Landmarks Preservation and the Law: Private Opportunity and the Public Good

by Daniel Rose, C.R.E.

The 19th century American missionaries who set out to proselytize Hawaii were vigorous, effective individuals; in time, when their families came to own or control most of the islands, it was said that "they came to do good and did very well indeed."

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

INTERPRETATIONS OF PUBLIC GOOD

These are all loaded terms, of course, since "public good", "private practitioners", and "do well" can each mean pretty much what we wish them to mean; and even the term "landmarks preservation" represents substantially different things to different people. To some it means *restoration*, or putting a building of unusual historic or aesthetic interest back into its original state and condition; to others it means *renovation*, which implies a

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physical upgrading while retaining original use; to still others, it can mean *adaptive use* in which older buildings are recycled to new uses in ways or styles that may or may not retain the original character, detailing or aesthetic integrity.

Mount Vernon, a classic *restoration*, is presumably ready for George Washington to resume residence on a moment's notice and is fully equipped for him, down to a new set of his wooden false teeth.

Ghirardelli Square in San Francisco and Boston's Old City Hall, on the other hand, ideal examples of *adaptive use*, have been reincarnated in forms more imaginative and more aesthetically pleasing than in their first lives. And many homes in Washington's Georgetown, Boston's Back Bay, and Philadelphia's Society Hill have been superbly *renovated*, providing identical surroundings for their new residents as for their original owners, only now with steam heat, electricity, and running water.

The old French saying, "the Good is the enemy of the Best; the Best is the enemy of the Good" is clearly applicable here because if pure *restoration* is the goal, *adaptive use* thinking can be destructive.

On the other hand, if *adaptive use* or *renovation* is acceptable, all parties concerned should agree beforehand on the degree of historic authenticity and continuity required because the economic feasibility (therefore the "do-ability") of an otherwise desirable project might be destroyed in the early planning stage.

Common sense and actual experience would seem to limit pure *restoration* activity to those philanthropic groups specifically equipped, financially and technically, to undertake them. Private skills and guidance can be hired on a fee basis as required, but there would seem to be no real place for private sector entrepreneurial involvement.

With pure *restoration* left to eleemosynary groups, *renovation* and *adaptive use* are areas for the most fruitful kind of cooperation between public and private entities.

PUBLIC INTEREST AND PRIVATE DEVELOPERS

The public interest in the effective recycling of desirable older structures is being increasingly acknowledged as it proves an important factor in revitalizing key areas in decaying old center-city locations. As under-utilized properties on strategic sites are brought back to social and economic health, the catalytic effect on adjoining areas becomes evident. Before long, property tax rolls are increased, new jobs are created, fresh purchasing power is attracted back to declining areas, and more efficient use is made of an existing and frequently under-utilized urban infrastructure.

The whole enterprise proves a "positive sum game" in which everyone comes out ahead. Philosophically, it represents a wise and conserving use of existing resources in which we progressively preserve first buildings, then neighborhoods, and finally the city itself. Given the public benefits that

flow from such activity, it follows that legitimate public interest should focus on the problems a private developer faces and on steps that may help overcome them.

To begin with, it is important to realize that the financial analysis a developer performs on a recycling project is precisely the same he applies to any other development, and the three basic equations are quite simple:

Gross Development Cost
− Total Financing
"Equity Investment"

Gross Income
− Real Estate Taxes, Operating Cost, and Debt Services
Net Cash Flow

"Net Cash Flow"
÷ Equity Investment
"Return on Equity"

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

The heart of the legal problem, then, is to devise mechanisms that:

1) Determine the appropriate public aims to be achieved.
2) Define the private role.
3) Make optimum use of those incentives available to the private sector that achieve public aims.

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

RISKS VERSUS POSITIVE AIDS

Availability of capital (mortgage and equity) is a problem that persistently plagues the preservation field (and "front end" cash is the most difficult of all to come by). Contractors and architects are reluctant to provide firm bids and guaranteed completion dates involving projects where, for example, structural problems, initially hidden from view, come to light as work progresses and result in delays and cost overruns. The relatively small size of many preservation projects prevents "economies of scale" that might otherwise apply. All are risks and problems the developer faces knowingly.

The taking of risks is indeed a key part of the entrepreneur's role, but in the long run, *society pays for undue risks,* either in the form of worthwhile projects left undone or in the form of higher potential rewards that will be necessary to attract desirable developers.

On the positive side of the ledger, of course, are the impressive and growing array of governmental aids for preservation work. Some are open and obvious but difficult to nail down. The federal government's National Historic Preservation Act (1966), National Environmental Policy Act (1969), and the National Historic Preservation Fund (created 1976) all provide important preservation tools; a variety of HUD programs are aimed at preservation, and the Department of Commerce (through the Economic Development Administration and Small Business Administration) provides several sources of funds. The more accessible these are made to the developer, the better for everyone concerned.

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

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

Given the above, it would seem that the meaningful problems of historic preservation law and its relation to the private developer involve fuller and more effective use of current tools rather than the need for the creation of new ones.

First of all, since in "the real world" the implementation of a law is as important as its textual formulation, the application and interpretation of preservation law must be seen as an area of continuing importance to all concerned. Clarity and internal consistency of regulations, and speed and flexibility in administration, are perhaps of even greater importance in this field than in others. The "credibility" of local government, too, in living up to its obligations and promises, is of immense significance in a field involving so many intangibles.

Secondly, in view of the desirability of positive preservation activity, imaginative and creative use of existing tools should be encouraged at all levels of government as being clearly consistent with the underlying legislative intent.

Thirdly, exploration should be made of the thorny and complex question of possible *waivers* (properly reviewed, approved, and controlled) in preservation projects of controls that may otherwise be applicable in such matters as building codes, zoning restrictions, or social engineering.

CONCLUSION

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

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