to the Board of Zoning Appeals that
687 such variance to standard yard requirements be made.

688 175-96 YARD VARIANCES (Historic District)

689 Due to peculiar conditions of design and construction in historic neighborhoods where buildings
690 and structures are often built close to the lot lines, it is in the public interest to retain a
691 neighborhood's historic appearance by granting variances to normal yard requirements, where
692 appropriate and where it is deemed that such a variance will not adversely affect neighboring
693 properties. The BAR may recommend to the Board of Zoning Appeals that such variance to
694 standard yard requirements be made.

695 175-97 (RESERVED)

696 175-98 EXEMPTION FOR PUBLIC WORKS (Historic District)

697 The Front Royal Town Council may exempt public structures, works, utilities and buildings from
698 compliance with this Article where public safety is endangered or an emergency situation arises.
699 Retroactive approval for emergency work undertaken shall be sought within thirty (30) days
700 following completion of the work. All work shall strive to maintain architectural compatibility
701 within the historic district for its public works and structures.

Chapter 18

Nonconforming Uses and Structures

18-100 Introduction

A claim that a use or structure is nonconforming is often raised by a landowner as a defense when the zoning administrator has determined that a particular use is in violation of the zoning ordinance.

The principles that apply to *nonconforming uses* and *nonconforming structures* compose a class of vested rights (discussed in Chapter 19). However, nonconformities and vested rights are treated in separate chapters in this handbook because different rules apply, even though both are intended to protect certain existing private property interests when zoning regulations are changed. As used in this chapter, the reference to *nonconforming uses* includes not only uses, but also structures (e.g., situations where a structure precedes and does not comply with new setback or height regulations).

Nonconforming Uses	Vested Rights
Determines whether a <i>pre-existing</i> use may continue even though it no longer conforms to new zoning regulations.	Determines whether a <i>previously approved</i> use has ripened to the point that it should be allowed to exist, even though it would not conform to new zoning regulations.

The rules applicable to nonconformities are governed by Virginia Code § 15.2-2307(C) through (G).

18-200 The nature of a nonconforming use

When a locality adopts or amends its zoning ordinance, the land within the locality is either undeveloped or developed with uses that may not conform to the new zoning regulations. These pre-existing uses may, if allowed to continue, threaten the effectiveness of the locality's comprehensive plan and zoning regulations. Nonetheless, it is well established in Virginia law that "as to an existing use, absent condemnation and payment of just compensation, the landowner has the right to continue that use even after a change in the applicable zoning classification causes the use to become nonconforming." See *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 271, 673 S.E.2d 170, 180 (2009); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006).

18-210 Nonconforming use defined

A *nonconforming use* is a *lawful* use that exists on the effective date of the zoning ordinance at issue and continues from that date in non-conformance to the ordinance. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005); *Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001); *Hardy v. Board of Zoning Appeals of Powhatan County*, 257 Va. 232, 508 S.E.2d 886 (1999); *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979).

In other words, when one is considering nonconforming uses, the principle of vested rights is at hand. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 454, 643 S.E.2d 203, 206 (2007) (operation of a power plant before the city had adopted comprehensive zoning established "a vested right to use the property for operation of a power plant" when the 1963 and 1992 zoning ordinances were adopted); *Holland v. Board of Supervisors of Franklin County*, 247 Va. 286, 441 S.E.2d 20 (1994) (a landowner may acquire a vested right to conduct a nonconforming use on its property if that use was in existence on the effective date of the zoning ordinance; because the quarry was not operational on the effective date of the county's zoning ordinance, a vested right under the common law of vested rights in effect at that time was not established); *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995) (a nonconforming use is said to be a vested right that zoning regulations generally cannot annul).

The doctrine of nonconformities is similar to, but different than, the concept of *grandfathering*, which is the term used when a locality expressly exempts a use or land from newly adopted regulations that would otherwise apply. See, e.g., *Bertozzi v. Hanover County*, 261 Va. 608, 544 S.E.2d 340 (2001).

18-220 A nonconforming use may not arise from an unlawful use

A nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance. *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *Hardy v. Board of Zoning Appeals of Powhatan County*, 257 Va. 232, 508 S.E.2d 886 (1999); *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) (junk vehicles did not become a lawful nonconforming use when the county amended its zoning regulations in 1985 to, among other things, substitute “inoperative motor vehicle” for “junk vehicle” and expand a definition to deem certain maintenance of inoperative motor vehicles to be a permitted accessory use).

In *Booher*, the landowner obtained a rezoning in 1975 changing the property’s zoning from A-2 to B-2 and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher’s application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the chancellor erred in determining that Booher’s operation was a lawful nonconforming use because the use was never lawful, despite the county’s implicit acceptance of the use for several years. The Court added that “[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . .” *Booher*, 232 Va. at 481-482, 352 S.E.2d at 321.

18-300 The purpose and scope of the nonconformities principle

The purpose of Virginia Code § 15.2-2307(C) through (G) is to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997).

Nonconforming uses are disfavored because they detract from the effectiveness of a comprehensive zoning plan. *Gardner, supra*. However, a locality may not terminate a nonconforming use in a manner that is not provided in Virginia Code § 15.2-2307. See *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007). In *Mirant*, the Virginia Supreme Court found that the effect of the city’s zoning text amendment effectively required Mirant’s coal-fired nonconforming power plant to cease operation within seven years and concluded that “termination of the use allowed by virtue of an established vested right impairs the vested right and therefore violates Code § 15.2-2307.”

A zoning ordinance should contain a statement of intent regarding nonconformities. A locality’s statement of intent in regulating nonconforming uses is relevant when applying that locality’s nonconformities regulations. See *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005).

18-400 A nonconforming use must have been a primary use of the property; an accessory use cannot become a nonconforming primary use

An accessory use cannot become a primary nonconforming use. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979) (accessory use cannot become a primary nonconforming use). Conversely, for a use to be eligible for nonconforming status, it must have been a primary use of the property.

Two trial court opinions highlight the application of *Knowlton*. In *Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County*, 7 Va. Cir. 201 (1983), the trial court concluded that a crusher that was accessory to a

nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and a 1958 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use. In *Gwinn v. Lester*, 1991 WL 835353 (Va. Cir. Ct. 1991), the trial court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation required that each parcel have one vehicle space per family unit and at that time the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a “use,” the parking of the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, the previously permitted accessory use – parking the dump truck – could not become a nonconforming primary use.

There also is support for the related position that a nonconforming use must have been substantial. In *Edenton v. Zoning Appeals Board*, 37 Va. Cir. 176 (1995), the issue was whether the appellants had established camping as a nonconforming use on a portion of their property where the activity was irregular and infrequent. In finding that the evidence was insufficient to establish a nonconforming use, the trial court stated:

Every pre-existing use does not qualify as a sufficient use to give rise to a vested right. The commonly applied guideline is that only a use which is substantial in the sense that its termination would involve *significant* financial, property, or other economic results will be protected. (emphasis added)

This rule is consistent with the prevailing rule throughout the United States – that a use must be substantial to attain nonconforming status. If the rule were otherwise, every trivial, incidental, or insubstantial activity, hobby, or act of personal convenience could attain constitutional protection as a nonconforming use; *e.g.*, a meal served in a house where the invitees are asked to contribute to the cost of the food could be the basis for a claimed nonconforming restaurant use; repairing a car in a garage for a friend as part of a bartered exchange or as a hobby could be the basis for a claimed nonconforming commercial garage; a telecommuter who worked at home from time to time could be the basis for a claimed nonconforming commercial office use.

18-500 The burden of proof is on the landowner to establish a nonconforming use except in a criminal proceeding

A landowner has a vested right to continue a nonconforming use if the validity of the nonconforming use is established. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992). In a civil proceeding in which a use is challenged as illegal, the challenging party – the locality – has the initial burden of producing evidence to show the uses permitted in the zoning district in which the land is located, and that the challenged use of the land is not a permitted use. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005). Upon a sufficient evidentiary showing by the locality, the burden then shifts to the landowner to show that the use is a lawful nonconforming use. *Patton, supra*. The reason for placing the burden of proof on the landowner in a civil proceeding is because the landowner has better access to the evidence pertaining to the uses of his or her own property. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979).

The rule imposing the burden of proof on the landowner is not excused by a locality’s incomplete or absent records. See *Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001), cited in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 69 Va. Cir. 129 (2005).

There is no presumption that a lawful nonconforming use exists, so the landowner must produce probative material evidence to meet the burden. In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006), the landowners failed to show that a garage apartment was a lawful nonconforming use from the unsubstantiated opinion of the original landowner’s daughter that a garage apartment was built in accordance with the county’s 1941 zoning ordinance. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the landowners attempted to establish that their vehicle light service business was established before the county’s 1941 zoning ordinance was adopted. The landowners acquired the property in 1949, and they failed to present any evidence regarding the property’s use before 1949. The circuit court rejected the landowners’

request that the court simply presume that the use of the property was lawful until 1949. *See also Shilling v. Baker*, 279 Va. 720, 728, 691 S.E.2d 806, 810 (2010) (the trial court did not err in concluding that a cemetery did not exist on the property before or at the time the urn containing the cremated remains of Shilling’s mother was buried and that the interment of the urn at that location violated the zoning ordinance’s requirement for a special use permit to use the land as a cemetery).

Likewise, circumstantial evidence alone may be insufficient to establish a nonconforming use. In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 69 Va. Cir. 129 (2005), the trial court declined to infer that a second dwelling on the landowners’ property was legally nonconforming because the zoning administrator had issued a partially illegible building permit for interior alterations in 1984. The court found that the BZA’s determination that the landowner had failed to sustain her burden was not plainly wrong.

18-600 The requirements to preserve nonconforming status

Virginia Code § 15.2-2307(C) provides that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued provided that three prerequisites are established, as set forth below:

Elements to Establish a Nonconforming Use
• The then-existing or a more restricted use continues. • The use is not discontinued for more than two years. • Buildings or structures are maintained in their then structural condition.

Virginia Code § 15.2-2307(C) also enables a locality to require that the uses of buildings or structures conform to the current zoning regulations whenever they are enlarged, extended, reconstructed, or structurally altered. In *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005), the Virginia Supreme Court held that the right to continue a nonconforming use did not extend to other areas of a building not used for the nonconforming use unless, at the time the zoning regulations were adopted, the design of the building clearly indicated that the use was intended throughout. The Court concluded that the owners failed to establish they had the right to extend the apartment use on the second floor of their building to the first floor, where they only showed that they intended renovations to the first floor and failed to prove that the first floor was arranged or designed for the apartment use when the regulations were adopted. The Court also confirmed that a locality may establish the way an extension of a use may be permitted, or it may prohibit extension of a use altogether.

An increase in the *land area* of a nonconforming use is generally prohibited. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997); *Board of Supervisors of Chesterfield County v. Trollingwood Partnership*, 248 Va. 112, 445 S.E.2d 151 (1994). Also, Virginia Code § 15.2-2307(C) enables a locality to prohibit a nonconforming building or structure from being moved on the same lot or to any other lot that is not properly zoned to permit the nonconforming use.

Finally, in determining whether a nonconforming use is established, equitable concerns cannot be the basis for a decision by the zoning administrator or the BZA. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006) (concern expressed by BZA about ending use of unlawful garage apartment after 54 years of use).

18-610 The first prerequisite: continuing the existing use or a more restricted use

The first prerequisite to establishing the right to continue a nonconforming use is that “the then existing or a more restricted use continues.” *Virginia Code § 15.2-2307(C)*. This question is resolved by determining whether the character of the use has changed. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 576, 260 S.E.2d 232, 236 (1979).

Whether the character of a nonconforming use has changed depends on several factors. An increase in size or

scope of the use is merely one circumstance relevant to determining whether the character of the use has been changed. *Knowlton, supra*. A zoning ordinance may expressly restrict the way a nonconforming use can be extended throughout an entire building, or expressly prohibit extension of the use. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005). A zoning ordinance also may prohibit the enlargement of a nonconforming structure. *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d 271 (2007) (zoning regulation prohibited nonconforming sign from being structurally altered, enlarged, moved, or replaced unless it was brought into compliance with the zoning ordinance; billboard was enlarged because electronic message board attached to the face of the billboard increased both its weight and mass; the fact that the surface area of the message board did not increase the advertising surface area of the billboard was not the controlling factor). A nonconforming commercial use need not remain static. *Knowlton, supra*. Trivial, insubstantial, or reasonably customary and incidental change may be permitted by the zoning ordinance. Numerous cases from other states hold that these minor changes are allowed for commercial uses only; the principle does not apply to residential uses. Unlawful changes of use can result from increased volume or frequency of use. *See 83 Am. Jur. 2d, Zoning and Planning, p. 669*. The degree of relevance of any change depends in each case upon the quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote. *Knowlton, supra; Wheelabrator Clean Water System, Inc. v. County of King George*, 43 Va. Cir. 370 (1997).

The following cases are examples where the courts found that the changes in the uses were sufficient to change the character of the use and destroy its nonconforming status:

- General cargo to trash hauling: The character of the use changed where a general trucking business engaged in hauling random cargoes using four small trucks parked on unimproved land and repaired and maintained in the shade of a tree, transformed into a specialized commercial enterprise engaged in collecting and disposing trash, using a fleet of 18 large trash compactors whose repair and maintenance required a spacious garage on the site and two gasoline tanks installed underground. *Knowlton, supra*.
- Warehouse and repair to assembly and fabrication: The character of the use changed where the property was used as a warehouse and automobile repair shop before the zoning ordinance was adopted, and was thereafter used to assemble boats, trailers, and related equipment, and still later was used for a metal fabrication operation. *Spotsylvania County Board of Zoning Appeals v. McCalley*, 225 Va. 196, 300 S.E.2d 790 (1983).
- Primary structure to accessory structure: A barn lost its nonconforming status under a regulation that required accessory structures to be in the rear yard of a single-family dwelling. When a new single-family dwelling was established on the property, the barn changed from being a primary structure to an accessory structure, and it was now located in the front sideyard in violation of the regulation. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005). Note that *Aesy* is not a true nonconformities case because no change in the locality's zoning regulations made a lawful structure unlawful; instead, it was the actions of the landowner to create a second primary structure that changed the status of the barn.
- Vehicle repair to paving and sealing: The character of the use changed where the property was used as a vehicle towing and repair business before adoption of the zoning ordinance, and was thereafter used for storing vehicles, equipment, materials, and supplies used in a paving and sealing business. Relying on *Knowlton*, the court rejected the landowners' argument that the vehicle repair activities under the original use allowed the paving and sealing business because there were truck repair activities associated with the prior use of the property; the similar accessory repair activities could not allow a different primary use – the paving and sealing business. *Seekford v. Zoning Appeals Board of the Town of New Market*, 49 Va. Cir. 112 (1999).
- Residence school and dormitory to primary residence and guest house: Assuming a lawful nonconforming use had existed, the character of the use changed where the property was originally used as a “private residence primary school” with a dormitory, and the rented guest house was originally used for classrooms. Even if the rented guest house had served as the dormitory, the character changed because using the guest house for a school was not the same as using the guest house for apartments. *Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (ultimately finding that although residence school and dormitory was originally nonconforming, original owners had obtained a special exception from the county in 1945 which converted the

nonconforming use into a conforming use).

- Auto repair; expansion in scope and intent: Assuming that a lawful nonconforming use had originally existed, the character of a vehicle light service business changed when the original one-car garage was replaced by a two-car garage, and the landowner turned the part-time business into a full-time business. *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1988).
- Carnival equipment storage with occasional repair to commercial garage: The character of the use changed where the nonconforming use had been storing carnival equipment, carnival equipment repair, and occasional repair and maintenance of trucks and trailers that transported carnival equipment, and the use became a commercial truck and motor vehicle repair and a towing facility. *Town of Mount Jackson v. Fawley*, 53 Va. Cir. 49 (2000).
- Infrequent to permanent campground: The character of a campground use changed where the portion of the property on the east side of a creek was infrequently used for camping before adoption of the zoning ordinance and was thereafter changed to a permanent commercial campground. *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995).

A change in the character of the use is not relevant if the nonconformity pertains to something other than the use. For example, in *Lievan v. County of Fairfax Board of Zoning Appeals*, 2000 Va. Cir. LEXIS 395, 2000 WL 33316930 (2000), the trial court concluded that the BZA correctly determined that a dry-cleaning business was not prohibited in the zoning district where the structure had been used as a shoe store when the applicable zoning regulations were adopted. The court rejected the petitioner's (a competing dry cleaner) argument that the change in the use of the property from a shoe store to that of a high-volume cleaners was a change in the character of the use to one that was more intense. The court noted that the change in use was not relevant because the nonconformity at issue concerned the size of the building used, not the use.

The failure to comply with a particular zoning requirement other than those provided in Virginia Code § 15.2-2307 and the locality's nonconformities regulations cannot be the basis for terminating a nonconforming use. *Donovan v. Board of Zoning Appeals of Rockingham County*, 251 Va. 271, 467 S.E.2d 808 (1996) (failure to screen nonconforming automobile graveyard as required by current zoning ordinance could not be basis for terminating nonconforming use). In *Gwinn v. Herring*, 2000 Va. Cir. LEXIS 392, 2000 WL 33316932 (2000), the circuit court held that a nonconforming junkyard did not become an illegal junkyard when it expanded in the absence of a zoning regulation specifically invalidating the use itself for failure to comply with the regulation.

18-620 The second prerequisite: not discontinuing the use for more than two years

The second prerequisite to establishing the right to continue a nonconforming use is that "the use is not discontinued for more than two years." *Virginia Code § 15.2-2307(C)*.

The Virginia Code does not define what it means to *discontinue* a use. The Virginia Supreme Court has applied the definition in *Webster's Third New International Dictionary* 646 (2002): "to break off, give up, terminate, end the operations or existence of, cease to use." *Prince William Board of County Supervisors v. Archie*, 296 Va. 1, 12, 817 S.E.2d 323 (2018) (holding that nonconforming automobile graveyard use was not discontinued).

18-621 Whether intent to abandon is required for the two-year period to run

The case law nationwide varies on the question of whether discontinuing a use requires an intention to abandon. Some courts have said that *discontinue* is synonymous with *abandon* and requires some evidence of intent to abandon. Other courts have said that ordinances terminating a nonconforming use if the use is discontinued for a specified period (e.g., 2 years) create a rebuttable presumption that the landowner intended to abandon the use. Still other courts have held that these regulations require no evidence of intent to abandon the use by the landowner, but instead look to only whether the use existed within the requisite period. See *Hartley v. City of Colorado Springs*, 764 P.2d 1216 (1988) for an exhaustive analysis of this issue.

In Virginia, the General Assembly has not required an intention to abandon in the language it chose in Virginia Code § 15.2-2307(C), thereby allowing localities to define the parameters of what it means to *discontinue* a use for two years. The Virginia Supreme Court has been willing to look at and defer to a locality's nonconformities regulations implementing Virginia Code § 15.2-2307. *See, e.g., Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005); *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987).

Thus, whether discontinuing a use requires an intention to abandon will depend on the language of the locality's zoning regulations. *See Prince William Board of County Supervisors v. Archie*, 296 Va. 1, 12, 817 S.E.2d 323 (2018) ("There is no intent element in the relevant nonconforming use termination ordinance"). Two trial court decisions out of the City of Norfolk appear to require that there be some evidence of an intent to abandon the nonconforming use based on the language in the city's zoning regulations. *Montgomery v. Zoning Appeals Board of the City of Norfolk*, 45 Va. Cir. 126 (1998); *Turock Estate v. Thomas*, 7 Va. Cir. 222 (1984). In *Montgomery*, the BZA determined that a duplex did not lose its nonconforming status even though it had been more than two years since both units had been occupied. The BZA decision was described by the court as follows:

The BZA based its decision on its reading of discontinuance as requiring a look at the totality of the circumstances of use as a duplex, including the intent of the landowner to use the property as a duplex, as well as overt acts in furtherance of that intent, not simply focused on the single fact of whether the property was occupied by one or two tenants during the time frame.

The *Montgomery* court agreed with the decision of the BZA and interpreted *discontinuance* in the Norfolk zoning ordinance to mean that it required an intention to abandon, noting the prevailing view described above from other states, citing several decisions from other state courts, and referring to the definition of *discontinuance* in a law dictionary which defined the word to be "synonymous with abandonment." One key factor in *Montgomery* is that Norfolk's zoning ordinance included the following, which may or may not have been relied upon by the Norfolk BZA in reaching its decision: "The words 'used or occupied' include the words '*intended*, designed or arranged to be used or occupied."

A trial court from the City of Chesapeake in *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) has followed *Montgomery*, holding that a nonconforming towing and recovery lot did not lose its nonconforming status where the owner attempted to lease the property throughout the period during which the towing lot use was discontinued and obtained a tenant within the two-year period whose actual use was prevented by the zoning dispute at issue in the case. The court said that "discontinuance or abandonment as used in zoning laws is construed to contain an element of intent, plus overt acts indicative of abandonment."

A locality should address whether an intention to abandon is part of the determination as to whether a use has been discontinued for two or more years in its zoning regulations.

18-622 The starting and ending dates for the two-year period

The starting date for the running of the two-year period may be easy to determine in some cases, such as when a nonconforming grocery store use closes after the building is damaged by a fire. For other nonconforming commercial uses, the only evidence as to when the use discontinued may be from evidence of the date a business license expired, a business tax went unpaid, or a lease agreement expired. For residential uses, the two-year period may begin when the structure is no longer occupied. Localities may need to obtain evidence from neighbors as well as utilities who may be able to determine if and when service was terminated.

The other important issue is whether a use has restarted within the two-year period. In *Board of Zoning Appeals of the City of Norfolk v. Kabhal*, 255 Va. 476, 499 S.E.2d 519 (1998), the owners' grocery store was closed after it was damaged by a fire. Within the two-year period after the store was closed, the owners secured financing to repair the property, paid a meals tax bond, obtained business licenses, obtained building permits and associated sub-permits, and obtained other required inspections. In other words, the owners in *Kabhal* successfully completed virtually all the steps necessary to re-open their grocery store within the two-year period except to re-open its doors for business. The Virginia Supreme Court found that the nonconforming use had restarted within the two-year period. *Kabhal* was

followed in *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015), discussed in section 18-621. However, merely obtaining a business license is likely insufficient to continue a nonconforming use. *Babazadeh v. Fairfax County Board of Zoning Appeals*, 1997 WL 107641 (Va. Cir. Ct. 1997).

The rule emerging from *Kabhal* and *Babazadeh* is that a landowner must obtain the requisite governmental approvals and successfully engage in a series of activities toward restarting the use within the two-year period to preserve the use's nonconforming status. A landowner should not be able to preserve the nonconforming status of a use or structure under *Kabhal* simply by engaging in various activities that fail to re-start the use within the two-year period. For example, obtaining a building permit but allowing it to expire, leasing the property but never re-starting the use, failing to pursue the full range of permits and approvals necessary to re-start the use, are all evidence of a failure to continue the use within the two-year period. In other words, the landowner must demonstrate that the necessary steps to re-start the use, or virtually all of them, have been successfully completed.

18-623 Abandoned signs

A locality may order the removal of a nonconforming sign that has been abandoned after attempting to provide notice to the owner. A sign is considered abandoned if the business for which the sign was erected has not been in operation for a period of at least two years. The locality may remove the sign and charge the costs to the owner if the owner refuses to remove the sign after reasonable attempts by the locality to notify the owner. *Virginia Code* § 15.2-2307(G).

18-630 The third prerequisite: maintaining structures and buildings in their then structural condition

The third prerequisite to establish the right to continue a nonconforming use is that “the buildings or structures [be] maintained in their then structural condition.” *Virginia Code* § 15.2-2307(C). As noted above, *Virginia Code* § 15.2-2307(C) enables a locality to require that the uses of buildings or structures conform to the current zoning regulations whenever the square footage of the building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (*Virginia Code* § 36-97 *et seq.*). In addition, a zoning ordinance may provide that “no nonconforming use may be expanded, or that no nonconforming building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such nonconforming use.” *Virginia Code* § 15.2-2307(C).

The requirement that “the buildings or structures [be] maintained in their then structural condition” means that “[w]hen a property owner wishes to make certain changes to, or to move, a building or structure which supports a nonconforming use or is itself nonconforming, the proposed changes are subject to the regulations of the zoning ordinance.” *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 247, 482 S.E.2d 812, 815 (1997). A locality may regulate or prohibit new construction related to a nonconforming use. *Gardner, supra* (holding that city could prohibit a cemetery from constructing new buildings or structures to support a nonconforming use).

In *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d 271 (2007), the Virginia Supreme Court did not consider the trial court's holding that the addition of an electronic message sign to a billboard *structurally altered* the billboard because it had already determined that the addition of the electronic message sign had *enlarged* the billboard in violation of the zoning ordinance. *See section 18-610*.

A change to the structural condition of a building or structure associated with a nonconforming use does not destroy the nonconforming status if the zoning ordinance allows the change. In *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987), a nonconforming hotel was enlarged and the Virginia Supreme Court held that the change in the hotel's structural condition did not terminate its nonconforming status. The change itself did not increase the nonconformity, and the city's zoning regulations allowed “additions or alterations that themselves conform to zoning requirements, as such changes cannot also increase the nonconformity.”

18-700 Restrictions on local zoning authority pertaining to certain nonconforming uses and structures: business licenses, building permits, property taxes, and other permits

If a use was nonconforming and a business license was issued by the locality for the nonconforming use, the holder of the business license operated continuously in the same location for at least 15 years, and paid all local taxes related to the nonconforming use, the locality must allow the business license holder to apply for a rezoning or a special use permit without charge by the locality or any agency affiliated with the locality for fees associated with the filing. *Virginia Code § 15.2-2307(C)*.

Virginia Code § 15.2-2307(D) prohibits localities from declaring that nonconforming structures are illegal and subject to removal solely because of the nonconformity if: (1) the locality “has issued a building permit, the building or structure was thereafter constructed in accordance with the building permit, and upon completion of construction, the local government issued a certificate of occupancy or a use permit therefor”; or (2) “the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years.” This provision is *restrictive legislation*, as compared to *enabling legislation*, and operates regardless of whether the locality has adopted an ordinance implementing the statute. *Lamar Co., LLC v. City of Richmond*, 287 Va. 348, 352, 756 S.E.2d 444, 446-447 (2014).

In *Board of Supervisors of Fairfax County v. Cohn*, 296 Va. 465, 821 S.E.2d 693 (2018), the Cohns’ parcel had three dwelling units on it (a main house, a converted garage, and a “garden house”), where the applicable R-1 zoning district allowed only a single dwelling unit. The two illegal structures were constructed before the Cohns acquired the parcel in 1998. In 2016, the zoning administrator issued a zoning violation because of the excessive number of dwelling units on the parcel. The Cohns appealed, claiming that the converted garage and the garden house had vested rights as dwelling units under Virginia Code § 15.2-2307(D)(ii) because they had been paying real estate taxes on them for at least the 15 previous years. The BZA concluded that Virginia Code § 15.2-2307(D)(ii) did not protect the unlawful use of the structures as dwelling units.

The trial court concluded that Virginia Code § 15.2-2307(D)(ii) created vested rights for both the illegal structures *and their uses*. The Virginia Supreme Court reversed, holding that only the structures themselves were protected by Virginia Code § 15.2-2307(D)(ii), and that Virginia Code § 15.2-2307(D)(ii) “does not provide protection for the uses of those structures.” *Cohn*, 296 Va. at 477 (the language of subsection (D) “does not mention the vesting of the right to use a building or structure in a particular way,” unlike the language used by the General Assembly in subsection (C), which refers not only to “buildings” and “structures,” but also “the uses thereof”).

Structures eligible for the protections of Virginia Code § 15.2-2307(D) are nonetheless nonconforming, and a locality may require in its ordinance that such a structure “be brought in compliance with the Uniform Statewide Building Code, provided that to do so shall not affect the nonconforming status of such building or structure.” Virginia Code § 15.2-2307(D) also provides that if a locality “has issued a permit, other than a building permit, that authorized construction of an improvement to real property and the improvement was thereafter constructed in accordance with such permit, the ordinance may provide that the improvements are nonconforming, but not illegal.”

18-800 Reconstruction or restoration of involuntarily damaged or destroyed nonconforming building

A locality’s zoning ordinance must permit the owner of any residential or commercial building damaged or destroyed by a natural disaster or other act of God to repair, rebuild, or replace the building to eliminate or reduce the nonconforming features to the extent possible, without the need to obtain a variance. *Virginia Code § 15.2-2307(E)*. An “act of God” includes a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, or certain fires. Virginia Code § 15.2-2307(E) also provides that a fire caused by an individual other than the owner does not adversely affect the rights vested in the affected property.

If a building is damaged greater than 50 percent (the statute does not expressly state whether it is referring to 50 percent of the physical structure or 50 percent of its value) and cannot be repaired, rebuilt, or replaced except to restore it to its original nonconforming condition, it may be restored to that condition. *Virginia Code § 15.2-2307(E)*.

If the building cannot be repaired, rebuilt, or replaced except to restore it “to its original nonconforming condition,” the landowner has the right to do so. *Virginia Code § 15.2-2307(E)*.

Chapter 21

Design Review: Selected Issues for an Architectural Review Board

21-100 Introduction

This chapter analyzes selected issues considered by architectural review boards (“ARB”) established under Virginia Code § 15.2-2306. The issues addressed in this chapter include design guidelines and their proper application, the authority to regulate aesthetics, dealing with trademarks and service marks, and the proper application of design guidelines to religious structures.

21-200 An ARB’s authority to make decisions based solely on aesthetics under Virginia Code § 15.2-2306

A locality has a substantial governmental interest in preserving its aesthetic character. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent express enabling authority such as that found in Virginia Code § 15.2-2306, a locality cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified *solely* on aesthetic considerations. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

One trial court has described Virginia Code § 15.2-2306 as “a broad grant of legislative authority for localities to enact zoning provisions tailored to preserving the unique character of their historic areas.” *Owens v. City Council of the City of Norfolk*, 78 Va. Cir. 436, 445 (2009) (upholding validity of district regulation allowing buildings taller than 35 feet with “authorized variations” determined to be architecturally compatible with the building’s surroundings).

21-210 The general rule is that a locality may not base a zoning decision solely on aesthetics

The ordinance considered by the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics, and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to localities to impose restrictions on architectural design. *Rowe* is still the controlling law in Virginia on the question of whether a locality may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, after *Rowe* the General Assembly enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In holding the James City County ordinance to be invalid, the *Rowe* court relied on its earlier decision in *Kenyon Peck v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969). In *Kenyon Peck*, the challenged portion of the County of Arlington’s zoning ordinance prohibited advertising by means of outdoor moving signs or devices. The plaintiff claimed that the basis for the prohibition was purely aesthetic; the county contended that the prohibition was based on, among other things, traffic safety. The Court stated:

There is a generally accepted rule that a State, municipality or county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations. However, aesthetic considerations are not wholly without weight and need not be disregarded in adopting legislation to promote the general welfare. [citations omitted]

Although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of police power are present.

Kenyon Peck, 210 Va. at 64, 168 S.E.2d at 120.

21-220 A locality's authority to regulate aesthetics in a historic district under Virginia Code § 15.2-2306

After *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), the General Assembly authorized localities to establish architectural review boards. Virginia Code § 15.2-2306 provides that a locality's historic district ordinance:

... may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein.

The scope of the authority of an ARB to consider architectural compatibility must be delineated in the locality's zoning regulations and guidelines.

21-230 The distinction between aesthetics and visibility: considered in the context of wireless facilities

In the past, the providers of wireless services in Virginia sometimes argued that evidence pertaining to the visibility of a proposed facility may not be considered because visibility is an aesthetic consideration not allowed by Virginia law. This assertion is based on a misunderstanding of *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), discussed in section 21-210. As noted above, the Virginia Supreme Court held in *Rowe* that Virginia localities were not enabled to impose *aesthetic* requirements related to the elevations of façades, materials, colors, texture, light reflecting characteristics and other special features intended for buildings within a particular zoning district.

The *visibility* of a wireless facility is primarily based on its size, height, location, or bulk, rather than the range of aesthetic considerations such as color and other features considered in *Rowe*. Virginia law expressly enables a locality to regulate the size, height, location, and bulk of structures. *Virginia Code § 15.2-2280(2)*. Moreover, when a locality is considering the visibility of a proposed facility, it is considering whether the facility, as proposed, will adversely affect the neighboring properties, the character of the district, and the public in general. This determination is quite different than the regulations that were considered in *Rowe*.

21-300 The requirements to establish or expand a historic district pursuant to Virginia Code § 15.2-2306

Historic districts are established and expanded by an ordinance adopted by the locality's governing body. *Virginia Code § 15.2-2306(A)(1)*. Before adopting an ordinance, the locality must:

- Identify and inventory all landmarks, buildings, or structures in the areas being considered for inclusion within the proposed district
- Provide for public input from the community and affected property owners in accordance with Virginia Code § 15.2-2204.
- Establish written criteria to be used to determine which properties should be included within a local historic district.

- Review the inventory and the criteria to determine which properties in the areas being considered for inclusion within the proposed district meet the criteria to be included in a local historic district.

Virginia Code § 15.2-2306(C).

The locality may include only the geographical areas in a local historic district where a majority of the properties meet the criteria established by the locality in accordance with Virginia Code § 15.2-2306. *Virginia Code § 15.2-2306(C)*. Local historic district boundaries may be adjusted to exclude properties along the perimeter that do not meet the criteria. *Virginia Code § 15.2-2306(C)*.

Other than requiring that they be established by ordinance, none of the foregoing applies to districts composed of parcels of land contiguous to arterial streets or highways found by the governing body to be significant routes of tourist access to the locality or to designated historic landmarks, buildings, structures, or districts therein, or in a contiguous locality. *Virginia Code § 15.2-2306(C)*.

21-400 Design guidelines and their proper application

Virginia Code § 15.2-2306 enables localities to determine whether a proposed structure is architecturally compatible with the historic landmarks, buildings, or structures within a historic district. *See Worley v. Town of Washington*, 65 Va. Cir. 14 (2004) (designation of town as historic district by the Virginia Historic Landmarks Commission is not the equivalent of designating the town as an historic landmark under Virginia Code § 15.2-2306).

These determinations are usually made by an ARB by applying appropriate design *guidelines* adopted by the governing body. *For a discussion of the legal status of guidelines, see Appendix E.*

21-410 Reasonable specificity and objectivity required in design guidelines

There is little Virginia case law considering Virginia Code § 15.2-2306, and it appears that, to date, only one court has been asked to decide whether a locality's design regulations (not guidelines) were void for vagueness. In *Covel v. Town of Vienna*, 78 Va. Cir. 190 (2009), *affirmed* at 280 Va. 151, 694 S.E.2d 609 (2010), the trial court considered whether the following aspects of a building, accessory building, structure, fence, or sign, contained in the town's historic district regulations, were unconstitutionally vague:

1. Exterior architectural features, including all signs, which are subject to public view at any time of the year from a public street, way, or place.
2. General design and arrangement.
3. Texture and material.
4. The relation to similar features of buildings, accessory buildings, structures, fences or signs in the immediate surroundings.
5. Harmony or incongruity with the old and historic aspect of the surroundings.
6. The extent to which historic places and areas of historic interest in the District will be preserved or protected.
7. Special public value because of architectural and other features which relate to the cultural and artistic heritage of the Town of Vienna.

The trial court held that the town's criteria were not unconstitutionally vague. Because the appellants failed to preserve their facial challenge to the town's regulations, the issue was not before the Virginia Supreme Court when it affirmed the trial court's decision.

In a limited sampling of cases from other jurisdictions, the courts have taken various perspectives as to the specificity required for a design guideline to be valid. For example, in *Shoal Creek Land & Cattle, LLC v. City of Arab*, 250 So.3d 602 (2017) the court held that the city's historic preservation commission improperly denied a certificate of appropriateness where the sole ground for the denial was the commission's opinion that the proposed window design conflicted with the "general character" of the historic district. Following prior case law, the court said that the "general character" criterion was too vague a standard. The court added In *Diller & Fisher Co. v. Architectural Review Board*, 246 N.J. Super. 362, 587 A.2d 674 (1990), the court found the following guideline language to be too vague:

Signs that *demand* public attention rather than *invite* attention should be discouraged. Color should be selected to *harmonize* with the overall building color scheme to create a *mood* and reinforce symbolically the sign's primary communication message. . . . Care must be taken not to introduce *too many* colors into a sign. A restricted use of color will maintain a communication function of the sign and create a *visually pleasing* element as an integral part of the *texture* of the street. [Emphasis supplied]

Likewise, in *City of Mobile v. Weinacker*, 720 So. 2d 953 (1998), the court rejected design guidelines that used undefined terminology such as *modern materials* and *modern architectural design* and statements such as:

[T]he use of neon will be considered in cases where the architecture of the building is compatible with neon.

. . .

[T]he use of plastic, vinyl or similar materials is discouraged and will be approved only under the circumstances where the architecture of the building where the sign is to be located or if surrounding buildings are of a modern architectural design and the building incorporates modern materials.

The court held that these guidelines failed to provide "ascertainable criteria, requirements, or guidelines for approval, [and therefore subjects] applicants to the unbridled discretion of the Review Board." *Weinacker*, 720 So.2d at 955.

On the other hand, the Alabama Supreme Court in *Ex parte City of Orange Beach Board of Adjustment*, 833 So. 2d 51, 55 (2001) distinguished *Weinacker* and held that the phrase "structurally unsound," although it allowed for some judgment, was not ambiguous in the manner and to the degree that the terms "modern materials" and "modern architectural design" in *Weinacker* were.

In *A-S-P Associates v. Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), the court held that the ordinance's standard of *incongruity* was a permissible general, yet meaningful, contextual standard that limited the discretion of the city's historic district commission. The court said that a *contextual standard* was one that derived its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In the city's case, the standard of "incongruity" had to derive its meaning, if any, from the total physical environment of the historic district, *i.e.*, the conditions and characteristics of the historic district's physical environment had to be sufficiently distinctive and identifiable to provide reasonable guidance to the historic district commission in applying the standard. The court added that to "achieve the ultimate purposes of historic district preservation, it is a practical necessity that a substantial degree of discretionary authority guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances." *A-S-P Associates*, 298 N.C. at 223, 258 S.E.2d at 454; see also, *Nadelson v. Township of Millburn*, 297 N.J. Super. 549, 560, 688 A.2d 672, 677 (1996) ("the heterogeneity of architectural style for non-designated properties in the Short Hills Park Historic District is not such as to render the standard of 'incongruity' meaningless. The predominant architectural style for non-designated properties in the district is 'Colonial' or 'Colonial Revival,' the characteristics of which are readily identifiable").

In *Conner v. City of Seattle*, 153 Wn. App. 673, 687-688, 223 P.3d 1201, 1208-1209 (2009), the court found the city's regulations to be constitutionally sound. The regulations required the decision-makers to consider "[t]he extent

to which the proposed alteration or significant change would adversely affect the specific features or characteristics specified in the . . . designating ordinance,” that “[n]ew additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property,” and that “new work shall be differentiated from the old and shall be *compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment*.” The court said that these were general standards, which gained specificity from application to a particular landmark and a particular proposal, adding that the fact that an ordinance must be applied in context to a given proposal did not render it unconstitutionally vague.

In *U-Haul v. City of St. Louis*, 855 S.W.2d 424, 427 (Mo. App. 1993), the court held that an ordinance entrusting the city’s heritage commission to enforce exterior appearance standards on a case-by-case basis was not unconstitutionally vague where it focused on specific areas, including “architectural development of the community, unattractiveness, compatibility with the neighborhood, and absence of detriment to the neighborhood” because “[i]t would be practically impossible and socially undesirable for the city to list all minimum exterior standards.”

21-420 The proper application of design guidelines

There is limited Virginia case law examining whether an ARB has properly applied its guidelines and the cases discussed below only indirectly considered whether the guidelines were properly applied.

The leading case in Virginia is *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004). Norton, a landowner in a historic district, was cited for replacing the all-wood front door on his house, constructed in 1884, with a door containing glass panes without a certificate of appropriateness. Both the city’s commission of architectural review and the city council denied Norton’s application for a certificate of appropriateness for the glass-paned door. The commission instructed Norton to restore the front door to its “original condition.” In affirming the commission, the city council noted that the commission “feels the door was wooden when it was built,” but stated no factual basis for determining the appearance or composition of the original door or whether it was a solid wooden door when the house was built. At trial, there was no evidence that the front door was a wooden door before 1992 and there was no evidence to verify how the city determined the original nature of the door. In fact, the city admitted that it did not know what type of door was on the house when it was constructed, and it could not explain why it instructed Norton to replace the front door, particularly since there were other glass-paned doors visible to the public not only on Norton’s house, but on other houses in the neighborhood. Despite the absence of evidence, the trial court affirmed the decision of the city council, concluding that the issue was fairly debatable. The Virginia Supreme Court reversed, finding that Norton met his burden to show probative evidence of unreasonableness in the city council’s action, and that the city failed to meet its burden to show that its decision was reasonable.

In *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E. 409 (2020), the Virginia Supreme Court affirmed the trial court’s dismissal of the landowner’s case on the pleadings where the landowner challenged a condition attached to a certificate of appropriateness granted to replace a fence. The city council had determined the wicket and spear fence design was architecturally and historically appropriate, but it imposed a condition limiting the double gate to six feet in width, rather than the eight-foot width requested by the landowner. The design guidelines themselves are not a focal point of the Court’s opinion. In affirming the trial court’s dismissal of the case, the Court said that the city council “had all the essential facts before it, considered all opinions and arguments presented by interested parties, and made its decision within its lawful authority.” *Byrne*, 298 Va. at 702, 842 S.E.2d 413.

In *Rogers v. Loudoun County Board of Supervisors*, 38 Va. Cir. 235 (1995), the neighbors of landowners who obtained a certificate of appropriateness for a house and barn challenged the board of supervisors’ approval of the certificate, claiming that the house and barn were not appropriately concealed from their manor house under the design guidelines. The court upheld the board’s decision, noting that the landowners had moved their proposed house 200 yards from its originally proposed location and that the plaintiff’s attorney had conceded that the house was “real close” to being properly located but “not yet there.” The court concluded that if the location of the house and barn was “real close” to being properly located as the plaintiffs conceded, the board’s decision could not be arbitrary or capricious.

21-500 The applicability of design guidelines to trademarks and service marks

Trademarks and *service marks* are two types of registered *marks* that may obtain protection under federal trademark laws. A *trademark* includes any word, name, symbol, or device, or any combination thereof used, or intended to be used, to identify and distinguish goods, including a unique product, from those manufactured or sold by others. 15 U.S.C. § 1127. A *service mark* is similarly defined, except that service marks identify and distinguish services, rather than goods.

21-510 In the implementation of local zoning regulations and guidelines, an ARB may require that a registered logo or symbol not be displayed on a sign or that it be changed as a condition of granting a certificate of appropriateness

Federal law does not prohibit an ARB from applying its design guidelines to an exterior sign, even if that sign uses a registered mark.

15 U.S.C. § 1121(b), which is part of the Lanham Act, prohibits a locality from requiring the alteration of a registered mark. However, this prohibition applies only to regulations that require alteration of the registered mark itself, not the use of the mark in exterior features. *Lisa's Party City Inc. v. Town of Henrietta*, 185 F.3d 12 (2^d Cir. 1999); *see also, Gold Coast Publications Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) (ordinance regulating placement and color of newsracks did not violate 15 U.S.C. § 1121(b)); *Payless Shoesource Inc. v. Town of Penfield*, 934 F. Supp. 540 (W.D.N.Y. 1996) (sign ordinance requiring exterior sign to be a uniform color did not violate 15 U.S.C. § 1121(b)). In other words, 15 U.S.C. § 1121(b) only prohibits a locality from requiring that a business alter its registered mark in every display of that mark within the locality, such as on letterhead, leaflets, magazines, newspapers, television and Internet advertising, and point-of-sale displays inside the business. *Lisa's Party City, supra*. The Lanham Act does not prohibit the application of local zoning regulations and guidelines that control the design elements of an exterior sign.

In *Lisa's Party City*, the town's sign regulations required that the design and style of signs for individual stores within a shopping plaza be "coordinated so as to create an aesthetic uniformity within the plaza." The owner of the plaza at issue in *Lisa's Party City* had selected the color red for all signs within the plaza. Lisa's Party City sought a variance so that it could erect a multi-colored sign that was consistent with its trademark. When the variance was denied, Lisa's Party City sued, contending that the town's requirement for uniformity in sign color compelled the alteration of its trademark in violation of 15 U.S.C. § 1121(b). The court of appeals rejected this claim, holding that:

[L]ocal uniform aesthetic and historic regulations simply limit color typefaces and decorative elements to certain prescribed styles. These regulations have no effect on the businesses' trademark. They limit only the choice of exterior sign at a particular location. As such, though entirely disallowing the use of a registered trademark in carefully delimited instances, these regulations do not require "alteration" at all.

Lisa's Party City, 185 F.3d at 15.

The legislative history of 15 U.S.C. § 1121(b) supports this conclusion. The House Report for H.R. 5154, the bill that became 15 U.S.C. § 1121(b), states:

During the course of Committee debate Mr. Frank raised the issue of whether the bill would in any way restrict the zoning or historic site protection laws or regulations of states. On the advice of counsel, the Committee concludes that the bill in no way affects the powers of state and local governments in areas of concern raised by the gentleman from Massachusetts.

H.R. Rep. No. 97-778, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 2621, 2622. In addition, in response to Representative Frank's stated concerns, the Commissioner of Patents and Trademarks, Gerald J. Mossinghoff, responded that "it will be clear that [an otherwise uniform aesthetic or historic zoning regulation] would not be adversely affected by the legislation." *H.R. Rep. No. 97-778, at 10 (1982)*. One federal appeals court has ruled contrary to *Lisa's Party City*, holding that requiring a sign displaying a trademarked logo to comply with an approved

color scheme in a shopping center violated 15 U.S.C. § 1121(b). *Blockbuster Videos Inc. v. City of Tempe*, 141 F.3d 1295 (9th Cir. 1998). The *Blockbuster* court also held, however, that the city could prohibit the trademarked sign altogether.

In summary, zoning regulations and guidelines merely control certain design elements to ensure that a sign or structure is appropriate for the district.

21-520 Colors may be registered marks or trade dress, and they may be subject to local regulations and guidelines

If a color meets the ordinary trademark requirements, there is no special rule preventing it from serving as a trademark. *Qualitex Company v. Jacobson Products Company Inc.*, 514 U.S. 159, 115 S. Ct. 1300 (1995). Therefore, if a color, or combination of colors, used in a particular manner is non-functional, inherently distinctive, and the imitation of that color or combination of colors would cause confusion as to the source of the goods, it may qualify as a trademark (or trade dress). *Two Pesos Inc. v. Taco Cabana Inc.*, 505 U.S. 763, 112 S. Ct. 2753 (1992).

Nevertheless, an ARB may require that proposed colors be changed if it determines the change to be necessary to issue a certificate of appropriateness.

21-600 Considering the architectural design of religious buildings and properties

This section examines the relationship between the architectural review of religious buildings and properties and the First Amendment's Establishment and Free Exercise Clauses, and the Religious Land Use and Institutionalized Persons Act of 2000. The reader should review section 6-500 for a summary of the First Amendment's Establishment and Free Exercise Clauses, and Chapter 34 for a general discussion of the Religious Land Use and Institutionalized Persons Act of 2000.

One commentator has stated that “[m]ajor religious traditions have been keenly aware of the symbiotic interaction between architecture and theology, of architecture’s connection with doctrinal and liturgical reform, and of the role architecture plays in sustaining and revitalizing faith.” Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Villanova Law Review 401 (1991). The relationship between architecture and religion was further explained by the commentator as follows:

[E]cclesiastical architecture is religious expression, its semiotic properties reflecting and influencing choices made by religious communities regarding theological principles, liturgical practices, faith renewal, doctrinal developments, missional goals and ecclesial identity. . . Houses of worship . . . express, among other things, the religious community’s purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of culture.

Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, supra. The commentator then provides the following caution to localities:

By determining which religious beliefs are worthy of architectural expression, the state compels affirmation of particular religious beliefs and ecclesial self-understanding and denies affirmation to others. . . . The state becomes the reviewer and arbiter of internal design decisions, arrogates to itself the role of religious community, and places itself in a position to direct the long term development of ecclesiastical architecture.

Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, supra.

Of course, First Amendment jurisprudence does not require that localities completely close their eyes to matters of architectural design where religious structures are involved – it is permissible to distinguish the secular from the religious. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305, 105 S. Ct. 1953, 1963-1964 (1985) (“The Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations . . .”). The Free Exercise Clause asks that the individual demonstrate

that beliefs professed are “sincerely held” and in the individual’s “own scheme of things, religious.” *Ford v. McGinnis*, 352 F.3d 582 (2^d Cir. 2003). Thus, on matters of architectural design, it is reasonable for the locality to ask whether a particular feature is related to a religious belief. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833, 109 S. Ct. 1514, 1517 (1989) (“States are clearly entitled to assure themselves that there is ample predicate for invoking the free exercise clause”).

As explained in more detail in Chapter 34, the neutral application of generally applicable and legitimate land use regulations will usually not be found to impose a substantial burden on religious exercise. In the architectural review context, therefore, the removal of religious artifacts such as crosses and stained glass windows depicting scenes in the life of Jesus Christ, a process known as deconsecration, is religious exercise. *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78 (1st Cir. 2013). However, requiring a church to file an application for a certificate of appropriateness before demolishing the church did not impose a substantial burden on religious exercise, despite allegations of delay, uncertainty and expense. *Roman Catholic Bishop, supra*. In *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009), the court concluded that a city’s historic preservation ordinance did not impose a substantial burden on religious exercise where the city’s landmark designation on an apartment house owned by a “substantial religious organization” prevented it from demolishing the building, which was located where the organization wanted to establish a family life center. *World Outreach Conference Center, supra*. The court said that the building remained habitable, could be sold to finance the construction of its family-life center elsewhere, and there were alternative sites on the organization’s property to locate the family life center. *World Outreach Conference Center, supra*.

21-610 Determining whether a feature is religious exercise

Determining whether the exterior features of a religious property are the result of sincerely held religious beliefs can be “a difficult and delicate task.” *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430 (1981). An ARB must decide whether the beliefs held by the applicant are sincere and whether they are, in the scheme of things, religious in character. *Ford v. McGinnis*, 352 F.3d 582 (2^d Cir. 2003). To that end, the ARB may ask for an explanation of the religious basis of the design features if their significance is not readily apparent. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 109 S. Ct. 1514 (1989).

If the religious institution states that a feature is religious in character, the statement must be given great weight. *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850 (1965). An ARB cannot inquire into the truth or falsity of the belief on which the statement is based. *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882 (1944). Also, the ARB may not determine, or base its decision on, whether including a particular feature is necessary for a particular religion. *Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 150, 747 N.E.2d 131, 138 (2001) (trial court impermissibly concluded that a steeple was not a necessary element of the Mormon religion; “[a] rose window at Notre Dame Cathedral, a balcony at St. Peter’s Basilica, are judges to decide whether these architectural elements are ‘necessary’ to the faith served by those buildings?”).

In conducting its review, an ARB is advised to heed the following passage from *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wash.2d 238, 250, 916 P.2d 374, 380 fn. 6 (1996): “While preserving aesthetic and historic structures may be of value to the [locality], ‘the possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.’”

If the feature is not tied to a sincerely held belief that is religious in character, then the religious institution must comply with all requirements of the applicable land use regulations, and there are no further First Amendment or RLUIPA considerations. If the feature is tied to a sincerely held belief that is religious in character, then the ARB must determine whether compliance with the applicable regulations imposes a substantial burden on free exercise. Generally, the outright disapproval of a religiously-connected feature would impose a substantial burden on religious exercise. *See Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310 (1986) (implicitly recognizing burden caused by prohibition on the wearing of a yarmulke by Jewish military officer).

Imposing a substantial burden on religious exercise is permitted only if there is a compelling governmental interest to do so. *See Chapter 34 for a discussion of the meaning of substantially burdening religious exercise*. However, neither

aesthetic concerns nor historic preservation under local regulatory schemes have been found to be a compelling governmental interest. See *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (“a municipality’s asserted interests in . . . aesthetics, while significant, have never been held to be compelling”); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001) (flag case; city has *substantial* governmental interest in preserving its aesthetic character). As some courts have said, a locality’s “interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of [the church’s] right to freely exercise religion.” *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 223, 840 P.2d 174, 185 (1992); *Munns v. Martin*, 131 Wash.2d 192, 209, 930 P.2d 318, 326 (1997) (quoting *First Covenant*); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D.Md. 1996) (historic preservation is not a compelling governmental interest).

21-620 If a feature is related to a religious exercise, it should be exempt from ARB review because its change, modification or disapproval likely would be found to impose a substantial burden on a religious exercise

To understand the principle of *substantial burden* as it pertains to architectural review, bear in mind that *substantiality* must be measured by the impact of the land use regulation on religious exercise, not by the impact of the regulation on the particular feature in its relation to the development as a whole. This distinction is critical. For example, the denial of a certificate of appropriateness because of the existence of a small window in a front door – a window that is significant to the religion – may be a substantial burden on religious exercise, even though, from a purely architectural standpoint, the window is a minor feature when compared to the structure as a whole.

The religious importance of some features on a religious structure is self-evident, such as stained glass, crosses and steeples on churches, and minarets on mosques. Some features likely have no relation to a religious belief, such as the type of rain gutters, the materials used for a structure’s exterior, or landscaping. Other features or elements may or may not be related to a religious belief, such as the color of the structure or its doors, the shape or orientation of a building, or the desire to construct an addition to an existing structure. The shape of a building (square, round, rectangular, a basilica, a cross) may be inextricably connected to liturgical experience and ecclesial identity. A building addition may be compelled as the result of a sincerely held religious belief because religious doctrine requires accommodating all people who wish to worship in a single structure.

Cases pertaining to the architectural design of proposed religious structures are limited. Most of the case law in this area pertains to historic preservation regulations that either prohibit the demolition of religious structures or require review and approval by the locality before exterior features of a designated religious structure are altered or demolished. Some of these cases have upheld the locality’s denial of the demolition permit, even though the religious institution had outgrown its existing facilities and would face financial hardship by being required to find another site to accommodate its activities. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D.Mich. 2004) (under RLUIPA); *Rector, Wardens and Members of Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2^d Cir. 1990) (pre-RLUIPA; pertaining to accessory building, not place of worship).

Other courts have found that these types of regulations impose a substantial burden on religious exercise. *Village of West Dundee v. First United Methodist Church of West Dundee*, 2017 IL App (2d) 150278, 74 N.E.3d 144 (2017) (village’s denial of demolition permit substantially burdened religious exercise where the church alleged that the significant cost to repair the building would potentially ruin the church); *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wash.2d 238, 916 P.2d 374 (1996) (holding that an ordinance prohibiting any alterations or significant changes to a church without city approval burdened the free exercise of religion because it prevented the church from selling its property and using the proceeds to advance its religious mission); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174 (1992) (holding that an ordinance requiring a church to get a certificate of approval before making certain alterations to the church’s exterior violated the Free Exercise Clause because it required the church to seek approval from secular authorities before altering the exterior of the building and by cutting in half the value of the church’s property); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D.Md. 1996) (city’s denial of certificate of appropriateness to allow demolition of old monastery violated the Free Exercise Clause because the church had a sincere religious belief that the monastery had to be demolished and replaced as part of the church’s mission to its members).

Controlling themes are hard to identify in these cases. The two Washington cases, *First United Methodist* and *First Covenant*, might be distinguishable from *St. Bartholomew's* because the Washington Supreme Court relied not only on the United States Constitution, but also the Washington Constitution, which admittedly granted more expansive religious protections than those under the United States Constitution. The buildings at issue in *First United Methodist* and *First Covenant* were the churches themselves, whereas the building at issue in *St. Bartholomew's* was an accessory structure. However, *Episcopal Student Foundation* involved a worship facility and the court found no substantial burden. *Keeler* has been criticized by one commentator as a misapplication of controlling Supreme Court precedent. Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and the Exceptions from Smith*, 75 N.Y.U. L. Rev. 1045 (2000). The facts in each case are critical.

21-630 If the size of a building is related to religious exercise, it may be exempt from ARB review because its change, modification, or disapproval would be found to impose a substantial burden on a religious exercise

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D.Cal. 2002) (denying redevelopment agency's motion to dismiss; granting church's request for preliminary injunction), the church sought to relocate to the city because its existing facility seated only 700 members, forcing it to hold multiple services for its congregation. Its senior pastor stated that the church's beliefs required that its congregation make a lasting impact in the communities served by the church by "ministering to the spiritual and physical needs of the members of these communities." The pastor concluded that its members were "compelled to continually seek growth in the size of [their] congregation and [their] ministries."

The city denied the church's application for a permit that would allow it to establish a 4,700 seat worship facility and accessory buildings. The court determined that the church was "unable to practice its religious beliefs in its current location. Simply put, its Los Alamitos facility cannot handle the congregation's large and growing membership, and its small quarters prevent Cottonwood from meeting as a single body, as its beliefs counsel." *Cottonwood Christian Center*, 218 F. Supp. 2d at 1226. The court then found that the denial of the permit substantially burdened religious exercise, stating that the church had "demonstrated that meeting in one location at one time, as well as providing numerous ministries, [were] central to its faith. Thus, beyond the fundamental need to have a church, Cottonwood has shown a religious need to have a large and multi-faceted church." *Cottonwood Christian Center*, 218 F. Supp. 2d at 1227.

Cottonwood may be unique to its facts since the church wanted to construct a new church facility on property the city wanted to condemn in favor of building a retail shopping center, and the church was able to establish that the *size* of the church was related to religious exercise.

ZONING **PRACTICE**

APRIL 2017

AMERICAN PLANNING ASSOCIATION



➔ ISSUE NUMBER 4

PRACTICE HISTORIC PRESERVATION



4

Protecting Value Through Historic Preservation Regulations

By Lane Kendig

Most communities recognize the need to protect historic and cultural sites, buildings, or neighborhoods, yet many qualifying places remain vulnerable across the country.

Clearly, the preservation of a community's historic assets enhances the community's attractiveness as a place to live and work and assists in providing a unique character that differentiates it from its neighbors. As with any new regulation, though, historic preservation regulations can raise fears. For example, landowners commonly fear that these regulations may adversely affect property values and destroy their freedom to do as they wish with their property. While such fears are largely groundless, it is important in developing regulations to seek to address these concerns. The landowner's fears are best addressed by recognizing that preservation may require continued investment that needs to be offset by an enhanced property value.

PLANNING

Ideally, each jurisdiction would have a historic preservation chapter in its comprehensive plan that links preservation to community character and economic development. Where such plans do not exist, there needs to be a significant planning effort in coordination with historic zoning updates. In cities, planning generally focuses on historic neighborhoods or streets. In counties, the focus is more commonly on individual historic structures or historically or archaeologically significant sites. These present different challenges for zoning, as they may involve preserving land in its current agricultural or natural state as well as protecting buildings. With sites that are subject to development, it is more important to recognize owner concerns about economic value.

The traditional goal of historic preservation planning has been to add candidate buildings, sites, or districts to national or

state historic registers. There are two distinct advantages of being listed on the National Register of Historic Places. First, Section 106 of the National Historic Preservation Act requires federal agencies to consider the effects of federally funded projects on historic properties. Second, commercial properties on the register are eligible for 20 percent federal tax credits. Meanwhile, state statutes may provide additional incentives for historic preservation.

The research, planning, and public participation associated with adding properties to national or state registers is often time consuming and costly. Buildings must be carefully analyzed for age, style, or other historic elements. The federal rules are not that onerous, but historic preservation planning requires design or architectural expertise. This is not quickly learned on the job, so planners without this expertise need professional consultants or volunteer assistance.

For historic districts, additional work is necessary to define boundaries. With most zoning districts, boundaries follow differences in land use or lot size. Meanwhile, historic preservation focuses on individual properties meeting the historic guidelines. In practice, there are difficult choices to make about including non-historic buildings or vacant land in order to minimize having very irregular district boundaries. Inclusion can trigger property owners' fears and result in opponents. Too irregular a district reduces the protection on the edge of the district. Advocates for a purist approach to historic preservation can make this worse by stoking landowner fears that the regulations will be overly strict.

LANDOWNER CONCERNS

The primary concern of landowners is that his-

toric preservation regulations will adversely affect the value of their property. The owners of non-historic buildings within a proposed historic district often fear regulations will impose major burdens on their property. For historic buildings one problem is that the interior may be unsuited to modern use. Another is that the building's maintenance costs may exceed economic returns.

Outside of urban areas, preservation of historic farms or estates typically requires the preservation of some surrounding land—which would otherwise be suitable for subdivision—and this can greatly alter property value. A means of preserving without reducing value is needed.

Old homes may be expensive to heat or cool, or to reconfigure for modern living needs. Large dwellings may be under pressure to convert to multiple residences because they have too much space for a single family. Small, older homes often require extensive remodeling or additions to adapt to modern lifestyles. Without regulatory protections, teardowns are common.

Old buildings of stone, brick, log, or wood frame may be very expensive to maintain. Landowners may be fearful that these costs cannot be offset by enhanced value under a historic designation. If these concerns are not addressed, owners will fight the designation and ultimately seek demolition.

Individual historic structures scattered in urban areas raise additional concerns. Commercial historic buildings are typically relatively small. When historic buildings are small in comparison to the size of the building that could be built if they were torn down, there may be considerable redevelopment pressure. For commercial historic buildings located in



Lane Kendig



In a historic district with houses similar to the stick Victorian at the top left, the Tudor at the top right is clearly out of character. What should be done if the building seeks an addition? Since it cannot feasibly be made to look like a stick Victorian, mitigation is necessary. A color change would draw less attention from the contributing historic homes (bottom left). And adding landscaping to screen the Tudor home from the street enhances the effect (bottom right).

residential neighborhoods, the designed use may be nonconforming under current zoning, which can limit property investment.

HISTORIC DISTRICTS

The historic district mapped to contiguous properties is the most common historic preservation zoning technique. Often jurisdictions apply these districts as an overlay to an existing base zoning district. Essential elements of a historic district are mapped boundaries, a description of the historic style, design guidelines, the appointment of a board to review and approve applications in the district, and criteria for approval.

District Boundaries

The boundaries are generally easy when all the buildings in a block or group of blocks are historic. The difficulties arise when buildings that do not meet the criteria for designation or vacant lots are interspersed with historic properties. Districts with vacant lots or non-historic buildings require design standards or guidelines that work for historic buildings, new construction, and non-historic buildings.

If the district cannot be mapped to whole blocks of historic properties, reduce the number of vacant or non-historic structures as much as possible, consistent with effective district boundaries. While there is a general

rule to avoid spot zoning, it is possible exclude lots within a historic district because there is an existing reason for the exclusion and their inclusion is likely to create major issues for the landowners.

Style Description

The description of style should be straightforward. If it is a national register district, the district documentation will contain detailed information about the architectural styles in the district, materials, and other elements contributing to its historic merit. For a locally designated district there is a need for original classification work. The recommended

resource for this work is *A Field Guide to American Houses*, first published by Alfred A. Knopf in 1984 and revised in 2013. This book has numerous drawings, photos, and descriptions of the styles that can be used as the basis for the code language and in evaluation of existing buildings. It is important in doing this to specifically identify style or styles in the district. This makes it easy to review any proposed exterior change to determine if the changes are consistent.

Design Guidelines

Design standards and guidelines are intended to preserve the existing historic character and prevent any exterior activities that would destroy or be inconsistent with that style. The design rules for exterior modifications to historic properties should derive from the documentation of the historic styles in the district. They should address style, colors, materials, and landscape elements that create the district's character, while avoiding overtly subjective elements. The task of developing design standards and guidelines for new construction and non-historic buildings is more difficult.

Most current development has an architectural style that is neo-eclectic. The homes are modern interpretations of past styles like colonial, Tudor, or Victorian; while they have some historic style elements, they will never be like the historic structures. For new construction, what is needed is a detailed list of the elements that must be incorporated to conform to the desired historic character. The design rules should contain a list of mandatory elements and a group of optional elements, from which a certain number must be chosen. The jurisdiction should consult with local home builders to ensure the guidelines produce a compatible building that will be marketable in the neighborhood. With builder support it is easier to include vacant lots in a district.

Meanwhile, the development of design guidelines for existing non-historic buildings requires a very careful analysis of each such building in the district for style, materials, color, use, type of construction, massing, and existing condition. Condition is important because it provides information about the likelihood that a building will need permits that require the historic board's approval. An assessment of each such building should be developed using the same style and design elements used in the historic analysis.

Formulate a design strategy for each type of non-historic building that might seek to add a room or do minor exterior work.

The design guidelines should provide clear policy to apply in approving applications for major repair or additions on these buildings. It is a mistake to require them to choose between disinvestment and meeting impossibly expensive conversion costs. The experience with nonconforming uses is a cautionary lesson. Planners originally thought that nonconforming buildings would be torn down. History shows they rarely disappear, and they generally suffer from disinvestment that lowers all property values in the neighborhood. In drafting standards, a list of enhancements that have reasonable costs should be developed so landowners have several options. For example, a porch across the entire front is an expensive requirement, but adding some trim to a small existing porch is a more acceptable solution. Avoid requiring major facade and roof changes, as they are very expensive.

When style and massing are dramatically different, consider mitigation that seeks to hide the incompatibility. Two mitigation strategies are obvious: color change and landscaping. Painting eliminates a sharp color contrast that draws attention to the building's differences. Greenery can hide a multitude of sins because it represents a mass that screens the view of the building from the street. Requiring the planting of canopy trees and large evergreens in the front yard will screen the view of the upper stories of the building. Foundation plantings and understory trees can reduce the ground-level view. The sidebar includes language that can be used to provide the desired level of mitigation in the design guidelines.

Mitigation assumes that non-historic buildings are likely to remain. The idea is to provide actions that allow an owner to make needed exterior repairs or reinvest in the dwelling. It hides the incompatibility rather than eliminating it. These strategies do not involve major costs for a land owner. In all cases the effort to address incompatible buildings in the districts should be designed to encourage reinvestment to preserve the economic value of the district.

Developing design guidelines for commercial areas can be easier as the focus is on street-facing facades. Many historic commercial district buildings will be largely compatible, with only modest style or height differences. An analysis should look at block faces.

If more than 15 percent of a block face is out of the style, the suitability for a historic district is questionable, and the community may want to consider design guidelines without a historic designation. An exception is a building whose facade was "modernized" in the last century. If the business community can be convinced that historic designation and restoring facades will enable the area to generate substantially more revenue, such restoration may be supported. Government grants to assist in the cost makes this more feasible.

For new buildings, only the street facade needs review. Height, general window proportions, floor to floor heights, colors, and materials are elements that should be the primary focus, as these can be addressed easily in new buildings. The cost of making a new building compatible should not be too great. Some style elements like terra cotta details are very expensive and should be avoided. Commercial uses often use false facades to produce a desired skyline, so this can be a reasonable approach to achieving a matching style.

Sample Mitigation Provisions

Mitigation. Lots XX, XX, and XX in the historic district have been identified as so different from the styles and character of the district that there is no practical means of making them compatible in style. When any such lot applies for a building permit that involves an increase in the floor area of the building or substantial structural repair, the historic preservation board may approve the application provided the following mitigation steps are undertaken:

1. One plant unit shall be planted in the front yard for every 1,600 square feet of land area in that front yard. The board shall count existing canopy trees and evergreen trees that are in good health and over 40 feet tall toward the requirements. The shrubs and understory trees shall be installed to maximize the screening of the lower levels of the building.
2. The building shall be painted in approved colors for the district to better match the adjoining buildings.

Administration

State statutes generally will specify the composition of a historic preservation board. It is critical that these boards have the technical capability to help landowners gain approval of an application that permits construction. Historic preservation requires architects or design professionals who have considerable experience in designing buildings and the skills to guide applicants to a satisfactory solution. Two other groups are desirable as members: builders and people who understand market dynamics and project financing. In large cities or urban counties, this expertise is likely to be available. In smaller cities and more rural areas, finding these people may be difficult. If the board does not have the expertise, the regulations should delegate reviews to staff and consultants.

Approval Criteria

The most basic approval criterion for proposed changes to historic structures, vacant land development, or improvements to existing non-historic structures is that the proposal would enhance the character of the historic district by meeting all required design criteria. If the proposal requests any exceptions from these design criteria, the regulations should require applicants to submit a detailed report indicating the economic, architectural, or other reasons for the deviation from strict adherence.

Demolition of an existing structure requires a different approach. One reason for approval would be that the structure is unsafe for habitation, and the cost of restoring it to a safe condition is so high that it is likely that the owner will let it continue to decline. In this case the historic board needs to explore with the owner whether there are things the jurisdiction can do that will alter the economics (see flexibility discussion below). To approve demolition, the board must find that denial would create a severe hardship and cause the structure to become blighted. That the owner can make more money through demolition is not an acceptable criterion for approval.

REGULATORY FLEXIBILITY

In many cases, historic districts will need to incorporate flexible zoning techniques to overcome landowner concerns about the impact of historic district designation on property values. These include flexible use permissions and incentives for maintenance.

Change of Use

If the existing use of a historic property fails to meet current demand, and rents do not support maintenance and reinvestment, consider allowing changes of use. Permitting large, older homes in a single-family district to be converted to two, three, or more residences is often a good solution. Jurisdictions can accomplish this by modifying the district density standard or incorporating special rules for historic structures in the district, allowing more units in those structures. Neighbors will need to be convinced that preserving the old homes is better than allowing disinvestment and teardowns.

For residential uses adjacent to downtown or on major streets where nonresidential uses are more valuable than housing, consider permitting the conversion of residential buildings to office or institutional uses. In these cases, additional parking may be necessary. This parking should be to the rear, where a drive or alley provides access. Parking in the front yards should be prohibited. If they are on the National Register, commercial structures may be eligible for a 20 percent tax credit, making preservation easier.

Sample Incentive Provisions

Pro forma: A pro forma shall be submitted by the developer justifying the proposed incentive. It shall document the costs of acquisition, improvements, and long-term maintenance. It shall indicate projected changes in revenue due any change in use. These costs shall be summarized and included in a proposed value with the change in use and density permitted. The pro forma shall demonstrate that the incentive provides additional revenue to pay for the maintenance and improvement costs and reasonable profit.

The planning director in conjunction with the historic commission or board shall evaluate the pro forma and its documentation to determine if the proposed incentive is adequate to persuade the landowner to invest but not so large as to provide increases in income over that of neighboring property. They are empowered to grant such incentives.



Brian Sansberry (lauri-terrace-knoxville-tn1.jpg, Wikimedia CC BY 3.0)



This historic home in Knoxville, Tennessee, has been subdivided into apartments without undermining its contribution to the Fort Sanders Historic District.

URBAN HISTORIC SITES

Name	Existing Building TsF*	Existing FAR	Zoned TDR	Site Area TsF (Existing Building TsF / Existing FAR)	Maximum Floor Area (Site Area x Zoned FAR)	TDRs (Maximum Floor Area—Existing building TsF)
Oreo Factory	200	0.31	0.44	645	283.9	83.9
Richfield Mansion	13	0.40	1.00	32.5	32.5	19.5
5th Street Church	15	0.18	2.50	83.3	208.3	193.3

*TsF = thousands of square feet

Incentives for Maintenance

Stone, brick, log, or wood frame structures often have high maintenance and upkeep costs. This is particularly true of rural buildings or where disinvestment has already occurred. The absence of insulation and obsolete heating, air conditioning, kitchen, and bath facilities are also potential costs associated with preservation. These costs may be addressed by a change in use; if not, other incentives are needed to encourage landowners to invest. The question becomes how much of an incentive should be provided. Incentives can include an increase of density on the property or transferable development rights (TDR). If this cannot be worked out before a district is created or a property designated, incorporate a process in the regulations to guide the historic board in evaluating the need for incentives on a case-by-case basis. Provide what is needed and don't offer too little or too much. See the sidebar on page 5 for an example.

SCATTERED-SITE PRESERVATION

Preserving individual historic structures and sites located outside of historic districts presents a distinct set of challenges. For these properties, existing development densities may be far below permissible densities for their zoning districts, and carefully calibrated incentives are necessary to gain landowner support for preservation.

Urban Historic Structures

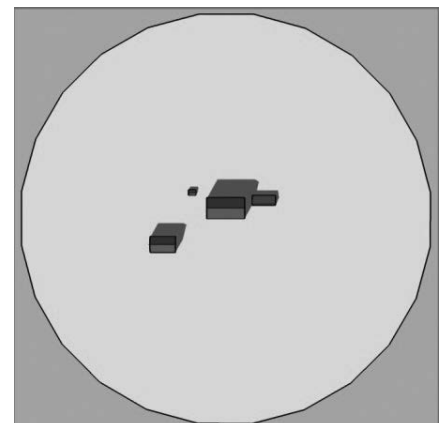
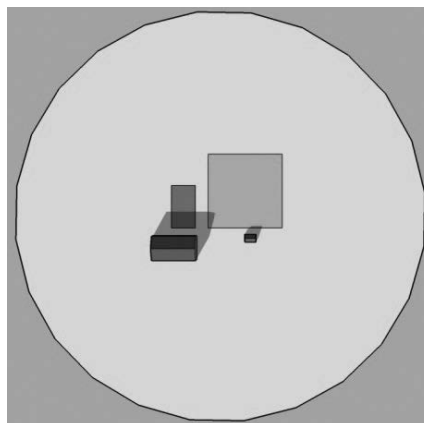
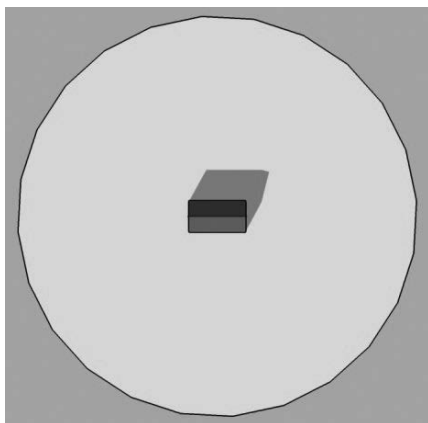
A common problem in urbanized areas is that individual historic structures often have floor areas well below the maximum permissible floor area or density of their zoning districts. For example, a historic structure with only 15 percent of the maximum floor area permitted creates a strong economic argument for demolition and redevelopment. The historic site is burdened by higher maintenance costs and less income potential compared to neighboring properties. TDR is the ideal tool for this

situation, as upheld by the Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

The table above illustrates how this system would work in a hypothetical community. The TDRs available are determined by subtracting the existing floor area of the site from the maximum permitted by the zoning. The measurements are in thousands of square feet, so one TDR is based on 1,000 square feet. To ensure a willing buyer and willing seller, the purchaser would be able to build 1,100 feet for each TDR.

Historic Sites

Historic sites require a different focus. The preservation of the historic buildings is only part of the job. Just preserving the buildings ignores their function and the setting for which they were built and robs visitors of the purpose and context of the historic site. Many



Left: A historic building (e.g., a plantation, homestead, leading citizen's home, or historic event). Middle: A historic building with important landscape and gardens. Right: A site with multiple historic buildings (e.g., farm, ranch, or plantation with multiple outbuildings).

Lane Kendig

of these sites are on largely rural or urban fringe sites.

A major part of a site's historic value is seeing the building in its historic setting of farmland, gardens, or yards. For example, a Greek revival plantation house with 10 acres of gardens surrounded by 200 acres of farmland needs at least the home and gardens to be preserved. If the grounds around the house and garden contained many mature live oaks or other large trees, this would be the critical area to preserve, while the farmland would not be as important.

Too often a historic building is preserved on an acre or so and surrounded by a subdivision of much smaller lots. This only preserves the home, but the site's value—mature trees and gardens that provided the historic context—is lost. The building simply becomes a large old home, and its visibility to the community lost in the subdivision. This sort of preservation does nothing to make it a historic attraction. Historic sites need to have surrounding land preserved as well as the buildings to provide the context of their original function to make it an attraction.

The illustrations on page 6 show several versions of historic sites. The idea is to preserve enough land to display them in context for visitors. Preserving the surrounding land lowers property value for development. Tools such as clustering, alternative uses, incentives, and TDR applied individually or in combination represent ways to restore the property's value. In suburban or rural environments, where the size of the property is adequate, clustering is an ideal tool to allow the needed open space to be protected without causing a loss of value.

How much land is needed for context? Key variables in determining this are historic use, ancillary buildings, vegetation, or type of event. In a forested area, a relatively small site that retains the trees to screen future uses will suffice. There is no definitive measure, but in general a radius of 200 to 500 feet is desirable. Trees, topography, property lines, existing homes on nearby property, and current use of surrounding land need to be evaluated in setting the protected area.

Also consider the approaches to the site via roads. Clustering allows the site to be protected as common open space while allowing the district's maximum density to be achieved. The size of the parcel is critical. If the protection area is no more than 30 per-

cent of the site in suburban character areas, clustering is a viable option. Up to 50 percent open space will provide a suburban character. In estate character areas the percentage of open space is 45 to 65 percent. Clustering will be very difficult in urban areas unless the property is very large.

With smaller sites, additional incentives will be required. Consider permitting farm buildings to change uses; for example, the barn or other buildings may be converted to residential use to increase development value. Additional incentives may be needed to ensure maintenance. Since old farm buildings or homes may require costly work to make them habitable, a pro forma can be used to determine the degree of an incentive that is needed to achieve preservation. When a site is just slightly too small for clustering to work, the code could allow a 10 percent density increase as an incentive.

TDR is the most efficient way to provide an incentive when the property is too small for clustering to work. Allowing a 10 percent density bonus with the purchase of TDRs is typically workable. Clustering must be a permitted use in the district, not a conditional use. The ordinance should provide a receiving zone with five times the potential to use TDRs than there are TDRs available on the historic site so that there is an ample market for the TDRs. Ensuring a market for TDR also requires consideration of the value a seller wants and what a buyer is willing to pay. TDR works on a willing seller, willing buyer basis.

It works best when the buyer is willing to pay more than the seller asks. Permitting 1.1 units for each TDR is a way to ensure purchasers want to buy TDRs. TDR makes creating larger open areas around the historic site feasible.

CONCLUSIONS

In drafting historic preservation regulations, it is important to try to offset the concerns of the landowners with incentives. A variety of approaches can be used to address specific concerns. Allowing a change in use is a simple strategy that is widely adaptable. A more complex problem is addressing the concerns about the costs of preserving and maintaining structures, which requires very specific zoning regulations that enable landowners to recoup these costs.

Preserving historic sites in rural or urban fringe areas is a very different problem. When

preserving a substantial amount of open land is essential to providing the historical context, regulations that allow or require clustering are important.

Finally, transfer of development rights is useful for preserving individual buildings in urban environments and for greenfield development.

ABOUT THE AUTHOR

Lane Kendig is the founder and former president of Kendig Keast Collaborative. He has been practicing and writing about the relationship between community design, planning, and regulatory tools for more than 45 years. In addition to the recent books *Community Character* and its companion, *A Guide to Planning with Community Character*, Kendig is the author of *Performance Zoning* and the PAS reports *Too Big, Boring, or Ugly* and *Traffic Sheds, Rural Highway Capacity, and Growth Management*.

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Vol. 34, No. 4

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for \$95 (U.S.) and \$120 (foreign). James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services. **Zoning Practice** (ISSN 1548-0135) is produced at APA. Jim Schwab, FAICP, and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or subscriptions@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

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ARE YOUR HISTORIC
PRESERVATION REGULATIONS
SENSITIVE TO LANDOWNER
CONCERNS?

4

QUICKNOTES

Historic Preservation Planning

Historic preservation planning is the process of creating and implementing a strategy to protect and enhance historic resources. These resources include sites, structures, objects, and districts that have national, state, or local historical or cultural significance.

Historic preservation planning provides a forum for planners, local officials, and community stakeholders to establish preservation goals and prioritize preservation actions. Additionally, it can help communities identify links among preservation goals and priorities and other planning issues, such as affordable housing, economic development, and environmental protection.

BACKGROUND

In the U.S., widespread interest in historic preservation started in the mid-20th century. Many cities were demolishing older structures and even clearing entire neighborhoods for redevelopment and highway-building projects. To strike a balance between progress and preservation, cities began using historic preservation programs to protect local landmarks and historic districts. These efforts gained momentum after President Lyndon Johnson signed the National Historic Preservation Act of 1966, which created the National Register of Historic Places, offered tax credits to help property owners rehabilitate historic homes, authorized the creation of state historic preservation offices, and established a mechanism to certify local historic preservation programs.

Traditionally, local historic preservation efforts have focused predominantly on the cultural and social benefits of preservation. These include maintaining tangible connections to the past and celebrating distinct architectural styles. In recent decades, many communities have also embraced historic preservation as an economic development or environmental protection strategy. Historic resources contribute to a sense of place and are often clustered in walkable neighborhoods and districts. Consequently, they attract visitors and young professionals, and they provide space for homegrown businesses and corporate expansions. Meanwhile, reusing older buildings often results in fewer environmental impacts, over the lifetime of the building, than demolition and new construction.

However, local historic preservation efforts involve tradeoffs. In some communities, property owners who want to modify or replace historic resources and residents and business owners concerned about rising rents in historic districts may view historic preservation efforts with skepticism. Furthermore, many local historic preservation programs are just beginning to recognize the importance of embracing diverse histories and ensuring equitable preservation outcomes.

CREATE A STRATEGY

Often, the first step in creating a local historic preservation strategy is to conduct a historic resource survey. In this context, *survey* means background research on potentially significant historic resources combined with a field survey to document the distribution and current conditions of resources across the study area and an evaluation process to determine the historical significance of each resource. While trained preservationists have traditionally led survey efforts, there is a growing awareness that including a wide range of community perspectives in this process is necessary to identify resources that reflect diverse cultural histories. Furthermore, some communities skip formal surveys in favor of community engagement activities designed to identify the local values that should drive preservation efforts.

Next, local officials typically adopt goals and objectives that establish a rationale for future preservation activities. These goals and objectives should highlight the relationship of historic preservation to the community's vision for growth and change and acknowledge potentially competing priorities. Finally,

Chris Pruitt Wikimedia (CC BY-SA 3.0)



East Battery Street in Charleston, South Carolina, is part of the first locally designated historic district in the United States.



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local officials work with planners and other community stakeholders to determine how the community wants to accomplish its objectives. This is where local officials specify how the local agencies will support preservation and which partners will assist in these efforts. The most common local historic preservation tools are historic preservation ordinances, public education, and technical or direct financial assistance for preservation actions.

Communities can include their historic preservation strategy as an element or chapter of the local comprehensive plan or, if the strategy focuses on a subarea of the community, as a section of a neighborhood, corridor, or district plan. Alternatively, local officials may adopt a standalone historic preservation plan.

UPDATE REGULATIONS

Local historic preservation ordinances establish legal protections for historic resources. At a minimum, they enable a process for officially designating local historic resources and require property owners to obtain a certificate of appropriateness or approval before altering or demolishing designated resources. These ordinances typically charge a historic preservation review board with developing criteria for local historical significance and reviewing all designation, alteration, and demolition applications.

Many historic preservation ordinances apply protections to entire districts in addition to individual sites or structures (i.e., landmarks). In these cases, the ordinance typically includes—or references a separate document with—design standards or guidelines for each historic district. Many ordinances also include maintenance standards for historic resources and explain how property owners can claim a limited exception from design or maintenance requirements in cases of economic hardship.

Some historic preservation ordinances include development incentives, such as relief from off-street parking requirements, or establish local financial assistance programs, such as local tax incentives. Furthermore, some communities with transfer of development rights regulations also allow property owners to sell unused development potential from historic properties to designated receiving sites (see *PAS QuickNotes* 74: Transfer of Development Rights).

PROVIDE EDUCATION AND ASSISTANCE

Because private property owners carry out most historic preservation activities, public education is a critical component of local historic preservation efforts. Consequently, many cities and counties have staff members that can help property owners understand not only legal requirements but also federal, state, and local sources of financial assistance.

In the U.S., property owners can claim a 20 percent income tax credit for rehabilitation work on structures listed on the National Register of Historic Places or that contribute to a local historic district certified by the Department of the Interior. Beyond this, many states have tax incentives modeled on the federal tax credit program, and some offer additional income or sales tax relief. Locally, some cities and counties discount or freeze property taxes for historic properties. Meanwhile, some communities have publicly or privately funded grant or loan programs that help owners maintain or rehabilitate historic properties.

CONCLUSIONS

Communities use historic preservation planning processes to discover or reconnect with their heritage, including previously hidden cultural narratives. While historic preservation efforts can stabilize older neighborhoods, revitalize traditional downtowns, and reduce environmental impacts associated with new development, an equitable distribution of these benefits depends on careful program design. Programs that combine historic preservation ordinances with public education and technical or financial assistance are often the most effective at meeting preservation objectives.

PAS QuickNotes (ISSN 2169-1940) is a publication of the American Planning Association's Planning Advisory Service (PAS). Visit PAS online at planning.org/pas to find out how PAS can work for you. Joel Albizo, FASAE, CAE, Chief Executive Officer; Petra Hurtado, PhD, Research Director; David Morley, AICP, Editor. © 2019 American Planning Association, which has offices at 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601-5927, and 1030 15th St., NW, Suite 750 West, Washington, DC 20005-1503; planning.org. All rights reserved. No part of this publication may be reproduced or utilized in any form or by any means without permission in writing from APA.

FURTHER READING

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American Planning Association
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September/October 2012

PAS MEMO

Historic Preservation: Expanding the Planner's Toolbox

By Patrice Frey and Rachel Bowdon

The connections among historic preservation, economic development, and environmental performance are well documented and increasingly persuasive to policy makers. These benefits for planet, people, and prosperity — the three-legged stool of sustainability — support a range of time-tested planning tools that are available to help communities conserve and leverage their historic places. Yet there is an important class of valuable buildings that is often overlooked by such tools: character-rich older buildings that may not meet conventional historic preservation designation guidelines but contribute substantially to vibrant and livable communities. To preserve these buildings, along with the wealth of benefits they provide, other tools are needed.

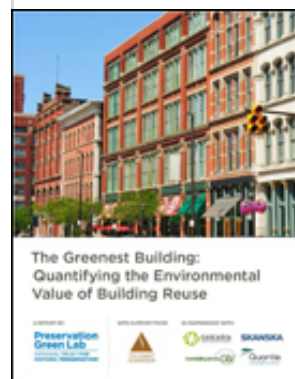
This *PAS Memo* explores a number of existing tools and strategies under development that enable communities to not only protect historic resources but also to harness and leverage the value of older buildings more generally.

Planet: The Environmental Value of Historic Preservation

Buildings are resource-intensive goods, both in their construction and in their operation. The green building community has made much progress in the last decade drawing attention to the significant amount of energy buildings use in their operations — buildings are responsible for fully 72 percent of electricity use and produce nearly 40 percent of carbon dioxide emissions in the United States (Department of Energy 2009). While these operational impacts are well documented, the environmental effects associated with the building construction process itself have not been well understood.

In recent years, a handful of studies — largely from international sources—have sought to quantify the environmental impacts associated with new construction. For example, one study, from the U.K.'s Empty Homes Agency, *New Tricks with Old Bricks*, found that it would take approximately 35 to 50 years for a new, green home to compensate through efficient operations for the carbon impacts that occurred as a result of its construction (Empty Homes Agency 2008). Researchers at the University of British Columbia undertook a comparable analysis on a university building and determined that a replacement building would require approximately 37 years to make up for its initial environmental impact (Busby, Perkins + Will 2006).

Building on this early research, in 2012 the Preservation Green Lab, a project of the National Trust for Historic Preservation, released a comprehensive study examining the environmental impacts of new construction and building reuse. Assessing seven different building types in four climate zones, *The Greenest Building: Quantifying the Environmental Value of Building Reuse* found that in almost every case, the reuse of existing buildings results in fewer environmental impacts over their life spans compared with demolition and new construction (Preservation Green Lab 2011). Even when comparing building rehabilitation with new, more energy-efficient construction, the value of building reuse still provides near-term opportunities to reduce negative impacts, such as those that contribute to climate change. The study finds that it can take between 10 and 80 years for a new, energy-efficient building to compensate for the environmental impacts that occur during construction. *The Greenest Building* concludes that most buildings in most climate zones will take 20 to 30 years to make up for their initial carbon impacts.



Quantifying the environmental value of building reuse. Photo courtesy National Trust for Historic Preservation.

NTHP's Green Lab

The Seattle-based **Preservation Green Lab** is a project of the National Trust for Historic Preservation. Launched in 2009, the Green Lab advances research that explores the value that older buildings bring to their communities and pioneers policy solutions that make it easier to reuse and green older and historic buildings. The Green Lab seeks to minimize carbon impacts from the built environment through direct emissions reductions from building retrofits and reuse, and to conserve character-rich and human-scale communities that attract people to more sustainable, urban living patterns.

The environmental advantages of older buildings are not limited to reuse. Contrary to the widespread perception that historic buildings are poor energy performers, national survey data from the Department of Energy finds that commercial buildings constructed before 1920 actually use less energy per square foot than those built in any decade after, except for those constructed after 2000 (U.S. Energy Information Administration 2003). Performance advantages in these older buildings often can be attributed to difference in construction methods. For example, many historic buildings have thick walls with high degrees of thermal massing that reduces the amount of energy needed to heat and cool buildings, as well as operable windows and other passive sources for air flow that reduce the need for mechanical ventilation.

Of course not all older buildings perform better than their newer counterparts, and even in instances when they do, there are important reasons to integrate retrofit strategies to ensure that these buildings maximize potential energy savings. From retrofits of the **Empire State Building** and the **U.S. Treasury Building** to more humble examples, there are more and more older buildings that serve as valuable case studies demonstrating myriad energy improvement strategies that can be employed in these structures. The **New Buildings Institute**, for example, offers a range of case studies that explore deep energy savings in existing buildings, many of which are designated as historically significant.

The Joseph Vance Building

In 2009, the **Joseph Vance Building**, located in Seattle, earned LEED for Existing Buildings (EB) Gold Certification for groundbreaking retrofit strategies that went beyond the building envelope and systems to include operations and maintenance. Strategic investments included roof replacement with a LEED-approved, light-colored membrane; lighting retrofit; water fixture replacement; the installation of bike storage and shower facilities; and a green tenant improvement and operations manual to guide tenant behavior. This resulted in a 24 percent drop in energy usage over the baseline and an Energy rating of 98, placing it in the top two percent of office buildings nationally. The owner, the Rose Smart Investment Fund, believes the success of the retrofit is self-evident: since completion of the renovation, occupancy increased from 68 percent to 96 percent.

DOE data suggest, however, that unlike older commercial buildings, older homes typically perform more poorly than those of more recent vintage, likely owing to the lack of insulation used in older residences and the integration of other energy-saving features in houses of more recent vintage (U.S. Energy Information Administration 2009). Fortunately, there are ample examples of historic home retrofits demonstrating that significant energy improvements can be attained — and in ways that preserve historically significant features. The Grocoff rehabilitation of a Michigan Victorian home and the Ross House retrofit in Glencoe, Illinois, offer two outstanding examples of sensitive historic rehabilitation projects that have achieved substantial energy performance improvements.

Sensitive Rehabilitation Projects

The Grocoff Rehabilitation: Five years after purchasing their 1901 Victorian home in Ann Arbor, Michigan, Matt and Kelly Grocoff proved that it is possible to transform a historic home into a cutting-edge net-zero home. From less-expensive improvements, such as the installation of low-flow shower heads, to bigger-ticket items, including the installation of photovoltaic panels, the Grocoffs have dramatically lowered their energy usage while still maintaining the historic integrity of their home. They will also save money — they estimate that their initial investments will save them approximately \$190,000 on energy bills over the next 25 years.

The Ross House: Built by Frank Lloyd Wright in 1915 as a "spec" house for his attorney, the Ross House in Glencoe, Illinois, was sitting vacant and in bad condition when John Eifler, head of Eifler and Associates, bought it in 2009. Eifler's intent was not only to rehabilitate the house but to make it better by adding sustainable features that would make it less expensive to maintain. Updates included geothermal heating and cooling, extensive wall and roof insulation, graywater recycling in bathrooms, and solar photovoltaic panels on the garage roof. Eifler expects that

these changes will earn the home LEED Silver certification from the U.S. Green Building Council.

Beyond the inherent value of reuse and improvements in energy savings, reuse of existing buildings contributes to other environmental goals as well. Older buildings were constructed before the advent or widespread use of automobiles, and thus tend to have significant location advantages. Historic buildings are typically located in mixed use neighborhoods that are dense and walkable, and often offer access to mass transit — all features that are widely understood to reduce vehicle miles traveled by those who live, work, and play in a neighborhood. Revitalization of existing neighborhoods also serves to lower demand for suburban-style housing and commercial development on the urban fringe.

Given the value of reuse over new construction, the retrofit potential of older buildings, and the location advantage of many of these places, it's clear that reusing historic buildings, as well as older buildings without historic designation, can offer a number of environmental benefits. While historic buildings enjoy a number of protections, it is necessary to consider tools that foster the retention of all older buildings.

People and Prosperity: The Social, Cultural, and Economic Value of Older Buildings

The protection of historically significant resources offers significant cultural and social value to communities, and it's these benefits that traditionally have been the foundation of historic preservation efforts. Conservation of historic buildings helps to retain a tangible connection to generations that came before and serves to preserve buildings of particular architectural and artistic merit. Importantly, preservation of buildings also helps communities retain a distinct sense of identity, ultimately creating an authentic sense of "place" that is difficult, if not impossible, to replicate with new construction. As with the environmental benefits of preservation, the place-making benefits of building conservation are not limited to those that are designated as historically significant, and often extend to older character-rich buildings as well.

There is increasing evidence that such distinct places play an important role in the economic competitiveness of cities. Key demographics that are especially important to a city's economic success — including well-educated young workers and entrepreneurs — are increasingly drawn to distinctive, vibrant, and walkable neighborhoods, as has been discussed at length by Richard Florida and other urban thought leaders who stress the connection between a rich built environment and a city's ability to attract talented people. Older character and historic buildings are essential to this urban place making, offering unique spaces that serve as the ideal home for everything from small locally owned businesses to larger-scale creative enterprises.

Of late, a number of high-profile corporations are making the move to older neighborhoods and buildings. For example, Google and Zappos — which depend greatly on their ability to attract and retain creative talent — are choosing more urban and accessible places over traditional office park settings, and they are also locating in older and historic buildings rather than constructing new Class A office space. Google recently opened a new office in urban Pittsburgh in a 100-year-old Nabisco factory that creates a vibrant open work space and connects to Pittsburgh's gritty rust-belt past. Zappos is in the process of moving its operations from a suburban office park to a revitalizing downtown Las Vegas, which has suffered from significant disinvestment over time. The shoe giant is creatively reusing existing buildings to making sure that employees can be closer to restaurants, cafes, bars, and other amenities offered by urban environments.



Google's new office in a 100-year-old Nabisco factory in Pittsburgh. Photo by harry_nl/Flickr (CC 2.0 Generic).

And there are plenty of smaller-scale innovative firms that are drawn to older neighborhoods as well. As real estate developer and founding director of the Preservation Green Lab Liz Dunn has noted, in many cities, the "new economy" is happening in older neighborhoods, where tech startups, design firms, and co-working spaces are choosing to locate (Levitt 2011). Class A office towers, divorced from a rich and diverse urban environment, don't hold much appeal for many young workers, and employers are responding accordingly.

Preservation of existing buildings offers other more conventional economic advantages as well. According to Heidi Garrett-Peltier, an economist with the Political Economy Research Institute at the University of Massachusetts-Amherst, repairing existing residential buildings produces roughly 50 percent more jobs than constructing anew. This is due to the labor-intensive nature of rehabs — manual labor accounts for 41 percent of the cost of rehabbing a building but only about 28 percent of the cost of new construction (Garrett-Peltier 2011).

In addition, reusing and retrofitting older buildings stimulates the local economy, both because the labor tends to be hired locally and materials for historic rehabilitations are often purchased locally. As nationally known economist Donovan Rypkema explained in his speech at the Missouri Statewide Preservation Conference in 2008, hiring labor and purchasing materials locally results in a positive ripple effect through entire local economies: "This labor intensity affects a local economy on two levels. First, we buy an HVAC from Ohio and lumber from Georgia, but we buy the services of the plumber, the electrician, and the carpenter from across the street. Further, once we buy and hang the sheet rock, the sheet rock doesn't spend any more money. But the plumber gets a haircut on the way home, buys groceries, and joins the YMCA — each recirculating that paycheck within the community" (Rypkema 2008).

The Planner's Preservation Toolbox: Conventional Strategies

A variety of tools are available to help planners advance preservation goals, many of them decades-old strategies that have demonstrated significant success over time. This section highlights several traditional preservation tools, and offers examples of some of the strongest practices in the country.

Preservation Ordinances

Enacted in over 2,300 communities across the U.S., preservation ordinances are the most popular and powerful legislative tool used to protect individual buildings and districts. While no two preservation ordinances are alike, they all share the same basic objective of using legal authority to identify, evaluate, and protect historically significant resources from inappropriate alterations or demolition. Preservation ordinances not only protect the design features of landmarks or entire historic districts, but also typically regulate the design of new construction within historic areas.

A preservation ordinance must contain several components to be legally viable. First, it must clearly state a public purpose that goes beyond aesthetic regulation and includes other community goals such as economic development or neighborhood revitalization. Second, a historic preservation review board must clearly define the criteria in the ordinance by which a historic landmark or district can be identified, evaluated, and protected. Appropriate criteria may include such factors as a building's role in national, state, or local history; its association with prominent historical figures; or its cultural significance. The ordinance also must explain what types of changes are subject to review — for example, demolitions, building or landscape alterations, or new construction in historic districts.

Historic preservation review boards usually measure criteria against standards and guidelines. The most common set of applied guidelines for historic district review are ***The Secretary of the Interior's Standards for the Treatment of Historic Properties***' rehabilitation standards established by the National Park Service, which emphasize that a property's significant features should be retained. The standards also recognize the importance of encouraging efficient, contemporary uses of property. Often, local design guidelines for historic buildings and historic districts are either directly modeled after the Secretary of the Interior's standards for rehabilitation or borrow heavily from their foundation.

While most ordinances are derived from the Interior Secretary's standards, their level of success is based on criteria that emphasize a community's own unique needs. What works in Savannah, Georgia, will not work in Chicago, and vice versa. In addition, the robustness of an ordinance is determined by how well it works within the municipal regulatory structure it resides within. If an ordinance is not strong or dynamic enough to withstand ever-changing governmental bodies and historic review commissions, it will not protect the historic resources it was created to serve.

Historic Landmarks and Districts

Preservation ordinances enable communities to protect both districts and individual buildings through local landmark designation. Contrary to popular understanding, local designation of local landmarks or districts offers a higher level of protection than state or national designations, and thus is crucial for effectively protecting historic resources. Individually landmarked buildings often garner the most attention due to their often iconic quality — for example, being the birthplace of a president or designed by a famous architect — but the majority of historic resources are designated by way of historic district designation.

The first local historic district dates back to 1931 in Charleston, South Carolina. It predated the first federally designated district by more than 30 years and was an important step in ensuring that there were enforceable protections against inappropriate alterations or demolition of "contributing" properties within entire neighborhoods or areas considered historically significant. The Charleston historic district introduced the concept of the *tout ensemble* — the idea that the character of an area is derived from its entirety, or the sum of its parts, rather than from the character of individual buildings — a profound departure from the "house museum" model that had until up to that point dominated preservation.

The benefits of historic districts are numerous. They have been effective at reducing demolitions among the nation's oldest building stock and have been shown to improve property values by stabilizing and enhancing a neighborhood's character. However, historic districts are not without controversy. Some local property owners may not appreciate having to abide by historic review board rules and others complain about the high costs often associated with maintaining a historic home. Because of their controversial nature, districts' design and rehabilitation guidelines must be clearly written, effectively communicated, and uniformly administered to ultimately be successful.

City preservation efforts must also anticipate threats to *potential* historic districts before they arise. For example, **San Francisco** focuses its historic resource surveys on neighborhoods that are undergoing long-range planning efforts. This proactive, targeted method ensures that historic resources most at risk are identified and protected as the city evolves.



Alamo Square Historic District, San Francisco. Photo by wallyg/Flickr (CC 2.0 Generic).

Transfer of Development Rights

Transfer of development rights (TDR) allows landowners to sever development rights from properties in government-designated low-density areas, such as historic districts, and sell them to purchasers that are allowed to build a higher-density development elsewhere. By creating a monetary value for the unused capacity that would otherwise be lost when the owner maintains the historic building, TDR encourages the preservation of existing buildings instead of demolition or renovations that would diminish the integrity of the property's value.

However, TDR still requires appropriate zoning requirements. A city must be willing to set up a TDR bank at the same time that it creates market demand by upzoning (increasing the floor area ratio) specific receiving areas conditional on buying TDRs. Timing is also an issue — if a developer is looking to sell her development rights, but has no purchasers, the transfer will not take place.

Challenges aside, TDR programs can be effective policy levers and can provide valuable incentives for the reuse of existing buildings if developed properly. Further, they allow local governments to avoid the conflict that accompanies land-use regulation by compensating landowners for restrictions on the development potential of their properties. Many U.S. cities, including **San Francisco, Seattle, Denver, and New York** have successfully implemented urban TDR programs. While these cities use differing mechanisms and varying levels of transfer capacities (e.g., building-specific versus zone-specific transfers), they are each effective at encouraging retention of historic buildings and structures.

Preservation Incentives

Preservation-focused tax incentive programs exist at the federal and state levels and are essential to the success of building reuse. In general, they counter private and public land-use policies favoring demolition and new construction while providing financial benefits to building owners who might otherwise feel burdened by building reuse projects.

At the federal level, the historic rehabilitation tax credit is the nation's largest incentive, promoting urban and rural revitalization through private investment in reusing historic buildings. The credit allows the owner of a certified historic structure to receive a federal income-tax credit equal to 20 percent of the amount spent on qualified rehabilitation costs. The Creating American Prosperity through Preservation Act (introduced in the Senate in February 2012 by Sen. Benjamin Cardin of Maryland) would amend the historic tax credit to make use of the credit easier and provide an added financial incentive to rehabilitation projects that meet certain energy-efficiency requirements.

A 10 percent credit for older, nonhistoric, nonresidential buildings is also available, but is less frequently used than the 20 percent credit. Substantial technical barriers exist to using this credit, and more analysis is needed to understand how it can be made more user friendly; in some instances, this credit may well tip the balance in favor of building reuse over demolition and new construction. For example, this credit has made the rehabilitation of former factories a much more attractive and financially feasible option for developers who would have otherwise found the barriers to reuse too great because of the strict regulatory requirements and uncertain cleanup costs often associated with former industrial sites.

More than half the states in the country have also enacted laws that afford tax relief to owners of historic buildings, many of which are modeled after the federal rehabilitation tax credit. When state tax credits are used in addition to the federal tax credit, the credit of a project can add up to as much as 30 percent. Some additional state tax incentives include income tax deductions, a credit or abatement for rehabilitation, sales tax relief, and tax levies. At the local level, many municipalities will often discount the local property tax or enforce a freeze on the current taxable value of the building or property for a designated number of years.

Whether federal, state, and local tax incentives are used independently or jointly, they are an outstanding means of leveraging private investment for adaptive reuse and bridging the financial gap on rehabilitation projects.

Expanding the Planner's Toolbox: Strategies for Promoting Older Building Conservation

Conventional strategies for historic resource conservation are of enormous value in protecting historically significant buildings, and, in the case of districts, other structures that contribute to the character and quality of a neighborhood. Yet such strategies were not designed to encourage the retention of and reinvestment in other quality older buildings that are not designated "historic." In recent years, a handful of newer planning tools have been developed that expressly help to protect such places.

Neighborhood Conservation Districts

Neighborhood conservation districts (NCDs) are a comparatively newer tool used to promote compatible development in established neighborhoods that are worthy of some level of protection but are not appropriate for consideration as historic districts because they lack qualifying historic structures or public support. Conservation districts take the form of either overlays or special planning and zoning districts and are much less restrictive than historic districts. They tend to focus more on preserving overall community character rather than specific historic fabric. While types of conservation districts vary greatly across the country, they often provide for review of demolitions and other major changes to existing properties, such as large additions. Conservation district reviews, however, rarely include the "fine grain" design-review items addressed by traditional local historic district regulations, such as windows, doors, trim, and building materials.

NCDs are becoming an increasingly popular go-to tool for planners across the country. **Dallas** has had a very successful Conservation District (CD) program since 1988. Stable neighborhoods with distinctive neighborhood character are eligible to become conservation districts and can officially be adopted within 12 to 18 months. Since there is no neighborhood age requirement and the review process is much quicker than for a historic district, CDs have become extremely popular in Dallas. To date, there are 20 CDs in Dallas and several more are under review.

Form-Based Codes

Many cities are looking to form-based codes to foster building reuse and encourage more compatible new construction. Good form-based codes for existing communities are context-sensitive, based on analysis of existing building patterns. With this analysis as a guide, zoning districts and development standards can be recalibrated to more closely match patterns that are seen as desirable and worth continuing.

Historic Main Street and neighborhood commercial districts are examples of where form-based codes can be particularly effective in promoting the conservation of existing buildings. In many cities, development in these areas is guided by one-size-fits-all commercial zoning that was created for auto-oriented retail locations. These standards may include highway-style minimum setbacks and excessive parking requirements with little in the way of pedestrian-oriented design elements. Potential development allowed "by right" is often much more intensive than "as-built" conditions, creating a speculative environment that discourages investment in existing buildings.

Denver created new Main Street zoning districts that were first used along the city's main commercial thoroughfare, Colfax Avenue. These districts reduced heights for a better fit with existing buildings, required most new construction to meet the existing street wall, and moved parking to the side or rear of the site. The new regulations have led to investment in existing, often historic structures, as well as several new projects that are helping to fill gaps in the historic fabric.

The success of this new form-based zoning helped spur Denver's 2010 adoption of a new citywide form-based code.



Larimer Square in Denver. Photo by dnkdotcom/Flickr (CC 2.0 Generic).

Demolition Deterrence

Many jurisdictions do not charge fees that adequately reflect the true cost of demolition and disposal of demolition debris, thereby making it easier for owners to choose demolition rather than repurposing of existing buildings. The **City of Tacoma, Washington**, provides an example of how this is changing. By increasing demolition and permitting fees to reflect true costs, the city is externalizing the cost of demolition into project costs, potentially discouraging demolition instead of subsidizing it. New York City has also implemented high demolition fees, in part because demolition and construction debris make up such a large percentage of that city's waste stream.

In **Telluride, Colorado**, if the demolition of a historic building occurs without a permit, that property will be precluded from redevelopment for 10 years. While this policy is limited to historic structures, there may be the potential to apply such a strategy to existing buildings more generally. Denver has also implemented a number of strategies to deter demolition, including the outright denial of building demolition requests unless "all economically viable use of the property" is precluded. Buildings with approved demolition cannot be demolished until the new building is approved by the city, thus preventing the creation of empty lots and surface parking lots (Collins, Waters, and Dotson 1991).

Perhaps one of the most thoughtful and progressive approaches to accounting for the costs of demolition can be found in **San Francisco**. Under that city's green building ordinance, if a building is demolished, stricter green-building code requirements apply to the new building that will be constructed in its place — in essence requiring the new building to achieve a higher level of environmental performance to offset the negative impacts associated with demolition and new construction. However, requirements for additional green features are reduced if the new building will provide additional density, thereby acknowledging the environmental benefits associated with added capacity to a site. San Francisco's requirements are unique in their acknowledgement of the environmental costs associated with demolition; they attempt to require developers to either rethink their decision to demolish or compensate for these impacts in some way.

Rightsizing Parking Requirements

Minimum parking requirements pose significant barriers to reusing older buildings built in urban locations before the advent of cars or parking mandates. These one-size-fits-all standards make it difficult or infeasible to restore older buildings due to lack of space or the high cost of adding parking structures. Further, minimum parking requirements do not recognize the walkable, transit-oriented nature of urban cores and can threaten the vibrant urban fabric that makes downtown locations so desirable.

Many cities are beginning to recognize the detrimental side effects of minimum parking requirements and have begun to enact ordinances that make exceptions for the reuse of older and historic buildings. For example, in 1999 **Los Angeles** adopted its Adaptive Reuse Ordinance, which allows economically distressed or historically significant office buildings to be converted into residential uses without requiring new parking spaces. After this ordinance was enacted, rehabilitations of older buildings skyrocketed: 7,300 new housing units were created from historic office buildings from 1999 to 2008, a dramatic increase from the 4,300 housing units that were added during the prior 30 years. Other cities, such as **Tacoma** and **San Francisco**, make parking-requirement exceptions for smaller, older buildings that were built before current-day code requirements. This not only encourages reuse of individual building stock but ensures that the walkable, historic urban character of entire neighborhoods is maintained.

Next-Generation Tools for Protecting Older Buildings

In addition to the strategies to encourage older and historic building conservation described above, new tools currently under development offer promise for the future. For example, there is increasing focus in places such as Seattle on improving building performance outcomes, but doing so in a way that also makes it easier to reuse and retrofit existing buildings. National efforts, led by organizations such as the Portland Sustainability Institute, that encourage the implementation of eco-districts — or neighborhood scale approaches to sustainability — may also produce useful community strategies for encouraging building reuse.

Outcome-Based Energy Codes

Energy codes can discourage both the reuse and retrofit of existing buildings. Prescriptive code provisions do not recognize the inherent passive strengths of historic or older buildings and at the same time can mandate changes that compromise inherent architectural character. As energy codes become increasingly stringent over time, the associated increases in construction costs to meet current codes can reduce the financial viability of repurposing older buildings, leading to further disinvestment and ultimately to demolition.

The Preservation Green Lab, the New Buildings Institute, and the City of Seattle have developed a regulatory framework for enhancing the energy performance of existing buildings through an alternative, **outcome-based energy code** path. Three historic building pilot projects now under way in Seattle are informing the development of a national model for how jurisdictions can simplify regulations to achieve verified energy performance and carbon reduction outcomes over time. This code framework enables a flexible, whole-building approach for realizing the energy saving opportunities that are unique to each existing building. Central to the new code's market acceptance is the emphasis given to the interactions between energy management software and technology, building operations, and occupant behavior in dramatically reducing energy use over time.



The Supply Laundry Building will be taken through a draft outcome-based compliance path. Reproduced courtesy of Vulcan Real Estate.

Eco-District Approaches to Building Conservation

As carbon reduction targets for buildings become increasingly more ambitious — encouraging buildings to achieve net-zero energy performance — older and smaller urban buildings may be particularly disadvantaged in meeting these goals. Because of their size and structure, it may be technically infeasible or too financially costly to install the advanced heating, cooling, and renewable energy systems needed to meet substantial emissions-reduction targets on a building-by-building basis.

In recent years, interest has emerged in the concept of eco-districts, which are neighborhood-scale efforts to achieve sustainable development objectives. **District energy systems** are often identified as one such neighborhood scale sustainable development option that may be particularly usefully for communities of older, smaller buildings. These neighborhood-scale utilities deliver heating, cooling, and hot water to a defined service area, and may ultimately make it more affordable and feasible to transition older buildings to cleaner sources of energy. There are hundreds of district energy systems already in use throughout the United States, the majority of which are located in hospitals, universities, and other institutional complexes, and a number of cities in the U.S. and abroad, including Stockholm, Sweden; Vancouver, Canada; and St. Paul, Minnesota, have long-standing systems. Other U.S. cities are beginning to embrace such systems.

West Union, Iowa, for example, is in the midst of an ambitious plan to redefine its downtown core that includes the creation of a new district-energy system based on renewable ground-source thermal energy (Preservation Green Lab 2010). The system will make West Union one of the first communities in the nation to choose district energy as an energy performance strategy in an existing neighborhood of historic buildings. While financing and other challenges make district-energy solutions challenging to scale to a large number of cities at this juncture, the **Portland Sustainability Institute**, **Living City Block**, the **International District Energy Association**, and others are working to make neighborhood-scale energy systems a more viable alternative to conventional emissions reduction strategies.

These district-based strategies may well offer planners yet another tool or group of tools with which to promote the conservation of existing buildings in the future.

Conclusion

Myriad tools are available to help communities retain valuable historically significant buildings, as well as nondesignated older buildings that add tremendous character and other benefits to communities. These strategies notwithstanding, there can be multiple forces at work that make it difficult for communities to promote the conservation of existing buildings. For example, new

construction may be less expensive (or seem that way), largely because the environmental and health impacts associated with new construction are externalized — that is, they are not included in developer costs, but are instead transferred to the community.

Yet encouraging efforts are underway to address this challenge. An ambitious new project by Earth Economics called the **Economics of Change** seeks to create a new investment model for real estate that includes social and environmental benefits, and would potentially serve to help communities promote reinvestment in existing buildings (Twill et al. 2011). In combination with the development of other tools that address other fundamental obstacles to reuse, such new thinking could lead to yet other generation of creative strategies that builds on the success of existing policy tools, while helping communities to achieve even more significant rates of building reuse.

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