

PUBLIC INTEREST EXCEPTIONS: THE FUTURE OF HISTORIC PRESERVATION LAW?

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INTRODUCTION

Municipalities¹ face tradeoffs preserving historic sites. On the one hand, historic preservation laws promote a municipality's history, but, on the other hand, historic preservation laws prevent communities from later altering or demolishing the site. Because alterations and demolitions are prohibited, nothing new can be developed on that site so long as the historic designation remains. As a result, many municipalities consider opportunity costs in historic preservation decisionmaking. Municipalities must decide either to freeze a historic site in time or embrace the prospect of future development at the expense of the community's historic identity.²

This is no easy decision. While historic preservation has benefits, development restrictions impose costs. Some question whether historic preservation is worth its costs. Critics like Alexander Kazam argue

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1 I use "municipality" to include all forms of local government, such as towns, cities, boroughs, etc.

2 This tension is inherent to historic preservation regulations. In fact, the modern historic preservation movement grew as a response to "the massive impact of redevelopment schemes." Barry Cullingworth, *Historic Preservation in the USA*, 23 BUILT ENV'T 137, 137 (1997). The conflict underlying the *Penn Central* case exemplifies this tension. New York City created its Landmark Preservation Commission in response to the unpopular destruction of Penn Station. Alexander Kazam, *From Independence Hall to the Strip Mall: Applying Cost-Benefit Analysis to Historic Preservation*, 47 ENV'T L. 429, 431 (2017). The Commission then prevented the Penn Central Transportation Company from building a skyscraper above Grand Central Terminal by designating the terminal a historic landmark. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 116–17 (1978).

that historic preservation's "marginal benefits have declined."³ This is because

the most important sites tend to be preserved first But remarkably, the pace of preservation has remained steady or even accelerated. . . . Whereas once cities battled to preserve Penn Station and Grand Central, today skirmishes erupt over "historic" parking lots. Washington D.C. and Arlington, Virginia recently landmarked several strip malls. In New York, the [Landmark Preservation Commission] landmarked a BP gas station as part of a historic district, nixing the station owner's plans to redevelop the property into a mid-rise condo development.⁴

Kazam also suggests that historic preservation laws stunt urban growth. He argues that these laws are used less for "saving cherished landmarks," and more as "an all-purpose tool for halting new construction."⁵ Critics like Kazam view historic preservation laws as not-in-my-backyard bludgeons with which communities target disfavored developers and projects.

Despite the attacks, municipalities continue to preserve historic sites⁶ because historic preservation carries important community benefits.⁷ These benefits are numerous. Historic preservation strengthens

3 Kazam, *supra* note 2, at 433.

4 *Id.* at 433–34.

5 *Id.* at 434; *see also* J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 669 (2012) ("[N]eighbors plainly do use preservation laws to secure benefits other than heritage protection, such as views and light."). Kazam also implies that historic preservation laws stunt GDP growth. *See* Kazam, *supra* note 2, at 433 ("Restrictions on development come at a cost. One recent study found that lifting barriers to urban construction could raise the gross domestic product (GDP) of the United States by between 6.5% and 13.5%—about one to two trillion dollars." (citing Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 25–26, 46 tbl.5 (Kreisman Working Paper Series in Hous. L. and Pol'y, Paper No. 30, 2015), <https://ssrn.com/abstract=2693282> [<https://perma.cc/REJ9-R7GE>])). But this criticism is overblown. As Professor J. Peter Byrne points out, "[e]ven if [historic] districts were frozen in amber, developers would have nearly the entire city in which to build without preservation restraint. . . . [P]reservation ordinances do not prohibit new development." Byrne, *supra*, at 670; *see also* Vishaan Chakrabarti, Opinion, *How to Make Room for One Million New Yorkers*, N.Y. TIMES (Dec. 30, 2023), <https://www.nytimes.com/interactive/2023/12/30/opinion/new-york-housing-solution.html> [<https://perma.cc/H82W-EXTG>] (explaining that New York City can significantly increase its housing supply without changing development restrictions).

6 Kazam, *supra* note 2, at 432 ("[H]istoric preservation is ubiquitous. Whereas New York was a pioneer in the 1960s, today hundreds of municipalities, from small towns to major metropolises, impose restrictions on property owners in the name of historic preservation.").

7 Some even argue that preserving history is a public duty. *See* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV.

community relationships and organization.⁸ It also promotes patriotism and a love of one's community.⁹ Historic preservation protects the cultural, architectural, and aesthetic nature of a community,¹⁰ providing a "sense of place" that unique historic sites give a community.¹¹ In some communities, historic preservation also provides economic and sustainability benefits.¹² Finally, and perhaps most obviously, historic preservation serves as a valuable educational tool.¹³ Municipalities that preserve their history calculate these benefits as outweighing the costs.

This cost-benefit analysis suffers from a critical limitation: the calculation must be made before protections are placed. The analysis cannot account for unforeseen future development needs. This is challenging because communities evolve; their needs change. A site's preservation may make sense in the present, but it places limits on the community's future. Blocks of rowhouses preserved as historic may, for instance, one day prevent a community from building a much-needed centrally located hospital, or a grocery store in a later-emerged food desert. These issues arise frequently as municipalities preserve more historic sites.¹⁴

The public interest exception, adopted by a handful of municipalities, empowers municipalities to perform a cost-benefit analysis after a site has already been designated and protected.¹⁵ This analysis determines whether the site should remain protected. Municipalities that adopt the public interest exception install a "safety valve" into their preservation regimes that otherwise restrict development.¹⁶ These safety valves "allow officials to approve projects that do not meet applicable standards if they offer unusually important public benefits."¹⁷ In

1142, 1142 (1990) (describing "conservation of artifacts of historic or aesthetic value" as a "[p]ublic responsibility").

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

9 *Id.*

10 *See id.* at 480; SARA C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* 14 (2d ed. 2018).

11 Rose, *supra* note 8, at 480.

12 BRONIN & ROWBERRY, *supra* note 10, at 15–16.

13 *Id.* at 13.

14 *See supra* notes 3–5 and accompanying text.

15 The public interest exception is understudied, and as a result, has no generally agreed upon name. Washington D.C. enacted the most prominent version of the provision, referred to as the "special merit" provision. Byrne, *supra* note 5, at 672. I, however, have chosen to follow Professors Bronin's and Rowberry's characterization of the provision as the "public interest exception" to emphasize the provision's use to bypass designation to benefit the public interest. BRONIN & ROWBERRY, *supra* note 10, at 199.

16 Byrne, *supra* note 5, at 672.

17 *Id.*

other words, the public interest exception allows officials to bypass historic preservation protections on a specific site if the public interest is greater served by a proposed project than it would be by the maintenance of the historic site.

This Note is the first work to provide an in-depth examination of the public interest exception. I argue that the public interest exception is important to the future of local historic preservation laws as the provision allows municipalities to maximize historic preservation's benefits while eliminating the risk that designations will forever freeze a community's development. Part I surveys how municipalities currently navigate requests to alter or demolish historic sites and explains this system's shortcomings. Part II examines the text of public interest exception provisions as enacted by three municipalities. Part III examines the provision's application. Part IV responds to potential criticisms of the public interest exception and advocates for new adaptations of the exception. Finally, the Note concludes by summarizing and suggesting the public interest exception is important to the future of local historic preservation laws.

I. THE CURRENT REGIME

According to one recent study, virtually every municipality grants local historic commissions the authority to protect historic sites from alteration and demolition.¹⁸ Property owners must request permission from the local historic commission to alter or demolish protected historic sites.¹⁹ Many municipalities require that alteration and demolition applications be reviewed for "appropriateness."²⁰ Standards for appropriateness vary, but they generally require commissions to review the property's historic nature, not the proposed alteration or new development's public benefits.²¹

Municipalities often refer to or codify the Secretary of the Interior's Standards for the Rehabilitation of Historic Properties when establishing a historic preservation commission's alteration and demolition application review standard.²² In municipalities that adopt them,

18 Sara C. Bronin & Leslie R. Irwin, *Regulating History*, 108 MINN. L. REV. 241, 300 (2023).

19 *Id.* at 301. I only refer to affirmative (intentional and purposeful) demolition when discussing demolition in this Note. Local ordinances may also regulate "'demolition by neglect' which occurs when property owners allow a property to fall into such a state of disrepair that it becomes necessary to demolish it." BRONIN & ROWBERRY, *supra* note 10, at 201.

20 BRONIN & ROWBERRY, *supra* note 10, at 197, 204.

21 See Bronin & Irwin, *supra* note 18, at 305.

22 *Id.* at 303.

local commissions may approve an alteration or demolition application if the application conforms to these standards. The standards create strong protections for historic sites. For example, 36 C.F.R. § 68.3(b)(2) requires that “[t]he historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided.”²³ Additionally, 36 C.F.R. § 68.3(b)(6) demands that “[d]eteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and, where possible, materials.”²⁴ Furthermore, 36 C.F.R. § 68.3(b)(9) instructs that “[n]ew additions, exterior alterations or related new construction will not destroy historic materials, features and spatial relationships that characterize the property.”²⁵ In all, these standards focus analysis on the historic character of the site and how best to protect it. They do not allow local historic commissions to consult a proposed project’s public benefits.

Other municipalities have adopted similar standards. New York City’s Administrative Code requires that the city’s Landmarks Commission consider various factors when an applicant files for a certificate of appropriateness to receive a permit to construct, reconstruct, alter, or demolish historic sites or districts.²⁶ First, New York’s Commission must consider the effect of the proposed work on the building’s exterior architectural features, and “the relationship between the results of [the] work and the exterior architectural features of other, neighboring improvements in [the] district.”²⁷ Second, the Commission must “consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.”²⁸ Like the Secretary of the Interior’s Standards, the New York Administrative Code instructs the Landmarks Commission to focus its analysis on the historic and architectural character of the building.²⁹ It does not allow the Commission to determine, or even inquire, whether the proposed alteration is in the public’s interest.

Dallas, Texas imposes even stricter requirements. Because the “[d]emolition or removal of a historic structure constitutes an

23 36 C.F.R. § 68.3(b)(2) (2024).

24 *Id.* § 68.3(b)(6).

25 *Id.* § 68.3(b)(9).

26 N.Y.C., N.Y., ADMIN. CODE § 25-307(a) (2025).

27 *Id.* § 25-307(b)(1).

28 *Id.* § 25-307(b)(2).

29 *Id.* § 25-307(d)–(e).

irreplicable loss to the quality and character of the city,” the “demolition or removal of historic structures should be allowed only” under four circumstances included in the City Code.³⁰ A demolition application may only be approved under one of four criteria:

- (i) To replace the structure with a new structure that is more appropriate and compatible with the historic overlay district.
- (ii) No economically viable use of the property exists.
- (iii) The structure poses an imminent threat to public health or safety.
- (iv) The structure is non-contributing to the historic overlay district because it is newer than the period of historic significance.³¹

Dallas dips a toe in the interest balancing analysis water. Criterion (i) considers whether the new structure “is more appropriate and compatible with the historic overlay district.”³² But this criterion only considers the public’s interest in maintaining a historic district. It does not consider the public’s interest in what might replace the historic structure. Criteria (ii) and (iii) allow demolition when there is no feasible way to safely or economically maintain the building.³³ Criterion (iv) allows demolition of non-historic buildings located in historic districts.³⁴ So long as the building may feasibly be maintained, Dallas’s demolition standard requires its commission to focus on the building’s historic nature. This mirrors New York City and the Secretary of the Interior’s standards. Like New York City and the Secretary of the Interior, Dallas also requires its commission to focus on the building’s historic nature and it may not consider other public benefits.

This short survey shows municipal ordinances that protect historic structures require alteration and demolition applicants to demonstrate that their proposals are either necessary for safety, the only economically feasible use of the property, or that the changes will preserve the historic character of the structure and surrounding neighborhood. These ordinances do not allow local historic commissions to consider the public’s interest in the proposed changes. Approval for demolitions and significant alterations is very difficult to procure under these standards. These historic preservation ordinances freeze parts of communities in time. This may prevent the communities from developing later-needed improvements on those sites. Some municipalities have adopted public interest exceptions to minimize this freezing effect.

30 DALL., TEX., CITY CODE § 51A-4.501(h)(1) (2024).

31 *Id.* § 51A-4.501(h)(2)(B)(i)–(iv).

32 *Id.* § 51A-4.501(h)(2)(B)(i).

33 *Id.* § 51A-4.501(h)(2)(B)(ii)–(iii).

34 *See id.* § 51A-4.501(h)(2)(B)(iv).

II. THE PUBLIC INTEREST EXCEPTION

Very few municipalities have adopted a public interest exception to their historic preservation scheme.³⁵ At least two major American cities have: Washington, D.C. and Philadelphia, Pennsylvania.³⁶ Some smaller municipalities, like Gaithersburg, Maryland, also adopted a public interest exception.³⁷ This Part will analyze the text of each of these municipality's public interest exception provisions.

A. *Washington, D.C.*

The District of Columbia terms its public interest exception the “special merit provision.”³⁸ The District implemented the provision to balance the community’s historic preservation interests against developer’s interests.³⁹ The provision provides an exception to the District’s “presumption against demolition” of properties designated as historic landmarks.⁴⁰ The District’s Code requires that the Mayor’s Agent issue a “permit to demolish an historic landmark or a building or structure in an historic district” before demolition can occur.⁴¹ The Code places strong restrictions on the mayor in reviewing the permit request. The Code requires that “[n]o permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner.”⁴² These are stringent requirements. The permit’s issuance (and subsequent demolition) must be *necessary* in the public interest. As the District of Columbia Court of Appeals explained, the

35 BRONIN & ROWBERRY, *supra* note 10, at 199.

36 *Id.* San Antonio, Texas used to have a public interest exception provision, but it has since been repealed. *See id.* San Antonio’s Unified Development Code now requires that “[n]o certificate shall be issued for demolition of a historic landmark or property located within a historic district unless the applicant provides sufficient evidence to support a finding . . . of unreasonable economic hardship on the applicant.” SAN ANTONIO, TEX., UNIFIED DEV. CODE § 35-614(e) (2023). The only other way an applicant can secure a demolition permit is if he can show that the historic site lost its significance. *Id.*

37 *See infra* Section II.C.

38 Byrne, *supra* note 5, at 672.

39 William King, Note, *Simplifying the District of Columbia Historic Preservation Act’s Three-Pronged “Special Merit” Exception Will Promote Clarity, Predictability, and Accountability in the Demolition Permit Review Process*, 13 GEO. J.L. & PUB. POL’Y 145, 147 (2015).

40 *Id.* at 148.

41 D.C. CODE § 6-1104(a) (2024); *see also id.* § 6-1102(8) (“‘Mayor’ means the Mayor of the District of Columbia, or his designated agent.”). As shown below, the Mayor’s Agent usually acts on behalf of the Mayor in analyzing and acting on special merit applications. *See discussion infra* Section III.A.

42 *Id.* § 6-1104(e).

permit's issuance is necessary in the public interest if it is "necessary to allow the construction of a project of special merit."⁴³ The District's only other approval criterion is that the "failure to issue a permit will result in unreasonable economic hardship to the owner."⁴⁴

The Code provides a narrow "three-pronged definition" of "special merit."⁴⁵ The Code defines special merit as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services."⁴⁶ While the first two prongs are important in their own right, this Note's analysis focuses on the third. The "social or other benefits having a high priority for community services" prong explicitly tasks the Mayor with considering the public's interest in the new development when reviewing a demolition application. Finally, the Code includes a provision designed to prevent futile demolitions. It states that if "the Mayor finds that the demolition is necessary to allow the construction of a project of special merit, no demolition permit shall be issued unless a permit for new construction is issued simultaneously under § 6-1107 and the owner demonstrates the ability to complete the project."⁴⁷ In sum, Washington, D.C.'s special-merit provision is defined by a narrow public interest exception subject to significant boundaries.

B. *Philadelphia, Pennsylvania*

Philadelphia enacted a similar public interest exception in its Historic Preservation Ordinance. The city's historic preservation regulations are located in the Zoning and Planning title of the Philadelphia Code.⁴⁸ The first section lists goals that demonstrate Philadelphia's intent to balance the public's interest in development with its interest

43 *Friends of McMillan Park v. D.C. Zoning Comm'n (FOMP I)*, 149 A.3d 1027, 1038 (D.C. 2016) (quoting D.C. CODE § 6-1102(10) (2016)).

44 D.C. CODE § 6-1104(e) (2024). This alternative buttresses the ordinance against a takings claim. See *Embassy Real Est. Holdings, LLC v. D.C. Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1050 (D.C. 2008) (framing the question "whether petitioner suffered unreasonable economic hardship" as "an unconstitutional takings argument"). The Code narrowly defines "unreasonable economic hardship" as "that [a] failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s)." D.C. CODE § 6-1102(14) (2024).

45 *King*, *supra* note 39, at 148.

46 D.C. CODE § 6-1102(11) (2024).

47 *Id.* § 6-1104(h).

48 PHILA., PA., CODE § 14-1000 (2023).

in preserving its past. Section 14-101 lists the Zoning Code's purpose as, among other things, to "[p]romote sound planning principles by . . . [p]rotecting the desirable characteristics of the City's neighborhoods,"⁴⁹ to "[p]romote sustainable and environmentally responsible practices by . . . [r]estoring and conserving the City's natural and historic resources"⁵⁰ and to "[p]romote growth and economic development."⁵¹

Like the District of Columbia, Philadelphia balances these competing goals through its public interest exception provision. Its text reflects the District's special merit provision:

No building permit shall be issued for the demolition of a historic building, structure, site, or object, or of a building, structure, site, or object located within a historic district that contributes . . . to the character of the district, unless the Historical Commission finds that issuance of the building permit is necessary in the public interest, or unless the Historical Commission finds that the building, structure, site, or object cannot be used for any purpose for which it is or may be reasonably adapted.⁵²

Like the District's provision, Philadelphia's provision creates a presumption against demolition.⁵³ The exception cannot be used if the Commission finds only that it may benefit the public interest. Instead, the exception requires that the Commission determines the permit's issuance is "necessary" to the public interest.⁵⁴ Furthermore, the Code also includes the same alternative approval grounds as the District's Code. The Historical Commission must find "that the building, structure, site, or object cannot be used for any purpose for which it is or may be reasonably adapted."⁵⁵ This reflects Washington, D.C.'s unreasonable economic hardship requirement.⁵⁶

While the District's special merit provision narrowly defines what constitutes the public interest, Philadelphia's public interest exception defines the public interest broadly. While the District's provision restricts special merit analysis to just three prongs,⁵⁷ Philadelphia allows the Commission to consider six criteria.⁵⁸ Philadelphia's provision

49 *Id.* § 14-101(1), (1)(c).

50 *Id.* § 14-101(2), (2)(c).

51 *Id.* § 14-101(3).

52 *Id.* § 14-1005(6)(d).

53 *See supra* note 40 and accompanying text.

54 *See* § 14-1005(6)(d).

55 *Id.*

56 *See supra* note 44 and accompanying text.

57 *See supra* notes 45–46 and accompanying text.

58 *See* § 14-1005(6)(e).

allows the Commission to consider the Code's goals (as laid out above);⁵⁹ the "historical, architectural, or aesthetic significance of the building, structure, site, or object;"⁶⁰ the "effect of the proposed work on the building, structure, site, or object and its appurtenances;"⁶¹ the "compatibility of the proposed work with the character of the historic district or with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings, and the streetscape;"⁶² and the "design of the proposed work."⁶³ Additionally, the Commission may look to the Secretary of the Interior's Standards for Rehabilitation "or similar criteria" as guidance.⁶⁴ The Code contains additional provisions in §§ (e)(.7)–(e)(.8) related to special cases "not contrary to the public interest" and "[w]ith respect to designated public interior portions."⁶⁵ These are not relevant to this Note's discussion

These criteria strike a balance between evaluating the value of the site's historic nature and evaluating the public's interest in the proposed demolition or alteration. Criterion (e)(.2) for example, focuses on the building's historic nature. It requires the Commission to consider the structure's "historical, architectural, or aesthetic significance."⁶⁶ Likewise criterion (e)(.4) requires the Commission to consider "[t]he compatibility of the proposed work with the character of the historic district or with the character of its site."⁶⁷ However, by incorporating the chapter's goals into the Commission's review standard, criterion (e)(.1) requires the Commission to consider whether the proposed alteration or new construction will promote economic growth.⁶⁸ The Commission must balance these competing interests in determining whether the proposed alteration or demolition is in the public's interest.

59 *Id.* § 14-1005(6)(e)(.1).

60 *Id.* § 14-1005(6)(e)(.2).

61 *Id.* § 14-1005(6)(e)(.3).

62 *Id.* § 14-1005(6)(e)(.4).

63 *Id.* § 14-1005(6)(e)(.5).

64 *Id.* § 14-1005(6)(e)(.6).

65 *Id.* § 14-1005(6)(e)(.7)–(.8).

66 *Id.* § 14-1005(6)(e)(.2).

67 *Id.* § 14-1005(6)(e)(.4).

68 *See Id.* § 14-1005(6)(e)(.1); *id.* § 14-1001(5).

C. Gaithersburg, Maryland

Like the two larger cities examined above, Gaithersburg adopted a public interest exception provision.⁶⁹ Like Philadelphia's historic preservation ordinance, section 24-223 of the Gaithersburg Municipal Code articulated its purposes:

[T]o: (1) safeguard the heritage of the city by preserving sites, structures, or districts which reflect elements of cultural, social, economic, political, archeological, or architectural history; (2) strengthen the local economy; and (3) promote the preservation and appreciation of those sites, structures, and districts for the education and welfare of the residents of the city.⁷⁰

It is unsurprising that the Gaithersburg Code also included a public interest exception because the Code framed historic preservation itself as a mechanism to serve the public interest. The Code considered the promotion of the welfare and the strengthening of the local economy as part of historic preservation's purposes.⁷¹ The public interest exception furthered these goals.

Gaithersburg framed its demolition procedures in terms of undue economic hardship,⁷² but the municipality does not require a property owner to only show undue economic hardship on his or her demolition application. Alternatively, the property owner may show that demolition is in the public's interest. The ordinance read:

- (a) In the case of a proposed demolition of a historic resource or property within a historic district, the historic district commission may consider an application for demolition if:
 - (1) The site or structure is a deterrent to a major improvement program that will be of substantial benefit to the city; or
 - (2) The retention of the site or structure would:
 - (i) Cause undue financial hardship to the owner; or
 - (ii) Not be in the best interests of a majority of persons in the community.⁷³

69 Gaithersburg's Municipal Code included a public interest exception when this Note was written. However, the city later repealed it. *Compare* GAITHERSBURG, MD., CODE § 24-9.9 (2025) *with* GAITHERSBURG, MD., CODE § 24-231.1 (2023) (repealed 2024). Although it is no longer in force, it still serves as a sample.

70 GAITHERSBURG, MD., CODE § 24-223 (2023) (repealed 2024).

71 *Id.*

72 *See id.* § 24-231.1 (tiding the section as “[u]ndue economic hardship for designated buildings and structures”).

73 *Id.* § 24-231.1(a).

The ordinance is deceiving. Although it framed demolition review criteria in “undue economic hardship” terms,⁷⁴ the ordinance’s criteria focused on the public interest more than it did the owner’s economic hardship. Subsection (a)(1) allowed for the demolition of a site that is blocking a new development in the public interest.⁷⁵ Subsection (a)(2)(ii) went a step further. It allowed the Commission to approve a historic site’s demolition if its retention was not in the best interest of a bare majority of persons in the community. No new development plan was required. The public’s interest in demolition need not have significantly outweighed its interest in retaining the site either. Only the slimmest majority was required. As this provision demonstrates, Gaithersburg’s public interest exception allowed the community to weigh its development interests against its historic preservation interests in determining whether a structure should be demolished.

D. The Standard Public Interest Exception

The public interest exceptions examined share certain common characteristics. First, these public interest exceptions balance competing public interests. These interests are listed in the ordinances discussed. This shows that these municipalities enacted public interest exceptions to strike a balance between the public’s interest in preserving its heritage and the public’s interest in development.

Second, these municipalities enacted public interest exceptions as a single alternative demolition criterion. The public interest exception functions as a complement to undue economic hardship provisions. Undue economic hardship provisions allow historic commissions to approve historic site demolitions if maintaining the site would constitute an unreasonable financial burden on the property owner. Undue economic hardship provisions and public interest exceptions work in tandem. The undue economic hardship provision focuses on the property owner’s financial condition. It is an inward-facing inquiry. The public interest exception, in contrast, focuses on the community’s interest in maintaining the historic site and its interest in a new development that could replace it. This is an outward-facing inquiry. The public interest exception reaches the interests of those not considered by the undue economic hardship provision.

Third, the public interest exceptions examined are more expansive than the undue economic hardship provision. In Gaithersburg,

⁷⁴ *Id.* § 24-231.1.

⁷⁵ *Id.* § 24-231.1(a)(1).

Maryland, for example, the Commission could approve the property owner's demolition application if the property owner could show he suffered an *undue* economic burden.⁷⁶ This "undue" language suggests the property owner's economic burden must be significant—a great economic hindrance. Gaithersburg's public interest exception, however, only required that the demolition is in the best interests of a simple majority of persons in the community.⁷⁷ There is no heightened burden in Gaithersburg's public interest exception, or any of the others examined above.

III. APPLYING THE PUBLIC INTEREST EXCEPTION

Courts have reviewed applications of the public interest exception. Each court's analysis sheds light on how public interest exceptions are applied. This Part is split into two subparts. The first examines how the courts in Washington, D.C., applied the public interest exception. The second examines the same for Philadelphia. I do not provide a subsection analyzing the application of Gaithersburg's public interest exception because there are no relevant cases available.⁷⁸ This Part shows that courts tend to grant deference to historic commissions in applying the public interest exception.

A. *Application in Washington, D.C.*

In *Friends of McMillan Park v. District of Columbia Zoning Commission (FOMP I)*, the District of Columbia Court of Appeals outlined the two-step approach the Mayor's Agent must take in deciding special merit questions.⁷⁹ First, the Mayor's Agent must determine whether the proposed development has special merit.⁸⁰ Second, after finding special merit, the Mayor's Agent "must balance that special merit against the harm to historic-preservation values that would result from the demolition or subdivision."⁸¹ Courts in the District of Columbia give broad deference to the Mayor's Agent. First, they apply a "substantial

⁷⁶ *Id.* § 24-231.1(a)(2)(i).

⁷⁷ *Id.* § 24-231.1(a)(2)(ii).

⁷⁸ I searched Westlaw and Lexis and found just one case citing the ordinance. The case, however, focuses on the ordinance's "undue financial hardship" exception instead of its public interest exception. *Halici v. City of Gaithersburg*, 949 A.2d 85, 89 (Md. Ct. Spec. App. 2008).

⁷⁹ *Friends of McMillan Park v. D.C. Zoning Comm'n (FOMP I)*, 149 A.3d 1027, 1038 (D.C. 2016).

⁸⁰ *Id.*

⁸¹ *Id.*

evidence” standard when reviewing fact finding decisions.⁸² Under the substantial evidence standard, the court will “uphold the Mayor’s Agent’s decision if the findings of fact are supported by substantial evidence in the record considered as a whole and the conclusions of law flow rationally from these findings.”⁸³ Second, District of Columbia courts apply a “limited and narrow” review standard⁸⁴ “when an agency’s—and, correlatively, the Mayor’s Agent’s—decision is based on an ‘interpretation of the statute and regulations it administers’”⁸⁵ As the District of Columbia Court of Appeals explains, the limited and narrow review standard means “that [the] interpretation will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute.”⁸⁶

Even with the deferential standard, courts still double-check the Mayor’s Agent’s special merit decisions.⁸⁷ The Mayor’s Agent must “precisely and clearly identif[y] the specific features of land planning on which the Mayor’s Agent relies to support a conclusion of special merit.”⁸⁸ The Mayor’s Agent cannot merely cite vague benefits to the public interest, or “benefits common to all projects.”⁸⁹ Additionally, the Mayor’s Agent must “specifically explain why those features are ‘sufficiently special’ as to rise to the level of special merit.”⁹⁰ The *FOMP I* Court found the Mayor’s Agent’s determination unspecific because the Mayor’s Agent only stated that “the totality of the plan . . . created the special merit” without further explanation.⁹¹ The court vacated the Mayor’s Agent’s orders because the orders “do not explain with

82 *Id.* at 1039 (quoting *Kalorama Heights Ltd. P’ship v. D.C. Dep’t of Consumer & Regul. Affs.*, 655 A.2d 865, 868 (D.C. 1995)).

83 *Kalorama Heights*, 655 A.2d at 868.

84 *Embassy Real Est. Holdings, LLC v. D.C. Mayor’s Agent for Hist. Pres.*, 944 A.2d 1036, 1050 (D.C. 2008) (quoting *Reneau v. District of Columbia*, 676 A.2d 913, 917 (D.C. 1996)); *see also* *DC Pres. League v. Mayor’s Agent for Hist. Pres.*, 236 A.3d 373, 378 (D.C. 2020) (noting that “[o]ur review of a decision of the Mayor’s Agent is ‘limited and narrow’” (quoting *Embassy Real Est. Holdings*, 944 A.2d at 1050)).

85 *Kalorama Heights*, 655 A.2d at 868 (quoting *Nova Univ. v. Educ. Inst. Licensure Comm’n*, 483 A.2d 1172, 1190 (D.C. 1984)).

86 *Id.* (quoting *Nova*, 483 A.2d at 1190–91).

87 *See* *Comm. of 100 on the Fed. City v. D.C. Dep’t of Consumer & Regul. Affs.*, 571 A.2d 195, 200 (D.C. 1990) (“The Preservation Act requires that a proposed amenity meet a high standard in order to qualify as a ‘special merit’ project . . .”).

88 *Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP I)*, 149 A.3d 1027, 1039 (D.C. 2016).

89 *Id.* (citing *Comm. of 100 on the Fed. City*, 571 A.2d at 200). The court explained that “[a] broad focus on the overall benefits flowing from a project runs beyond the task assigned to the Mayor’s Agent.” *Id.* at 1039–40.

90 *Id.* at 1039 (quoting *Comm. of 100 on the Fed. City*, 571 A.2d at 200).

91 *Id.*

sufficient clarity which ‘specific features of land planning’ the Mayor’s Agent relied upon and why those features combined to support a conclusion of special merit.”⁹²

The Mayor’s Agent must also find that the applicant demonstrated that the demolition was necessary. This requires that the “applicant . . . show that ‘all reasonable alternatives were considered.’”⁹³ But this necessity requirement is not a high bar. Demolition need not be strictly necessary, but reasonable. Take *Preservation League v. Mayor’s Agent for Historic Preservation*, for example.⁹⁴ There, historic preservation advocates challenged the Mayor’s Agent’s finding of necessity.⁹⁵ The advocates argued that the project’s public interest benefits, including a park and interpretive exhibits, “could physically have been provided without any demolition of the” protected structure.⁹⁶ This argument promoted a strict understanding of necessity: that the proposed public benefits must occupy the same space that protected structures already inhabit. The court disagreed with this understanding, however. It held that necessity “is not limited to physical necessity, and includes considerations such as financial feasibility.”⁹⁷ The court further explained that “[r]easonableness must be imputed into the ‘necessary’ standard, and at hearing on each ‘special merit’ permit, factors including but not limited to cost, delay, and technical feasibility become proper considerations for determining ‘necessary.’”⁹⁸ Thus, the District of Columbia courts use a flexible multifactor approach to determine necessity. The inquiry focuses on what is reasonable, not what is strictly necessary.

The *Preservation League* Court applied this principle to the Mayor’s Agent’s determination that demolishing most of the West Heating Plant, a deteriorating historic landmark, was necessary.⁹⁹ It rejected the preservation advocates’ argument that the demolition was not necessary “because the structure could have been substantially restored, after initial demolition, using ‘in-kind’ materials.”¹⁰⁰ The court upheld

92 *Id.* at 1039, 1041.

93 DC Pres. League v. Mayor’s Agent for Hist. Pres., 236 A.3d 373, 379 (D.C. 2020) (quoting *Citizens Comm. to Save Hist. Rhodes Tavern v. D.C. Dep’t of Hous. & Cmty. Dev.*, 432 A.2d 710, 718 (D.C. 1981)).

94 *Id.*

95 *Id.* at 382.

96 *Id.*

97 *Id.* (citing *Don’t Tear It Down, Inc. v. D.C. Dep’t of Hous. & Cmty. Dev.*, 428 A.2d 369, 380 (D.C. 1981))

98 *Id.* (quoting *Don’t Tear it Down*, 428 A.2d at 380).

99 *Id.* at 377–78 (“[A]ny adaptive reuse of the Plant would require ‘essentially full demolition and reconstruction of the majority of the existing building structure.’”).

100 *Id.* at 382.

the Mayor's Agent's finding as reasonable because "the balancing of net preservation loss and special merit favors" the Mayor's Agent's decision.¹⁰¹

After the Mayor's Agent determines that the project has special merit, he must "balance the historical value of the particular landmark against the special merit of the proposed project."¹⁰² Courts apply the deferential substantial evidence standard in reviewing the Mayor's Agent's balancing analysis. For example, in *DC Preservation League*, the court affirmed the Mayor's Agent's balancing determination after applying the substantial evidence review standard.¹⁰³ The Mayor's Agent determined that "although the Plant has some historic value as an architectural building, overwhelming evidence supported the conclusion that the value of the project outweighed the loss of the Plant's historic elements."¹⁰⁴ Additionally, the "Mayor's Agent also credited testimony indicating that the transformation of the site would be an important step toward revitalizing the historic C&O Canal Park, thereby reducing the net historic preservation loss."¹⁰⁵

The Mayor's Agent used these findings to determine "that the project's special-merit benefits outweighed the net loss to historic preservation caused by the demolition."¹⁰⁶ The Mayor's Agent only needed to make this determination by a preponderance standard. The court need not find that the benefits outweigh the costs to the "greatest extent possible."¹⁰⁷ The Washington, D.C. special-merit provision requires only that one side outweigh the other.

To summarize, the District of Columbia applies its public interest provision, known as the special-merit provision, in two steps. First, the Mayor's Agent determines whether the proposed project is one of special merit. If the Mayor's Agent finds that special merit exists, the Mayor's Agent must balance the benefits to the public interest created by the project against the net loss to historic preservation caused by the demolition. District of Columbia courts apply a deferential substantial-evidence standard in reviewing the Mayor's Agent's balancing determinations, usually upholding them.

101 *Id.*

102 Citizens Comm. to Save Hist. Rhodes Tavern v. D.C. Dep't of Hous. & Cmty. Dev., 432 A.2d 710, 716 (D.C. 1981).

103 *DC Pres. League*, 236 A.3d at 384 (using the substantial evidence standard to uphold the Mayor's Agent's balancing determination).

104 *Id.*

105 *Id.*

106 *Id.* at 383.

107 *Id.*

B. Application in Philadelphia

The nation's capital boasts a large collection of cases analyzing the special-merit provision.¹⁰⁸ Philadelphia lacks the same volume. In fact, I could only find one case that analyzes the Philadelphia Historical Commission's application of the exception.¹⁰⁹ Luckily, the only relevant case available, *In re Friends of Marconi Plaza*, provides a detailed examination of Philadelphia's public interest exception application.¹¹⁰ As shown below, Philadelphia's public interest exception is applied like Washington, D.C.'s special merit provision.

In re Friends of Marconi Plaza concerned the removal of a Christopher Columbus statue in Philadelphia's Marconi Plaza.¹¹¹ The statue was designated as an historic object in 2017.¹¹² The Philadelphia Historical Commission approved the statue's removal following unrest in the wake of Black Lives Matter protests.¹¹³ The Historical Commission approved the removal under Philadelphia's public interest

108 For readers interested in exploring Washington, D.C.'s historic preservation caselaw, Georgetown University's Law Library maintains a database that hosts both court and Mayor's Agent historic preservation law decisions. See *D.C. Historic Preservation Law Collection*, DIGITALGEORGETOWN, <https://law.digital.georgetown.edu/collections/bdb751b4-23bc-44db-b7d7-cb2e188172ce> [<https://perma.cc/6MQN-SLSJ>] (last visited Jan. 19, 2026).

109 I searched both Westlaw and Lexis for cases. Other cases only passingly mentioned the public interest exception. See, e.g., *Turchi v. Phila. Bd. of License & Inspection Rev.*, No. 658 C.D.2014, 2015 WL 5437160, at *5 (Pa. Commw. Ct. May 15, 2015) (mentioning the "hardship-public interest test"); *Woodland Terrace Homeowners' Ass'n v. Phila. Bd. of License & Inspection Rev.*, No. 801 C.D.2014, 2015 WL 5436758, at *7 (Pa. Commw. Ct. Apr. 22, 2015) (mentioning the public interest exception in its discussion of the hardship exception). *Woodland Terrace* notes that § 14-1005(6)(d), which houses Philadelphia's public interest exception, was enacted after this case began. Originally, the public interest exception was contained in § 14-2007(7)(j), but that subsection was repealed and reenacted as § 14-1005(6)(d). *Id.* at *7 n.12. I searched Westlaw and Lexis for this section too but found no new relevant results.

110 *In re Friends of Marconi Plaza (Marconi I)*, No. 00295, 2021 WL 3864127 (Pa. C.P. Phila. Cnty. Aug. 17, 2021), *aff'd*, 287 A.3d 965 (Pa. Commw. Ct. 2022).

111 *In re Friends of Marconi Plaza (Marconi II)*, 287 A.3d at 968–69. Although the Historical Commission used Philadelphia's public interest exception to justify removing the statue, this is atypical of public interest exception cases. As this Note shows, public interest exceptions are usually used to alter or demolish protected structures so that a new structure in the public interest can be built. But here, the Historical Commission wanted to remove the monument because it was offensive to many, not because the community wanted to replace it with any planned development in the public interest. For more on the intersection of historic preservation and statue removal, see J. Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, 71 FLA. L. REV. F. 169 (2020).

112 *Marconi II*, 287 A.3d at 969.

113 *Id.* at 968, 970.

exception.¹¹⁴ The Commission's decision was appealed to the License and Inspection Review Board.¹¹⁵ The Board upheld the Commission's decision, and the objectors petitioned the trial court for review.¹¹⁶ The trial court reversed, holding that the Commission approved the statue's removal "without any legal basis."¹¹⁷ Although the city of Philadelphia appealed the trial court's decision to the Commonwealth Court,¹¹⁸ the appeal is irrelevant to this discussion because the appellate court focused on issues unrelated to the public interest exception.¹¹⁹

The trial court focused on the Philadelphia Historical Commission's determination under the public interest exception. The case also shows that the application of Philadelphia's public interest exception reflects the application of Washington, D.C.'s special merit provision. First, the trial court applied the same standard of review that Washington, D.C. courts apply in reviewing Mayor's Agent decisions. The trial court applied "a substantial evidence" standard, requiring that the Court "inquire whether there is such relevant evidence of record which a reasonable person might accept as adequate to support a conclusion."¹²⁰ This standard is nearly identical to Washington, D.C.'s which will "uphold the Mayor's Agent's decision if the findings of fact are supported by substantial evidence in the record considered as a whole and the conclusions of law flow rationally from these

114 *Marconi I*, 2021 WL 3864127, at *4.

115 *Marconi II*, 287 A.3d at 970.

116 *Id.* at 971.

117 *Marconi I*, 2021 WL 3864127, at *3.

118 *Marconi II*, 287 A.3d at 972.

119 The city raised three issues on appeal: (1) that the "[o]bjectors lacked standing to appeal the Historical Commission's decision that the removal of the Columbus statue was necessary in the public interest"; (2) "that the Historical Commission properly exercised its discretion given the risk of vandalism to the statue and the absence of evidence from Objectors that removal could not be safely accomplished"; and (3) that "the trial court erred in its construction and application of Directive 67." *Id.* at 973 (citing PHILA., PA., CODE § 14-1005(6)(d) (2023)). Directive 67 required that "an opportunity to solicit and obtain *public input shall be provided*" when there is "a *proposal to remove* [public art] *due to public protest*." *Id.* at 969 (quoting CITY OF PHILA. OFF. OF THE MANAGING DIR., MANAGING DIR.'S DIRECTIVE 67: POLICY ON THE DONATION/GIFTING, PLACEMENT, AND REMOVAL OF PUBLIC ART § B.III.2 (2018) (emphasis added)). The appellate court collapsed issues two and three into a single analysis focusing on Directive 67. The court considered the "contention that Directive 67 did not bar the Historical Commission's approval of the proposal to remove the Columbus statue." *Id.* at 978. The appellate court's review focused on these issues, rather than the public interest exception standard found in § 14-1005(6)(d).

120 *Marconi I*, 2021 WL 3864127, at *3 (quoting *Mulberry Mkt., Inc. v. City of Phila., Bd. of License & Inspection Rev.*, 735 A.2d 761, 767 (Pa. Commw. Ct. 1999)).

findings.”¹²¹ The Pennsylvania trial court further explained that “administrative agencies [like the Philadelphia Historical Commission] are traditionally given deference when applying their own guiding statutes absent ‘fraud, bad faith, abuse of discretion, or clearly arbitrary action.’”¹²²

Despite this deferential standard, the trial court invalidated the Philadelphia Historical Commission’s determination that the statue’s removal was within the public interest. First, the court explained that because it was “undisputed” that the statue’s removal constituted demolition,¹²³ the Historical Commission must determine that removal is “necessary in the public interest.”¹²⁴ But even though the Historical Commission found the removal necessary, the trial court rejected the finding for “insufficient evidence in the record to make the determination.”¹²⁵

The trial court held that the Historical Commission failed to provide a “detailed, expert report containing *any* quantitative data with respect to the state of the Statue and removal.”¹²⁶ This requirement is similar to the one imposed by the District of Columbia Court of Appeals in *FOMP I*: the Mayor’s Agent was required to “precisely and clearly identif[y] the specific features of land planning on which the Mayor’s Agent relies to support a conclusion of special merit.”¹²⁷ The *Marconi I* court required the Philadelphia Historical Commission to supply this detailed analysis because the goals of § 14-1001 of the Philadelphia Code bound the Commission to a “duty to preserve and protect historical objects, such as the Statue.”¹²⁸ Like the vague public benefits in *FOMPI*,¹²⁹ the *Marconi I* court held that accounts of isolated civil unrest were similarly insufficient to trigger Philadelphia’s public interest exception.¹³⁰ These were vague because they were not ongoing. The Historical Commission based its conclusion that the

121 *Kalorama Heights Ltd. P’ship v. D.C. Dep’t of Consumer & Regul. Affs.*, 655 A.2d 865, 868 (D.C. 1995).

122 *Marconi I*, 2021 WL 3864127, at *3 (first quoting *Winslow-Quattlebaum v. Md. Ins. Grp.*, 752 A.2d 878, 881 (Pa. 2000); and then citing *Turchi v. Phila. Bd. of License & Inspection Rev.*, 20 A.3d 586, 591 (Pa. Commw. Ct. 2011)).

123 *Id.* (citation omitted).

124 *Id.*

125 *Id.*

126 *Id.* at *4.

127 *Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP I)*, 149 A.3d 1027, 1039 (D.C. 2016).

128 *Marconi I*, 2021 WL 3864127, at *4. These goals and purposes are discussed above. See *supra* text accompanying notes 49–51.

129 *FOMPI*, 149 A.3d at 1029.

130 *Marconi I*, 2021 WL 3864127, at *4.

monument's continued display presented a public danger on an affidavit and news reports of *past* unrest.¹³¹ But as the *Marconi I* court noted, "the record before this Court was devoid as to any *ongoing* civil unrest."¹³² Thus, the court found the Historical Commission's decision arbitrary because it was "based on those transient and isolated incidents."¹³³

Philadelphia's public interest exception is applied much like Washington, D.C.'s special merit provision. First, Pennsylvania courts apply the same deferential substantial-evidence standard to Historical Commission decisions that D.C. courts apply to Mayor's Agent decisions. Second, although both jurisdictions provide substantial deference to their respective public interest exception decisionmakers, courts in both jurisdictions require that the decisionmakers cite concrete reasons for the decision. Data used to determine whether a proposed demolition satisfies the special merit or public interest exception cannot be vague.

Philadelphia's public interest exception also deviates from the District's special merit provision. The *Marconi I* court explicitly tied the Philadelphia Historical Commission's decision to its prescribed purposes and goals whereas District of Columbia courts have not. But this difference is nominal at best—it does not substantively affect the court's analysis. The *Marconi I* court used the ordinance's goals to implicate the substantial-evidence-review standard. Washington, D.C. courts use the same standard without going through this preliminary step.¹³⁴

The application of Philadelphia's public interest exception also leaves one question unanswered. It is unclear how the Philadelphia Historical Commission should balance the public's interest in the demolition against historic preservation values. Washington, D.C., cases indicate that the Mayor's Agent should follow a preponderance standard.¹³⁵ Neither *Marconi I* nor *Marconi II* discusses the relevant standard. The text of the ordinance only requires that the "Historical Commission find[] that issuance of the building permit is necessary in the public interest."¹³⁶

131 *In re* Friends of Marconi Plaza (*Marconi II*), 287 A.3d 965, 970 (Pa. Commw. Ct. 2022).

132 *Marconi I*, 2021 WL 3864127, at *4 (emphasis added).

133 *Id.*

134 *FOMPI*, 149 A.3d at 1039.

135 *See supra* text accompanying notes 106–07.

136 PHILA., PA., CODE § 14-1005(6)(d) (2023).

IV. POTENTIAL CRITIQUES

Municipalities have used the public interest exception to balance the community's interest in development with its interest in preserving the past. Yet it is no perfect solution. This Part discusses two potential critiques of the public interest exception. It also proposes a modest solution to the second. First, critics may object to the public interest exception because it requires decisionmakers to use a balancing test. Second, critics may object to weighing the public's interest in a new development and its interest in preserving a historic site on a preponderance standard. This Part argues that traditional critiques of balancing tests are not as potent to public interest exceptions and that concerns about the preponderance standard should be met by raising the bar.

A. *Against Balancing Tests*

Balancing tests are inherent to the public interest exception. The exception creates flexibility. Municipalities may use the exception to alter or demolish designated historic sites despite protections that come with designation. This requires a balancing calculus: Is the public's interest in development greater than the community's interest in preserving its history? If so, these municipalities allow the sites to be altered or demolished in favor of new development. How else can a community decide that its interest in development trumps its interest in historic preservation? No formulaic, rule-like replacement focused on objective facts could adequately take a community's needs, characteristics, and history into account.

Without any viable alternative, the public interest exception leaves us only with its balancing test. Justice Scalia once quipped that balancing tests often require decisionmakers to “judg[e] whether a particular line is longer than a particular rock is heavy.”¹³⁷ The late Justice may have a point—but not in this context. Balancing the public's interest in new development against its interest in persevering its past is not akin to asking whether a particular line is longer than a particular rock is heavy because the interests are relative to the same constant: the public. Justice Scalia's critique comes from a case where the interests were not grounded in the same constant, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*¹³⁸ In *Bendix*, the Supreme Court held that an “Ohio statute that suspends limitations protection for out-of-state

¹³⁷ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

¹³⁸ *Id.*

entities is a violation of the Commerce Clause.”¹³⁹ The Court balanced disparate interests to make this determination. The Court balanced “the State’s putative interests [in the policy] against the interstate restraints [on commerce] to determine if the burden imposed is an unreasonable one.”¹⁴⁰ These interests were not grounded to a common constant. Interstate commerce does not equal Ohio. Justice Scalia’s response was a critique to this kind of arbitrary balancing. While that kind of interest balancing asks whether a line is longer than a rock is heavier, the public interest exception balancing test, in contrast, asks whether one line is longer than the other, or whether one rock is heavier than the other. While some degree of arbitrariness will always be present in adjudicating public interest exception decisions, the public serves as the common constant that grounds the analysis.

Justice Scalia’s critique of balancing tests extended beyond their content (or lack thereof). In his highly influential piece, *The Rule of Law as a Law of Rules*, Justice Scalia lamented that judges are often tasked with applying the balancing test. He wrote:

[W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where “law,” properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.¹⁴¹

Justice Scalia’s opinion is well taken; but like his substantive critique against balancing tests, his attack on judges as balancing test administrators does not apply in the public interest exception context.

While appellate judges may apply balancing tests in reviewing decisions by historic commissions or equivalents like Washington, D.C.’s Mayor’s Agent, these judges are only *reviewing* balancing determinations *already made*. The original decisionmakers, not reviewing judges, act as the fact finders. In Washington, D.C., this is the Mayor’s Agent, and in Philadelphia, this is the Historical Commission. The public

139 *Id.* at 889 (majority opinion).

140 *Id.* at 891.

141 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

interest exception does not require judges to act as the original fact finders. Instead, municipalities attach deferential substantial-evidence standards to judicial review of these decisions.¹⁴² This prevents judges from making their own *de novo* determinations. Instead, the judges are empowered only to determine “whether there is such relevant evidence of record which a reasonable person might accept as adequate to support a conclusion.”¹⁴³ Only when no reasonable person could accept the conclusion may a judge step in and overrule the fact finder. This places the decisionmaking authority in the Mayor’s Agent or historic commission. These decisionmakers will usually be members of the municipality’s executive branch, and thus accountable to the people through mayoral elections or other municipal mechanisms. Thus, Justice Scalia’s second relevant critique of balancing tests is not applicable in the public interest exception context.

Even if Justice Scalia’s balancing test critiques are persuasive, his chief attacks are not relevant in the public interest exception context. Historic commissions are not balancing two unlike abstractions against each other. Instead, commissions applying the public interest exception balance similar interests grounded to the public constant. Additionally, the historic commissions act as fact finders, and reviewing judges do not usurp their role in applying deferential review standards to these decisions. Although balancing tests are not perfect, these popular critiques against them are not relevant in the public interest exception context.

B. *Preloading the Scales*

As currently designed, the balancing test inherent to the public interest exception suffers from a significant flaw: the preponderance standard. The preponderance standard allows historic commissions to issue an alteration or demolition permit if the public’s interest in the new development outweighs the public’s interest in preserving its history.¹⁴⁴ The public’s interest in development can outweigh its historic preservation interest to the greatest or least extent possible.¹⁴⁵ There is no higher threshold requirement.¹⁴⁶

142 See discussion *supra* Part III.

143 *In re* Friends of Marconi Plaza (*Marconi I*), No. 00295, 2021 WL 3864127, at *3 (Pa. C.P. Phila. Cnty. Aug. 17, 2021) (quoting *Mulberry Mkt., Inc. v. City of Phila., Bd. of License & Inspection Rev.*, 735 A.2d 761, 767 (Pa. Commw. Ct. 1999)), *aff’d*, 287 A.3d 965 (Pa. Commw. Ct. 2022).

144 See *supra* text accompanying notes 106–07.

145 See *supra* text accompanying notes 106–07.

146 See *supra* text accompanying notes 106–07.

Although the preponderance standard has not caused significant problems in the cases examined above, its widespread adoption could undermine the public interest exception. The public interest exception is useful because it empowers municipalities to balance historic preservation goals with community development needs. But this weight may be easily overcome under the preponderance standard. A hypothetical situation illustrates this point. Imagine Albemarle and Orange Counties, Virginia, enacted a public interest exception. A developer then petitioned the local historic commissions to build a new Revolutionary-War-themed amusement park, a cross between Williamsburg and Disney World. The developer submits several proposals to the historic commission to modify three historic sites: Thomas Jefferson's Monticello, James Madison's Montpelier, and James Monroe's Highland.¹⁴⁷

The historic commissions use the preponderance standard. Albemarle's would, without hesitation, find that the developer's proposal to tear down Monticello and construct a Jefferson-themed hotel does not generate a public interest great enough to outweigh the public's interest in preserving the World Heritage site.¹⁴⁸ Monticello is among the nation's most recognizable landmarks and receives "nearly a half-million visitors a year."¹⁴⁹ The local historic commissions would not permit the developer to demolish Montpelier or Highland either. But what would the historic commission do if, instead of demolishing the historic homes, the developer asked to build on undeveloped parts of the protected estates? In this scenario, the developer plans to add in rides or other attractions on the property. These new developments would not destroy the estates' historic fabric but would certainly cut

147 These three estates were the homes of these American Founding Fathers. I have been fortunate to visit all three and highly recommend making a trip to see them. See THOMAS JEFFERSON'S MONTICELLO, <https://www.monticello.org> [<https://perma.cc/3Y8V-FNJJ>] (last visited Feb. 28, 2025); JAMES MADISON'S MONTEPELIER, <https://www.montpelier.org> [<https://perma.cc/Y3QK-M7VZ>] (last visited Feb. 28, 2025); JAMES MONROE'S HIGHLAND, <https://highland.org> [<https://perma.cc/W7D8-7BHE>] (last visited Feb. 28, 2025). This hypothetical also assumes that the developer possesses development rights blocked by designation protections. See BRONIN & ROWBERRY, *supra* note 10, at 37–68 (discussing designation protections).

148 *Mission and Vision Statement*, THOMAS JEFFERSON'S MONTICELLO, <https://www.monticello.org/thomas-jefferson-foundation/mission-and-vision-statement/> [<https://perma.cc/U4DX-NTGB>] (last visited Feb. 28, 2025).

149 Debra Bruno, *If You Don't Have Time to Absorb Jefferson's Monticello, Head to Monroe's Highland*, WASH. POST (Dec. 13, 2018), https://www.washingtonpost.com/lifestyle/travel/if-you-dont-have-time-to-absorb-jeffersons-monticello-head-to-monroes-highland/2018/12/13/7d77d11c-f998-11e8-863c-9e2f864d47e7_story.html [<https://perma.cc/GW38-CX7C>].

into it. If the new attractions would entice more tourists to visit the historic sites, would the historic commissions approve the plans? The local commissions could approve on the grounds that the community's interest in the development attracting more tourists and generating more revenue for the local economy outweighed the public's interest in keeping the historic sites free from any interference. Even if the commission is hard-pressed to make the exception at Monticello, would it approve the developer's plans for Montpelier or Highland, which attract far fewer visitors than Monticello?¹⁵⁰ Under the preponderance standard, it is conceivable that the historic commission could accept these proposals, even if they undermine the historic character of the sites.

These scenarios can be avoided if municipalities preload public interest exceptions with weighted standards. Plenty of balancing tests used in other areas of the law already do this. Federal Rule of Evidence 403, for example, allows the court to "exclude relevant evidence if its probative value is *substantially* outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."¹⁵¹ The rule requires the court to find that the probative value is substantially outweighed; a mere preponderance standard is not satisfactory. This preloads the balancing test to require a higher burden than the preponderance standard. Municipalities that enact public interest exceptions should include similar language. Further research is required in this area to determine what replacement standard is the best, as municipalities can choose between language like "substantially," and "significantly."

Municipalities can also preload the scales by requiring that historic commissions find certain facts when applying the public interest exception. This heightens the bar because commissions that cannot make required findings will be blocked from permitting an alteration or demolition. Municipalities can tailor requirements to a community's needs and desires. Communities more concerned with their history may require many specific findings, while development-minded communities can require less. There are many facts that a community can require historic commissions to find. The community may require that the proposed public interest project benefits the arts, or outdoor leisure. It may also require that the proposed project generates at least \$5 million in tax revenue annually. Or it may even restrict approval if

150 There were only a few other tourists at Montpelier when I visited, and my family and I basically had a private tour of Highland. Monticello was packed.

151 FED. R. EVID. 403 (emphasis added).

the proposed project is found to increase housing supply by 300 units. The possibilities are endless. Requirements that certain facts be established before a legal standard is applied are not a novel creation. They are often used in administrative law.¹⁵² To some extent, requirements like these are already baked into the public interest exception through the substantial evidence standard discussed above. The *Marconi I* court, for instance, required the Historical Commission to present quantitative data to support its finding.¹⁵³ More explicit requirements allow municipalities to preload the scales without relying on judges to only require what is necessary to count as substantial evidence.

Although giving a specific text prescription is beyond the scope of this Note, municipalities should create public interest exceptions that preload the scales. They can do this either by requiring historic commissions to find that the public's interest in the new development substantially or significantly outweighs the public's interest in preserving its history or by requiring historic commissions to find specific facts before applying the public interest exception. This will prevent municipalities from losing historic preservation's benefits. Municipalities can maintain their historic nature and leave room for development by requiring developers to meet this higher standard. Although this may impede future development efforts, not increasing the standard's bar may under protect historic sites.

CONCLUSION

The public interest exception serves as a compromise between competing values. Municipalities that enact historic preservation ordinances value their heritage and its preservation. Protecting these historic sites, however, comes at a cost. Municipalities often trade long-term development rights to preserve their history. The designated sites become frozen in time. Historic commissions and their counterparts place alteration and demolition restrictions that prevent new, economically and socially beneficial developments from replacing these historic sites. While these protections come with significant benefits, their costs often increase over time as a community's needs change.

Public interest exception provisions allow communities to prevent that freeze. Where the current dominant regime across jurisdictions rigidly prevents municipalities from altering or demolishing historic

152 See, e.g., Gwendolyn Savitz, *Reviewing Mixed Questions of Fact and Law in Administrative Adjudications: Why Courts Should Move to "Substantially Established Facts"*, 68 VILL. L. REV. 463, 473–79 (2023) (discussing administrative law areas like social security and immigration where factual determinations are used as predicates for legal conclusions).

153 See *supra* note 126 and accompanying text.

sites absent extraordinary circumstances like public safety, lack of an economically feasible alternative, or that the changes will preserve the neighborhood's historic character,¹⁵⁴ the public interest exception provides municipalities with flexibility. Municipalities may designate historic sites without risking that the site be frozen in time forever. If the community's needs change, and the historic value of the protected site is relatively small, a community may invoke the public interest exception to alter or demolish the site as needed.

Public interest exceptions exist at the intersection of administrative and local law. Municipalities create historic commissions (or task similar entities) with administering historic preservation laws. Historic commissions in public interest exception municipalities receive petitions from developers to except the designated historic site from protections to either alter or demolish it for a new development. These provisions usually require the commissions to judge the public's competing interests in historic preservation and new development on a preponderance standard. This means that if the public's interest in the new development outweighs the public's interest in preserving the historic site, even in the slightest way possible, the historic commission may grant the petition, removing the protections from the site in favor of the new development. In Washington, D.C., this requires a two-step analysis. The Mayor's Agent (the District's equivalent of a historic commission) must first find that the proposed project is one of special merit. Then he must balance the competing interests.¹⁵⁵

These decisions are often appealable, but reviewing courts adhere to very deferential review standards on appeal. Courts in the jurisdictions examined above use the substantial-evidence standard. In Washington, D.C., the reviewing court will "uphold the Mayor's Agent's decision if the findings of fact are supported by substantial evidence in the record considered as a whole and the conclusions of law flow rationally from these findings."¹⁵⁶ Philadelphia adheres to a very similar standard.¹⁵⁷ This has not, however, prevented reviewing courts from reversing historic commission decisions.¹⁵⁸

While the public interest exception allows municipalities to balance the public's competing interests to better account for the community's future needs, it does come with some drawbacks. First, the public interest exception relies on a balancing test inherent to its

154 See discussion *supra* Part II.

155 See discussion *supra* Section III.A.

156 *Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regul. Affs.*, 655 A.2d 865, 868 (D.C. 1995).

157 See *supra* text accompanying note 120–21.

158 See discussions on cases *supra* Part III.

analytical framework. Even so, traditional balancing test critiques are not as pertinent in the public interest exception context. The public interest exception tasks historic commissions to balance the public's interest in development with its interest in historic preservation. This analysis is grounded by a constant: the public's interest. It compares the public's interest in one to the public's interest in the other. Additionally, Justice Scalia's point that balancing tests often allow judges to act as the fact finder is irrelevant in this context because the historic commissions act as the fact finder. Judges only review these decisions. And these reviews are based on the very deferential substantial-evidence standard. Thus, there is less risk that judges will usurp the fact-finder role. Second, municipalities currently calibrate the public interest exception on a preponderance standard. This standard is too low and could undermine the goals of historic preservation law. To prevent this, municipalities enacting public interest exceptions should calibrate the provision to a higher standard. Replacement candidates include substantial and significant outweighing standards. Municipalities may also require historic commissions to find certain facts before approving an alteration or demolition. Further research is required in this area to determine what the best standard for the public interest exception is.

Public interest exception provisions are important to the future of historic preservation laws. Municipalities will continue to designate and protect historic sites. This is good. Historic preservation is necessary. It ties a community to its roots, educates the community on their past, and preserves the community's unique character. But municipalities should not be forced to freeze their historic districts in time forever. Community needs change. A block of historic rowhouses may contribute to the municipality's historic nature. Protecting these rowhouses may benefit the public, keeping the aesthetic nature of the city alive, and educating them about their history. But when times change, municipalities should have some mechanism to add much-needed developments. Municipalities should not be required to keep all of these rowhouses when the neighborhood desperately needs a supermarket to alleviate a food desert, or a hospital when few exist nearby. The utility of historic preservation is substantially decreased if it prevents needed new developments. Not only is this bad for a community in its own right, but this growing pressure historic preservation exerts is likely to reduce popular support for historic preservation as a policy matter.

This is not to say designation protections should easily be overcome. Instead, municipalities should put a thumb on the scale by pre-loading the balancing test. This can be done with requirements that

the public's interest in the new development significantly or substantially outweigh its interest in preserving the historic site or by requiring historic commissions to find certain facts before applying the public interest exception. This weighted balancing test will prevent municipalities from transforming the public interest exception into a pure cost-benefit analysis that undermines the goals of historic preservation. Preservation requires that developers cannot alter or demolish historic sites whenever the public may receive an economic benefit from the new development greater than the economic benefit it receives from the maintenance of the historic site. Historic preservation cannot function unless it prevents some new developments. But the prevention of new development in these areas should not freeze communities in time forever, without any recourse to change the community's features.

Over-designation will lead to more criticism. If historic preservation is to survive, municipalities must adopt the public interest exception to act as a safety valve. It relieves pressure on community development when necessary, without ceding historic preservation's value.