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## Navigating the Tension Between Preservation and Development Pressure: Cities' Imperative to Save Independent Music Landmarks While Simultaneously Providing for Growth

Mary-Michael Robertson

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# Navigating the Tension Between Preservation and Development Pressure: Cities' Imperative to Save Independent Music Landmarks While Simultaneously Providing for Growth

## ABSTRACT

*While cities can use their power to enact zoning ordinances and create historic preservation districts, these preservation ordinances vary widely across the United States, from allowing almost any type of development to strictly limiting any new development that does not match existing height, density, and use patterns. Within this framework, state legislatures have often limited the types of regulatory actions cities may take, as cities are merely political subdivisions of the state. Some states—known as “Dillon’s Rule” states—restrict cities from taking novel legislative approaches to existing policy issues, such as affordable housing, unless those powers are expressly provided to the municipalities by the state legislature. “Home rule” states, on the other hand, grant broad legislative authority to cities to act on any local issues not preempted or foreclosed by the state legislature. The current affordable housing and homelessness crises in cities across the United States cause some scholars to argue against traditional historic preservation broadly, as it often results in overinclusive or unnecessary preservation that hinders efforts to develop more densely.*

*In fast-growing places like Nashville, Tennessee, with strong music and entertainment scenes, there is a tension between preserving notable music landmarks and the pressure to develop housing in higher densities. These cities need the power and means to generate innovative methods of determining which sites to preserve while upzoning surrounding areas. Cities tend to over-prioritize either preservation or new development without creating a logical method for preserving only those sites with continued relevance and use while facilitating new development on other sites. Where applicable, states should legislate to make it easier for Dillon’s Rule and partial or limited home rule cities to create innovative preservation schemes prioritizing sites of importance without preserving entire swaths of neighborhoods or districts*

*unnecessarily and for aesthetic reasons alone. Cities should use existing means to develop zoning schemes with a more individual site analysis approach, allowing for the preservation of individual buildings while increasing density around them with incentives for housing development.*

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## I. INTRODUCTION

During the COVID-19 pandemic, music venues across the United States struggled to survive; capacity limitations and distancing mandates, along with a decline in customer numbers, severely impacted many small enterprises, however, unlike these businesses, certain music venues faced an additional challenge: they lacked alternative service options, such as outdoor spaces or takeaway, to switch to for maintaining operations.<sup>1</sup> To provide some relief, Congress responded by passing the Save Our Stages Act.<sup>2</sup> The pandemic underscored both the critical role and the fragility of independent music venues; at the same time, it exacerbated the issues of housing affordability and homelessness across urban areas in the United States.<sup>3</sup>

Neither the viability of independent music landmarks nor the housing affordability crisis were unfamiliar issues in the United States, yet the COVID-19 pandemic shined a new light on both.<sup>4</sup> Long before the pandemic, and continuing through its later stages, local venues and landmarks had been vulnerable to development pressures, and development at higher densities has been deemed necessary by some to alleviate the housing crises in US cities.<sup>5</sup> Historical preservation and the co-existent need for increased provision of affordable housing have

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1. See Janis Denk, et al., *The Impact of COVID-19 on Music Consumption and Music Spending*, PLOS ONE, May 13, 2022, at 1, 2, 17(5): e0267640, <https://doi.org/10.1371/journal.pone.0267640> [<https://perma.cc/W2B3-Y79T>].

2. See Consolidated Appropriations Act 2021, Pub. L. No. 116–260 (2020); *Save Our Stages Act Has Passed as Part of the COVID-19 Relief Bill*, SAVE OUR STAGES, <https://www.saveourstages.com/> [<https://perma.cc/M5SH-JJAT>] (last visited Nov. 9, 2023) (led by Senators John Cornyn and Amy Klobuchar and Representatives Peter Welch and Roger Williams, the bipartisan Act was introduced as the Save Our Stages Act, S. 4258, 116th Cong. (2020), and included grant programs for independent venues. It eventually passed as a component of one of the COVID-19 relief bills during the pandemic).

3. See *Out of Reach: The High Cost of Housing*, NAT'L LOW INCOME HOUS. COAL. (2022), <https://nlihc.org/oor> [<https://perma.cc/AD8D-XJGH>].

4. See *id.*; Marissa R. Moss, *Financially Vulnerable, Independent Music Venues Worry of Having to Sell*, NPR (Aug. 27, 2020, 6:00 AM), <https://www.npr.org/2020/08/27/906292770/financially-vulnerable-independent-music-venues-worry-of-having-to-sell> [<https://perma.cc/K2CP-XNL2>].

5. See Arno van der Hoeven & Erik Hitters, *The Spatial Value of Live Music: Performing, (Re)Developing and Narrating Urban Spaces*, 117 GEOFORUM 154, 154 (2020), <https://doi.org/10.1016/j.geoforum.2020.09.016> [<https://perma.cc/RSG7-NV3Q>]; Cassandra Stephenson, *Council Acts to Preserve Live Music Venues in Nashville Amid Development Pressure*, TENNESSEAN (Apr. 20, 2022, 4:17 PM), <https://www.tennessean.com/story/news/local/davidson/2022/04/19/city-takes-steps-preserve-nashville-independent-live-music-venues/7333496001/> [<https://perma.cc/NK3L-YLVM>].

long been at odds with each other in much of the discourse among urban planning, local government, and legal scholars.<sup>6</sup>

This Note begins by describing the background and current nature of cities' power to act on preservation. Next, this Note explains why current city- and state-level approaches to the preservation of music venues and landmarks are insufficient in the face of development. It then surveys various cities' approaches to saving local music landmarks, exploring novel strategies for preservation that simultaneously allow for surrounding development. This Note then suggests balancing preservation and development by proposing that, where applicable, state legislatures enact statutes to make the process easier for cities with limited inherent authority and that, in the meantime, cities use existing tools to create innovative methods of distinguishing between sites that need to be preserved and those that do not—increasing surrounding density for development.

## II. BACKGROUND

### *A. The Origins and Limits of a City's Power and Autonomy to Preserve Venues*

Colonial cities were originally independent corporations with charters.<sup>7</sup> In the eighteenth and nineteenth centuries, however, US cities' authority to pursue policy objectives and other non-essential, non-administrative functions became increasingly limited.<sup>8</sup> Cities, unlike the federal government and states, have never had a clear position or hierarchical status formally established by the US Constitution.<sup>9</sup>

#### 1. Historical Context

The US Supreme Court as early as 1907 considered the issue of city versus state power in *Hunter v. Pittsburgh*, which held that cities are merely “political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as

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6. See Dan Bertolet, *When Historic Preservation Clashes with Housing Affordability*, SIGHTLINE INST. (Dec. 18, 2017, 6:30 AM), <https://www.sightline.org/2017/12/19/when-historic-preservation-clashes-with-housing-affordability/> [<https://perma.cc/SB5V-UQKW>].

7. RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 59 (2016).

8. *Id.*

9. See *id.* at 60–61; TRAVIS MOORE, LEGIS. RSCH. OFF., DILLON RULE AND HOME RULE: PRINCIPLES OF LOCAL GOVERNANCE 1 (2020) [https://nebraskalegislature.gov/pdf/reports/research/snapshot\\_localgov\\_2020.pdf](https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf) [<https://perma.cc/Z5RB-6TM3>].

may be entrusted to them.”<sup>10</sup> The Court established that any power conferred to cities “rests in the absolute discretion of the State . . . In all these respects the State is supreme, and its legislative body . . . may do as it will, unrestrained by any provision of the Constitution of the United States.”<sup>11</sup>

## 2. Dillon’s Rule and Home Rule States

Today, there are Dillon’s Rule and home rule states, each with different implications for the level of discretion cities have in setting and pursuing policy objectives, including those related to preservation, affordable housing, and other policies.<sup>12</sup> Iowa Supreme Court Justice John Dillon created the underlying concept behind Dillon’s Rule states in 1868 and wrote of it further in *Municipal Corporations* in 1872 while serving as a judge on the US Court of Appeals for the Eighth Circuit.<sup>13</sup> Dillon’s Rule was upheld by the Supreme Court in *Hunter v. Pittsburgh*.<sup>14</sup> Most states eventually adopted this Rule in whole or in part, which meant that “municipal corporations [could] exercise only those powers expressly granted by the state legislature and essential to the purposes of the corporation.”<sup>15</sup>

States that had adopted Dillon’s Rule required cities to seek state legislative approval for “even the most uncontroversial and mundane tasks of government.”<sup>16</sup> About a quarter of states adopted home rule in the late 1800s and early 1900s instead, which was meant to return some degree of power to cities by allowing them to exercise actions not expressly granted by the state legislatures.<sup>17</sup> However, this shift did not change the supremacy of state legislatures over those of cities, as broader adoption of home rule paralleled the creation of state boards and state administrative law which oversaw city efforts.<sup>18</sup>

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10. SCHRAGGER, *supra* note 7, at 61 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907)).

11. *Id.*

12. *See id.* at 61–62.

13. *Id.*; *Dillon’s Municipal Corporations*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY, <https://scholarship.law.wm.edu/harriscollection/48/> [<https://perma.cc/W9DR-JEDM>] (last visited Nov. 9, 2023).

14. *See* SCHRAGGER, *supra* note 7, at 61.

15. *Id.*

16. *Id.* at 62.

17. *See id.* at 62–64; NAT’L LEAGUE CITIES & LOC. SOLS. SUPPORT CTR., PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 11 (2020) [hereinafter PRINCIPLES OF HOME RULE], <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/3FKH-SBFN>].

18. SCHRAGGER, *supra* note 7, at 64.

Now, cities can generally only exercise powers that state legislatures explicitly grant or those powers that are implied or incident to those expressly granted, depending on an individual state's constitution.<sup>19</sup> States with home rule have delegated power to municipalities, leading to greater autonomy to pass any constitutional laws without seeking permission for powers not expressly delegated, but this power is still limited to those subjects determined by the state legislature.<sup>20</sup>

### 3. Forms and Avenues for Historic Preservation

Historic preservation is primarily managed by federal or state governments, which have set clear procedures and criteria that must be met for eligibility.<sup>21</sup> For example, eligibility for inclusion in the National Register of Historic Places is generally limited to properties that achieved significance over fifty years ago, among other criteria.<sup>22</sup> State historic preservation offices perform much of the surveying, evaluation, and nomination of significant buildings, sites, and districts to the National Register of Historic Places.<sup>23</sup> These ordinary formal federal or state processes cannot protect independent music venues or other important landmarks that are not old enough or otherwise do not meet strict criteria, as requirements like the fifty-year significance period are not attainable for many sites that nonetheless may be important for preservation in cities with rich music histories.<sup>24</sup>

Cities have their own measures to protect local landmarks beyond the national registry process; in the United States, there are thousands of local ordinances that define historic districts and set restrictions on development.<sup>25</sup> These preservation ordinances can vary widely, from allowing almost any type of development to strictly limiting any new development.<sup>26</sup> Limitations can vary by use, density,

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19. See *id.* at 69; PRINCIPLES OF HOME RULE, *supra* note 17.

20. See PRINCIPLES OF HOME RULE, *supra* note 17, at 20.

21. See *Federal Historic Preservation Laws, Regulations, and Orders*, NAT'L PARK SERV., <https://www.nps.gov/subjects/historicpreservation/laws.htm> [https://perma.cc/HHV2-WWWW] (Oct. 20, 2022).

22. See 36 C.F.R. § 60.4 (2023).

23. *State Historic Preservation Offices*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nationalregister/state-historic-preservation-offices.htm> [https://perma.cc/64LB-TQW3] (June 30, 2023).

24. See 36 C.F.R. § 60.4 (2023).

25. See CONSTANCE E. BEAUMONT, NAT'L TRUST FOR HIST. PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002), <https://mrsc.org/get-media/0E24E2FB-023D-45E0-A611-96B94FF43F35/toolkit.aspx> [https://perma.cc/VSG5-YZ7T].

26. See *id.*

height, or other restrictions.<sup>27</sup> Communities thus have different degrees of historic preservation and various levels of political support for preservation, and state legislatures have often established limitations on the types of regulatory measures that cities can take, enhancing these differences.<sup>28</sup>

Municipal governments have the power to enact and enforce local preservation laws; in home rule states, this authority is broadly granted by the state legislature, while in states that follow Dillon's Rule, the legislature explicitly outlines and details this authority.<sup>29</sup> For example, Virginia's state statute conveying historic preservation authority expressly states that:

Any locality may adopt an ordinance setting forth the historic landmarks within the locality as established by the Virginia Board of Historic Resources, and any other buildings or structures within the locality having an important historic, architectural, archaeological or cultural interest, any historic areas within the locality as defined by § 15.2-2201,<sup>30</sup> and areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts, amending the existing zoning ordinance and delineating one or more historic districts, adjacent to such landmarks, buildings and structures, or encompassing such areas.<sup>31</sup>

Like Virginia, other states with full or partial Dillon's Rule governance structures typically have statutes conveying this authority that contain one or more of the following: provisions establishing historic preservation commissions or boards; statements of authority granted to the commission; provisions enabling designation of landmarks, districts, and criteria; among many others.<sup>32</sup>

Tennessee, for example, is a mixed Dillon's-home rule state, meaning that the state constitution allows for cities and counties to adopt home rule charters, yet only a small number of cities and counties in Tennessee, including Memphis, have done so.<sup>33</sup> Nashville, however,

27. *See id.*

28. *Id.*; SCHRAGGER, *supra* note 7, at 65.

29. *See* JULIA H. MILLER, NAT'L TRUST FOR HIST. PRES., A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 8 (2008), [https://cdn.savingplaces.org/2023/03/27/15/39/04/344/NTHP%20Preservation%20Books\\_A%20Layperson%60s%20Guide%20to%20Preservation%20Law.pdf](https://cdn.savingplaces.org/2023/03/27/15/39/04/344/NTHP%20Preservation%20Books_A%20Layperson%60s%20Guide%20to%20Preservation%20Law.pdf) [<https://perma.cc/T9MF-44ZU>].

30. VA. CODE ANN. § 15.2-2201 (2023) (defining "historic area" as "an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation").

31. VA. CODE ANN. § 15.2-2306 (2023).

32. *Id.*

33. LOC. SOLS. SUPPORT CTR., TENN. 1 (Dec. 2020), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/6059598578b57d5cd9010238/1616468357982/TN+Home+Rule+Summary+3.10.21.pdf> [<https://perma.cc/GP9T-K6HT>] (fourteen cities in Tennessee have adopted home rule charters, out of 348 total cities in the state); *see* MOORE, *supra* note 9.



has not adopted a home rule charter, despite its consolidation with the surrounding Davidson County that effectuated substantial regulatory authority.<sup>34</sup> After its 1953 Home Rule Amendment, Tennessee cities that have adopted home rule charters may change their city charters, which the state General Assembly cannot do; Tennessee cities that have not adopted home rule charters fall under the state's "Dillon's Rule, which strictly and narrowly construes local authority."<sup>35</sup> Home rule in Tennessee only provides cities immunity from state preemption concerning limited types of provisions, while others—including those related to preservation, zoning, or affordable housing—cannot be inconsistent with any laws that the state legislature chooses to pass in the relevant subject areas.<sup>36</sup> Tennessee's General Assembly may only pass laws for home rule cities that are general in terms and effect and cannot direct legislation at particular cities unless doing so as part of a reasonable classification.<sup>37</sup>

In a purely home rule state like New York, the police power granted in the state constitution combined with a law such as the New York State Municipal Home Rule Law provides municipalities with the general authority to enact local laws for the "protection and enhancement of [their] physical and visual environment[s]."<sup>38</sup> This includes the power to regulate historic resources: "local historic preservation laws may cover properties of purely local historic interest, as well as those listed on the National and State registers, or both."<sup>39</sup> In addition to zoning, cities in New York use landmark preservation laws to regulate districts or specific landmarks, "differ[ing] from zoning because its purpose is not the regulation of land uses, per se, but protection of a community's historic resources, even, in limited circumstances, the interior of buildings."<sup>40</sup>

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34. LOC. SOLS. SUPPORT CTR., *supra* note 33.

35. *Id.* at 1–2; TENN. CONST. art. 11, § 9.

36. *See* LOC. SOLS. SUPPORT CTR., *supra* note 33.

37. *Id.* at 6–7 (quoting *Civ. Serv. Merit Bd. of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991)) ("The constitution's text constrains the legislature from singling out any counties or cities in legislation . . . [T]he inquiry is 'whether th[e] legislation [in question] was designed to apply to any other county in Tennessee, for if it is potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied [to only one county].'" (alteration in original)).

38. DIV. LOC. GOV'T SERVS., N.Y. DEP'T STATE, LEGAL ASPECTS OF MUNICIPAL HISTORIC PRESERVATION 2, 2 (2005), <https://dos.ny.gov/system/files/documents/2023/01/legal-aspects-of-municipal-historic-preservation.pdf> [<https://perma.cc/WE5Q-H6ZK>] (citing N.Y. GEN. MUN. LAW § 36-a).

39. *Id.* at 4.

40. *Id.* at 8–9 (citing N.Y. GEN. MUN. LAW § 96-a).

## 4. Music Landmark Preservation

Given the widespread presence of musically significant locations throughout the United States, preserving these sites has garnered proposals utilizing governance schemes both internal and external to local governments.<sup>41</sup> In the face of the loss of countless sites important to music fans and locals across the United States, groups aimed at preserving venues, recording studios, theaters, dance halls, and other sites have formed.<sup>42</sup> Some sites, like Woodstock, are on the National Register.<sup>43</sup> Similarly, the National Trust for Historic Preservation (NTHP) and other efforts have succeeded in preserving sites like Nashville's RCA Studio A and artists' birthplaces or former homes.<sup>44</sup>

The NTHP publishes an annual list of "America's 11 Most Endangered Historic Places," comprising important sites most at risk of destruction or irreparable damage.<sup>45</sup> In 2019, it included Nashville's Music Row district as a whole; in 2018, it had only listed five properties

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41. See Katherine Flynn, *Historic Places Tied to Music Strike a High Note*, PRES. MAG. (2017), <https://savingplaces.org/stories/historic-places-tied-to-music-strike-a-high-note> [https://perma.cc/YUH6-8AUG].

42. See Katherine Flynn, *Five Music History Sites in Transition*, NAT'L TR. FOR HIST. PRES. (Feb. 15, 2016), <https://savingplaces.org/stories/five-music-history-sites-in-transition> [https://perma.cc/V8SN-8Z7W]; Ben Sisario, *Small Clubs Are Where Rock History Is Made. How Many Will Survive?*, N.Y. TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/05/06/arts/music/independent-venues-coronavirus.html> [https://perma.cc/8V66-V74S]; Ashley Zlatopolsky, *How Detroit Sound Conservancy Helps Restore Motor City Music History*, DETROIT FREE PRESS (Apr. 20, 2017, 1:58 PM), <https://www.freep.com/story/entertainment/music/2017/04/19/detroit-sound-conservancy-music-preservation/100459438/> [https://perma.cc/Y559-TQGC]; Zach Mortice, *Preservation Chicago Names the Warehouse, the Birthplace of House Music, as One of the Most Endangered Buildings in Chicago*, ARCHITECT'S NEWSPAPER (Mar. 21, 2023), <https://www.archpaper.com/2023/03/preservation-chicago-names-the-warehouse-birthplace-house-music-one-most-endangered-buildings-chicago/> [https://perma.cc/7WRM-D6DM].

43. Andrew Flanagan, *Site of Woodstock Added to National Registry of Historic Places*, NPR (June 7, 2017, 12:52 PM), <https://www.npr.org/sections/therecord/2017/06/07/531899417/site-of-woodstock-added-to-national-registry-of-historic-places> [https://perma.cc/CU2E-MPBX].

44. See Joey Garrison, *Iconic Signs at Nashville's Historic Studio A Return After Nearly 50 Years*, TENNESSEAN (Oct. 21, 2017, 5:55 PM), <https://www.tennessean.com/story/money/industries/music/2017/10/21/rca-studio-a-iconic-signs-after-nearly-50-years/787238001/> [https://perma.cc/VN4M-VLSH]; *Historic RCA Studio A Saved From Demolition*, ROLLING STONE (Dec. 23, 2014), <https://www.rollingstone.com/music/music-country/historic-rca-studio-a-saved-from-demolition-183201/> [https://perma.cc/7XLB-Q9HD]; Randy Kennedy, *Saving Nina Simone's Birthplace as an Act of Art and Politics*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/arts/design/nina-simone-house-birthplace.html> [https://perma.cc/B26E-Z4QQ]; *Nina Simone Childhood Home*, NAT'L TR. FOR HIST. PRES., <https://savingplaces.org/places/ninasimone> [https://perma.cc/H3GU-8FGH] (last visited Nov. 9, 2023).

45. *11 Most Endangered Historic Places*, NAT'L TR. FOR HIST. PRES., <https://savingplaces.org/americas-most-endangered-historic-places> [https://perma.cc/W8EQ-NQFK]; *Nashville's Music Row: Updates*, NAT'L TR. FOR HIST. PRES., <https://savingplaces.org/places/nashvilles-music-row/updates#.Y1W6qHbMJPZ> [https://perma.cc/K6BZ-UYMN] (last visited Nov. 9, 2023).

within Music Row.<sup>46</sup> In addition to residences and businesses, Music Row is home to Broadcast Music, Inc.; the American Society of Composers, Authors, and Publishers; Curb Music; Warner Brothers Music; SONY; and other famous songwriting, publishing, and recording studios where Elvis Presley, Dolly Parton, B.B. King, and countless other music icons have recorded.<sup>47</sup>

Following the alarming increase in endangered historical locations along Music Row, the NTHP submitted formal comments to the Metro Nashville Planning Commission regarding the city's Music Row Vision Plan, arguing for more robust historic preservation, particularly in light of the fifty buildings on Music Row that had been demolished between 2013 and 2019.<sup>48</sup> The comments outlined specific policy proposals, including actions to (1) discontinue Specific Plan exemptions encouraging demolition; (2) eliminate increased building height allowances; (3) develop the Transfer of Development Rights program “to place the receiving area outside of Music Row, to offer owners of historic properties the opportunity to sell their development rights on a first-come-first-served basis, and to identify an entity that will manage the TDR program”; and (4) provide support for the creation of a nonprofit to manage a revolving fund for the preservation of music business properties.<sup>49</sup>

##### 5. Development Pressure and the Affordable Housing and Density Arguments Against Preservation

The ongoing crises of affordable housing and homelessness in US cities have led some experts to question the widespread practice of historic preservation, contending that it can lead to overly extensive conservation of areas, thereby hindering the development of denser housing solutions.<sup>50</sup> Those who oppose broad historic preservation

46. *Id.*

47. *11 Most Endangered Historic Places: Nashville's Music Row*, NAT'L TR. FOR HIST. PRES., [https://savingplaces.org/places/nashvilles-music-row#Y1W\\_Q3bMJPa](https://savingplaces.org/places/nashvilles-music-row#Y1W_Q3bMJPa) [<https://perma.cc/WB3V-3LCS>] (last visited Nov. 9, 2023).

48. *See Nashville's Music Row: Updates*, *supra* note 45.

49. *Id.*

50. *See* Adam A. Millsap, *Historic Designations Are Ruining Cities*, FORBES (Dec. 23, 2019, 8:40 AM), <https://www.forbes.com/sites/adammillsap/2019/12/23/historic-designations-are-ruining-cities/?sh=762835857afe> [<https://perma.cc/NYZ6-PA8M>]; J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 666 (2012) (“The past years have seen widely noticed critiques of historic preservation by ‘one of our leading urban economists,’ Edward Glaeser, and by star architect Rem Koolhaas. Glaeser . . . argues . . . that historic preservation restricts too much development, raises prices, and undermines the vitality of the cities. Koolhaas . . . argued that

argue that it is particularly troublesome when preservation or maintenance of a status quo is used as a tool to prevent low-income housing or other beneficial uses for growing cities.<sup>51</sup> While the federal government could designate historic districts, districts designated locally often have the greatest on-the-ground implications due to local control over zoning and building codes often coinciding with these historic designations.<sup>52</sup>

Empirical results are mixed as to whether historic designations lead to an increase or decrease in individual property value, but the stability promised by a district-wide designation may limit the density of new development, thus affecting the number of potential additional housing units in the vicinity.<sup>53</sup> One avenue through which this conflict might occur is increased review processes—and associated increased veto points—for new development or demolition proposals.<sup>54</sup> Despite this potential incongruity between housing provision and preservation, some preserved structures are repurposed into housing with the aid of historic tax credit programs and other incentives.<sup>55</sup>

In numerous cases across the nation, historic preservation has been employed as a strategy to impede new development, often safeguarding sites whose historical importance may be considered ambiguous or indeterminate: for example, an eight-story apartment building development project in San Francisco was delayed five years due to evaluation of what those opposing its development deemed a “historic laundromat” on the site.<sup>56</sup> Similarly, in Seattle, when a

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preservation lacks an organizing theory, imposes inauthentic consumer-friendly glosses on older structures, and inhibits architectural creativity.”)

51. See Millsap, *supra* note 50; Joe Cortright, *Historic Preservation: NIMBYism for the Rich?*, STRONG TOWNS (June 14, 2017), <https://www.strongtowns.org/journal/2017/6/13/historic-preservation-nimbyism-for-the-rich> [<https://perma.cc/9PG9-NYWB>].

52. See Millsap, *supra* note 50 (beginning with the first local historic district in Charleston).

53. See *id.*; Ken Bernstein, *The Top Ten Myths About Historic Preservation*, L.A. CITY PLAN. [https://planning.lacity.org/odocument/e315c7f3-e066-470d-be31-bb05a01b0f42/Top%20Ten%20Myths\\_0.pdf](https://planning.lacity.org/odocument/e315c7f3-e066-470d-be31-bb05a01b0f42/Top%20Ten%20Myths_0.pdf) [<https://perma.cc/4SXE-3XMX>] (last visited Nov. 9, 2023).

54. See Millsap, *supra* note 50; Bernstein, *supra* note 53.

55. See *Smart Growth and Preservation of Existing and Historic Buildings*, EPA (Apr. 18, 2023), <https://www.epa.gov/smartgrowth/smart-growth-and-preservation-existing-and-historic-buildings> [<https://perma.cc/PBV7-HA85>]; *Tax Incentives for Preserving Historic Properties*, NAT'L PARK SERV. (Oct. 5, 2023), <https://www.nps.gov/subjects/taxincentives/index.htm> [<https://perma.cc/YE48-4ME5>]; U.S. DEP'T HOUS. & URB. DEV. & ADVISORY COUNCIL ON HIST. PRES., AFFORDABLE HOUSING AND HIST. PRESERVATION, [https://www.huduser.gov/portal/publications/pdf/historic\\_preserv.pdf](https://www.huduser.gov/portal/publications/pdf/historic_preserv.pdf) [<https://perma.cc/RST2-WS2E>] (last visited Nov. 9, 2023) (“Rehabilitating historic properties to provide affordable housing is a sound historic preservation strategy.”).

56. See Millsap, *supra* note 50; Joe Kukura, *So-Called ‘Historic Laundromat’ Property Sold, but High-Rise Still Likely to Replace It*, SFIST (Apr. 25, 2019), <https://sfist.com/2019/04/25/so->

developer proposed a two hundred-unit multifamily development with a height that met the zoning district restrictions, a historic preservation board nonetheless rejected the proposal because its height was taller than some surrounding historic buildings.<sup>57</sup>

Costs of excessive historic preservation include high compliance costs for those living in the districts, delays in permitting, and limited housing supply.<sup>58</sup> Cities do not always consider these costs when deciding whether to preserve: for example, “Washington, D.C.’s Historic Preservation Review Board doesn’t even consider the economic impact of designating an area a historic district.”<sup>59</sup> Indeed, some planning and urban growth scholars have argued that “in the world of historic preservation, a loose relationship between a building’s historical value and its likelihood of being protected is all too common.”<sup>60</sup>

## 6. The Role of Zoning in Housing Affordability and Development

Zoning in the United States had what urban studies professor Sonia A. Hirt terms its “formative years” between 1905 and 1935, the point at which most cities had enacted zoning ordinances.<sup>61</sup> Zoning today varies considerably by locality and state, but the style of many comprehensive ordinances derives from New York City’s 1916 zoning ordinance.<sup>62</sup> Other states adopted similar plans before and after

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called-historic-laundromat-property-sold-but-high-rise-still-likely-to-replace-it/  
[<https://perma.cc/P8LX-T9ML>].

57. Dan Bertolet, *When Historic Preservation Clashes with Housing Affordability*, SIGHTLINE INST. (Dec. 19, 2017, 6:30 AM), <https://www.sightline.org/2017/12/19/when-historic-preservation-clashes-with-housing-affordability/> [<https://perma.cc/WTU2-AQNB>] (“So the site remained a parking garage, and Seattle lost 200 new homes adjacent to the region’s biggest transit hub . . . Design review and environmental review, while well-intended, can sabotage homebuilding and affordability. The same goes for historic preservation rules . . . If cities aren’t careful, their historic preservation regulations can function as exclusionary zoning.”).

58. Millsap, *supra* note 50.

59. *Id.*

60. Jacob Anbinder, *What Historic Preservation Is Doing to American Cities*, ATLANTIC (May 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/historic-preservation-has-tenuous-relationship-history/629731/> [<https://perma.cc/5QCE-9Y3J>] (noting that Los Angeles’ “iconic Brown Derby restaurant is gone,” yet a Brentwood Chevron station and a D.C. strip mall are preserved); see Randall Mason, *Theoretical and Practical Arguments for Values-Centered Preservation*, 3 CRM: J. HERITAGE STEWARDSHIP (2006), <https://www.nps.gov/crps/CRMJournal/Summer2006/view2.html> [<https://perma.cc/39UT-7968>]; Binyamin Appelbaum, *Opinion: When Historic Preservation Hurts Cities*, N.Y. TIMES (Jan. 26, 2020), <https://www.nytimes.com/2020/01/26/opinion/historic-preservation-solar-panels.html> [<https://perma.cc/5UTX-8JR5>].

61. See SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 13 (2014).

62. See DONALD L. ELLIOTT, A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES 15–16 (2008).

President Hoover’s Advisory Committee on City Planning and Zoning issued a model legal framework for zoning, the Standard Zoning Enabling Act, in 1924, revised in 1926, followed by the Standard City Planning Enabling Act in 1928.<sup>63</sup>

Land use planning, encompassing zoning and historic preservation, is intricately linked to housing affordability through various channels. This includes the gradual trend of municipalities to mandate larger lot sizes and diminish residential densities in zoning laws, and the phenomenon of Not in My Backyard (NIMBYism)—wherein homeowners resist new developments they believe could undermine their property values, disrupt neighborhood integrity, or compromise safety—exerts significant influence on urban development dynamics.<sup>64</sup>

While zoning and historic preservation both fall under the broader umbrella of urban planning and may overlap, particularly in the generation of historic zoning overlay districts, zoning and historic preservation are generally considered to be distinct planning schemes with separate legal authority.<sup>65</sup> In a 2021 Texas Supreme Court case, *Powell v. City of Houston*, homeowners argued that Houston’s Historic Preservation Ordinance violated both the city’s charter requiring a referendum to allow zoning and the Texas Zoning Enabling Act; the city countered with an argument that this Historic Preservation Ordinance was not a zoning regulation.<sup>66</sup> Over four thousand other municipalities in the United States already had similar ordinances like the contested one in Houston, but Houston is unique in its requirement for a referendum to allow zoning.<sup>67</sup> Houston, in arguing that the ordinance was valid, stated that its historic preservation ordinance was *not* zoning and that historic preservation ordinances fell within the city’s general home rule police powers.<sup>68</sup> The Texas Supreme Court agreed with

63. See *id.*; ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT (1926), [https://planning-org-uploaded-media.s3.amazonaws.com/legacy\\_resources/growingsmart/pdf/SZEnablingAct1926.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf) [<https://perma.cc/R8HL-73D9>]; ADVISORY COMM. ON CITY PLANNING AND ZONING, A STANDARD CITY PLANNING ENABLING ACT (1928), [https://planning-org-uploaded-media.s3.amazonaws.com/legacy\\_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf) [<https://perma.cc/QET4-HNKD>].

64. See ELLIOTT, *supra* note 62, at 83–84.

65. See Diana Ionescu, *Is Historic Preservation Zoning?*, PLANETIZEN (Sept. 30, 2021, 8:00 AM), <https://www.planetizen.com/news/2021/09/114817-historic-preservation-zoning> [<https://perma.cc/TV8C-9HN5>].

66. *Id.*; *Powell v. City of Houston*, 628 S.W.3d 838, 841 (Tex. 2021).

67. Sarah Bronin, *Houston: Still Zoning’s Last Frontier?*, STATE & LOC. GOV’T L. BLOG (Sept. 14, 2021), <https://www.sloglaw.org/post/houston-still-zoning-s-last-frontier> [<https://perma.cc/97Q5-TFDS>] (as “the only large American city without a zoning code”).

68. *Id.*

Houston that zoning and historic preservation law “derive from distinct legal schemes and have different purposes,” meaning that a city could have zoning without historic preservation, or vice versa.<sup>69</sup>

While not technically zoning, historic districts “provide many of the same benefits to incumbent homeowners as strict land-use regulations . . . limit[ing] the types of buildings that can be constructed, the alterations that can be made . . . and prevent[ing] uses that may decrease surrounding property values.”<sup>70</sup> Some contend that zoning reforms and other related laws can “improve housing affordability and advance racial equity.”<sup>71</sup> These proposed reforms include allowing greater density for multifamily housing, reducing the prevalence of height limits, decreasing minimum lot size requirements, reducing how extensive design review processes are, and considering the role of public participation.<sup>72</sup>

### III. ANALYSIS

#### A. *Challenges Inherent in Cities’ Current Approaches to Preservation of Music Landmarks*

While increased uniformity of culture across the United States has occurred over time, changing development patterns have not diluted many unique qualities of musically oriented cities.<sup>73</sup> US cities approach preservation of music venues and landmarks in a variety of often piecemeal ways dominated by private actions, depending on underlying legal authority, local politics, and highly localized factors.

##### 1. Memphis’s Missing and Remaining Landmarks

Memphis, Tennessee, is one of the United States’ key “music cities,” one with unmistakable cultural heritage that has changed the

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69. *Id.*; Ionescu, *supra* note 65 (finding that the historic preservation ordinance was not zoning because it was not “close to citywide applicability, it did not subject regulated property to uniform standards, and it did not implicate uses”).

70. Millsap, *supra* note 50.

71. *Cracking the Zoning Code: How Zoning Can Improve Housing Affordability and Racial Equity*, URBAN INST., <https://apps.urban.org/features/advancing-equity-affordability-through-zoning/#reforms> [<https://perma.cc/JL2E-R5PY>] (last visited Nov. 9, 2023).

72. *See id.*

73. *See* ROBERT GORDON, *IT CAME FROM MEMPHIS* 3 (2nd ed. 2020) (“Walking out the front door to a landscape that could be anywhere has taken a new meaning . . . Walking out the front door is no longer necessary. Today, particulars everywhere are made generalities. . . . This age of access, however, has not erased history, and cannot completely remove an area’s innate characteristics.”).

world's music.<sup>74</sup> Home of the Delta blues; Sam Phillips' Sun Studio, "the site where black and white cultures merged as rock and roll"; Stax Records; Elvis Presley's Graceland; and Beale Street, "Memphis has always been a place where cultures come together . . . The music in Memphis is more than a soundtrack to these confrontations. It is the document of it."<sup>75</sup> While some of these landmarks have been preserved, others have been lost.<sup>76</sup> Many of Memphis' surviving landmarks are now some of the most-visited attractions in the state, and music tourism is estimated to comprise at least twenty percent of the billions of dollars visitors add to the Memphis economy on a yearly basis.<sup>77</sup> One of these landmarks, the Presley family's former home at Graceland, is listed on the National Register of Historic Places and is also a National Historic Landmark.<sup>78</sup>

While the city has not prevented the abandonment or demolition of some of its cultural resources, National Historic Landmarks Graceland and Sun Studio remain, as do the Beale Street Historic District, the American Recording Studio East, and the still-operating Royal Studios, which was given a historical marker within the last ten years.<sup>79</sup> Although the building was demolished in 1989 for a never-built community center, the original Stax Recording Studio site and surrounding land were purchased by a nonprofit, Soulsville USA, which constructed the Stax Museum of American Soul Music in 2001, followed by the Soulsville Charter School in 2005.<sup>80</sup> American Sound Studio, where over one hundred hits including "Sweet Caroline," "Son of a Preacher Man," "The Letter," "Goodtime Charlie's Got the Blues," and

74. *Id.* at 3–7.

75. *Id.* at 10.

76. *Id.* at 105 ("Unlike most of Memphis's other studios, Ardent Recording has survived the bulldozer and the other confrontations from the city and the industry."), 296–97 ("Another crane appeared above midtown today . . . The waterfall of development money overflowing from Austin onto Nashville and now . . . Memphis. The erosion is initially subtle, a decaying house replaced with a new one, a vacant lot sprouts a duplex. Then the homes that define a city become less valuable and then less valued than the land underneath them and the erosion becomes a tsunami of erasure.").

77. Chris Davis, *Music Tourism Is Transforming Memphis*, MEMPHIS MAG. (Nov. 29, 2015, 7:37 PM), <https://memphismagazine.com/culture/music-tourism-is-transforming-memphis/> [<https://perma.cc/3DH4-4GEN>].

78. *The Estate of Elvis Presley/The Elvis Presley Trust*, GRACELAND: THE HOME OF ELVIS PRESLEY, <https://www.graceland.com/about-graceland> [<https://perma.cc/4RLU-HXA7>] (last visited Nov. 9, 2023).

79. Davis, *supra* note 77 ("In 1982 Graceland was new, Sun was down, Beale was desolate, and the abandoned building that had formerly housed the Stax Recording Studio wouldn't even be torn down for another seven years. 'But even back then something was there . . . The whole city was like a museum without walls. There was just so much history.'").

80. GORDON, *supra* note 73, at 312.



some of Elvis's post-Comeback Special sessions were recorded, was not preserved, but its former location, then a Family Dollar store, received a historical marker in 2014.<sup>81</sup> Notable music landmark The Levitt Shell, a venue in Overton Park where Elvis and countless others performed, was preserved after twenty years of work by a preservation group called Save Our Shell.<sup>82</sup> A local "Community LIFT" program renovated and reopened the home of pianist Memphis Slim in 2014.<sup>83</sup> Community members have often spoken out in attempts to save cultural landmarks in Memphis,<sup>84</sup> and this Community LIFT program has worked to seek and use funding to invest in the community through grants and loans.<sup>85</sup>

Despite having a home rule charter, through which local citizens can directly vote on or add amendments to the city's charter by petition without the approval of the Tennessee legislature, Memphis has not preserved some of the sites residents attempted to save.<sup>86</sup> Ultimately, for sites not meeting national preservation criteria in Memphis, private actors and nonprofit organizations loom large in the success stories of preserved cultural sites, reflecting a piecemeal approach that has resulted in some preserved sites interspersed in a city with substantial losses.<sup>87</sup>

## 2. Nashville's Sites and Strategies

*The "Music City,"* Nashville, Tennessee, is home to Music Row, the Bluebird Café, the Ryman Auditorium, and other music venues and landmarks, including smaller venues like the Exit/In, where Rodney

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81. *American Studio Historic Marker Unveiled*, W. TENN. HIST. SOC'Y (Jul. 16, 2014), <https://wths-tn.org/2014/07/16/american-studio-historic-marker-unveiling/> [<https://perma.cc/SUD6-AQEA>].

82. Davis, *supra* note 77.

83. *Id.*

84. See GORDON, *supra* note 73, at 297 ("A community is cumulative and most people notice its disappearance too late. There is protection in civic zoning and ordinances, and those protections get written when people get loud. Memphis knows about getting loud . . . Memphis is a space where inventiveness leaps both forward and back, where Sam Phillips' mantra, 'Give me something different' is always in tune . . . The battle for Memphis' soul may never have raged as strongly as it does today because the possibility of its loss has never been so strong.").

85. COMMUNITY LIFT, <http://communitylift.org/> [<https://perma.cc/2SQZ-CAP9>] (last visited Nov. 9, 2023).

86. See LOC. SOLS. SUPPORT CTR., *supra* note 33; Casey Williams, *City Council Takes up 'Home Rule' Idea That Could Change Clarksville Government*, CLARKSVILLE NOW (June 1, 2022, 4:19 PM), <https://clarksvillenow.com/local/city-council-takes-up-home-rule-idea-that-could-change-clarksville-government/> [<https://perma.cc/T676-EPPX>].

87. See *American Studio Historic Marker Unveiled*, *supra* note 81; GORDON, *supra* note 73, at 312.

Crowell, Guy Clark, and Marty Stuart played to “younger, more progressive audiences” in the 1970s.<sup>88</sup>

The Ryman Auditorium, originally a tabernacle later owned by the National Life and Accident Insurance Company, eventually fell into disrepair in the 1970s and was surrounded by an area of downtown Nashville that had become neglected, “a PR problem” for National Life.<sup>89</sup> Some argued for demolition of the site, and they met strong pushback from preservationists, musicians, and the public, resulting in its approval on the National Register of Historic Places and designation as a National Historic Landmark.<sup>90</sup> In March of 1974, the final *Grand Ole Opry* show at the Ryman, the “Mother Church of Country Music,” took place before the new large, air-conditioned Grand Ole Opry House was unveiled six miles away from downtown.<sup>91</sup> In the 1990s, country and Americana artist Emmylou Harris chose the old Ryman Auditorium, closed since the 1970s, as the site to record an acoustic album.<sup>92</sup> She and many other artists began a campaign to save the Ryman, resulting in private investment from WSM and the *Grand Ole Opry*’s owners totaling 8 million dollars for its restoration.<sup>93</sup> The Ryman reopened in 1994 as a venue, one year before the *Grand Ole Opry* turned seventy.<sup>94</sup>

In 2015, the NTHP nominated the entirety of Music Row to the Tennessee Historical Commission’s State Review Board and the National Park Service for historic recognition.<sup>95</sup> The National Park Service then approved a study about the district’s historical significance, documenting information on nearly four hundred music-related sites; this study would assist property owners in individually seeking designation on the National Register, allowing for federal historic tax credits.<sup>96</sup> Chet Atkins’ RCA Studio A, where Dolly Parton

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88. See DAYTON DUNCAN & KEN BURNS, *COUNTRY MUSIC: AN ILLUSTRATED HISTORY* 377, 361, 482 (2019).

89. *Id.* at 361.

90. *History*, RYMAN, <https://www.ryman.com/history/> [<https://perma.cc/F93C-87AR>] (last visited Nov. 9, 2023).

91. DUNCAN & BURNS, *supra* note 88, at 362–63.

92. *Id.* at 481 (“Marty Stuart said, ‘The windows were broken out, and pigeons were flying around, and they conducted two-dollar tours.’”).

93. *Id.* at 482.

94. *Id.*

95. Patrick Sisson, *To Honor Nashville’s Music Row, Entire District Submitted for Historic Recognition*, CURBED (May 2, 2016, 9:46 AM), <https://archive.curbed.com/2016/5/2/11565170/nashville-music-row-historic-preservation> [<https://perma.cc/WG98-ZS5D>].

96. Dees Stribling, *Park Service Acknowledges Historic Character of Music Row*, BISNOW (Nov. 22, 2016), <https://www.bisnow.com/nashville/news/neighborhood/park-service-acknowledges-historic-character-of-music-row-68007> [<https://perma.cc/3P2A-77EQ>].

recorded “Jolene,” was added to the National Register around the same time, which helped thwart plans for condos and a restaurant to be constructed on the site, only after a long saga and a purchase by a preservationist “benevolent millionaire” following its sale by the heirs of Owen and Harold Bradley.<sup>97</sup> Around the same time, Music Row property owners and lessees met with city officials to discuss the possibility of a Music Row Code, which would have restricted density in some areas, but the Code was never enacted, largely because of the difficult question of how to save not only a building’s physical architecture, but also its historic and cultural significance.<sup>98</sup>

Despite a recent development boom and rise in property values in Nashville, many additional well-known venues announced during the COVID-19 pandemic that they would close or be forced to move.<sup>99</sup> Revered cultural sites, including the Ernest Tubb Record Shop on Broadway, are selling for high prices—\$18.3 million in this case—amidst the real estate and tourism boom.<sup>100</sup> A development firm acquired Exit/In for \$6.45 million in 2021, a price that the venue’s operator could not initially meet despite a desire to purchase it.<sup>101</sup> The operator, like most in Nashville, leased the space as opposed to owning it.<sup>102</sup> Although the development firm put in a request for historic landmark designation and the club is partially covered by a historic overlay, the venue operators argue that the requested designation would only prevent demolition of the building itself rather than keeping the venue in operation into the future.<sup>103</sup> In 2022, venues like Mercy

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97. See Sisson, *supra* note 95; Nate Rau, *Analysis: How Nashville Can Save Its Independent Music Venues*, TENN. LOOKOUT (Apr. 14, 2021, 4:02 AM), <https://tennesseelookout.com/2021/04/14/analysis-how-nashville-can-save-its-independent-music-venues/> [https://perma.cc/KH4X-LDMH].

98. Rau, *supra* note 97 (“The Music Row Code, as it was called, never came to fruition in part because of the same challenges that now confront Nashville in saving its independent music venues. Are we trying to save the architecture, which in many cases is frankly nondescript and perhaps unworthy of preservation? Or are we trying to save the historic and the cultural significance of the building?”).

99. Stephenson, *supra* note 5; *The State of Nashville’s Independent Music Venues*, 90.3 WLPN NEWS (Jun. 3, 2022), <https://wpln.org/post/episodes/independent-music-venues-nashville/> [https://perma.cc/564P-RW2R].

100. See William Williams, *Ernest Tubb Record Shop Building Sells for \$18.3M*, NASHVILLE POST (July 29, 2022), [https://www.nashvillepost.com/business/development/ernest-tubb-record-shop-building-sells-for-18-3m/article\\_bffdf31c-0f7f-11ed-a393-536584d741e0.html](https://www.nashvillepost.com/business/development/ernest-tubb-record-shop-building-sells-for-18-3m/article_bffdf31c-0f7f-11ed-a393-536584d741e0.html) [https://perma.cc/3BSM-DARG].

101. Stephenson, *supra* note 5; *The State of Nashville’s Independent Music Venues*, *supra* note 99.

102. Stephenson, *supra* note 5; *The State of Nashville’s Independent Music Venues*, *supra* note 99.

103. Stephenson, *supra* note 5; *The State of Nashville’s Independent Music Venues*, *supra* note 99.

Lounge—which had been operating for twenty years—Cannery Ballroom, and the High Watt all announced their closures.<sup>104</sup>

In 2021, Nashville’s Metro Council resolved to inventory all of the city’s independent music venues.<sup>105</sup> In April of 2022, Metro Council voted to approve three steps aimed at stabilizing and preserving “some of Nashville’s most iconic independent live music venues.”<sup>106</sup> Council members voted to use \$260,000 of American Rescue Plan funds: (1) to study preservation strategies; (2) to revive the city’s Music City Music Council; and (3) to grant \$50,000 to restore Elks Lodge, previously called Club Baron, where Jimi Hendrix, B.B. King, Etta James, and Ray Charles played in the 1950s and 1960s.<sup>107</sup>

The study that the Council approved involved the work of outside consultants who study successful methods other cities have employed to help preserve live music venues facing pressure from surrounding development.<sup>108</sup> The Music City Music Council originally began during Mayor Karl Dean’s administration in 2009 but ended a few years later.<sup>109</sup> Reviving the Council in a new form assisted the city’s efforts to preserve music venues, and one Council member argued that Nashville should take more steps of this nature, advocating for something similar to Huntsville, Alabama’s decision to add a music officer to its mayor’s office.<sup>110</sup> Independent music venue owners and operators have created an organization called the Music Venue Alliance Nashville intending to control their businesses and maintain independent ownership.<sup>111</sup>

### 3. Other Cities’ Strategies to Preserve Music Landmarks

Music venues that achieve “legendary” status often avoid being lost by being officially recognized on the National Register of Historic

104. Stephenson, *supra* note 5; *The State of Nashville’s Independent Music Venues*, *supra* note 99.

105. Stephenson, *supra* note 5.

106. *Id.*

107. *Id.* (Elks Lodge, formerly Club Baron, was initially hindered by the construction of Interstate 40 through Jefferson Street, as were other Black-owned music venues. Despite its designation as a historic landmark in 2016, the site was damaged by a tornado four years later. It was described as one of nine critical at-risk properties by a nonprofit organization called Historic Nashville in 2021. The Nashville Convention and Visitors Corporation created a nonprofit organization, Music City, Inc., which will use the newly approved \$50,000 grant to restore the site).

108. *Id.*

109. *Id.*

110. *Id.*

111. MUSIC VENUE ALLIANCE—NASHVILLE, <https://www.mvan.org/our-mission> [<https://perma.cc/7NGK-CQQ6>] (last visited Nov. 9, 2023).

Places—like Gruene Hall,<sup>112</sup> the oldest dance hall in Texas that is still in operation, and its district—or by being privately preserved, such as the Longhorn Ballroom in Dallas, Texas, which was originally Bob Wills’ Ranch House.<sup>113</sup> Following its bankruptcy, the Longhorn Ballroom was purchased and preserved—a \$20 million project with \$4 million in economic incentives from the city of Dallas—by promoter Edwin Cabaniss, who had previously done the same for Dallas’s Kessler Theater and Houston’s Heights Theater.<sup>114</sup>

Some cities have supplemented these approaches by pursuing novel alternatives for their music sectors. Huntsville, Alabama’s, program, based in its Mayor’s Office, is extensive: Mayor Tommy Battle created a Music Initiative for the city that included appointing an inaugural Music Officer—a role meant to advocate for the local music sector and strategic planning and economic opportunities.<sup>115</sup> Huntsville, home to several significant music venues, also created the Huntsville Music Board, a nine-member “volunteer citizen advisory committee appointed by the City to help cultivate a vibrant music economy in Huntsville.”<sup>116</sup> Huntsville also requested the completion of a Huntsville music audit conducted by a consulting group to assess “strengths and opportunities of Huntsville’s music economy.”<sup>117</sup> Nearby, in Muscle Shoals, Alabama, known as the home of FAME Studios and Muscle Shoals Sound Studio (both listed on the National Register of Historic Places), the Muscle Shoals Music Preservation Society in

112. GRUENE HALL, <https://gruenehall.com/> [<https://perma.cc/AYA8-D7EM>] (last visited Sept. 4, 2023); GRUENE, <https://www.gruenetexas.com/history/> [<https://perma.cc/A6UH-E3UK>] (last visited Nov. 9, 2023) (noting developers in the 1970s had purchased the district for a planned housing development until others intervened and worked with them to instead list the district on the National Register in 1975).

113. Jean Scheidnes, *The Longhorn Ballroom, Texas’s Most Historic Music Venue, Swings Back to Life*, TEX. MONTHLY (Mar. 31, 2023), <https://www.texasmonthly.com/style/longhorn-ballroom-renovation/> [<https://perma.cc/2QJQ-ML8S>]; *Longhorn Ballroom*, PRES. DALLAS, <https://preservationdallas.org/location/longhorn-ballroom-216-corinth-street-riverfront> [<https://perma.cc/9VUP-D278>] (last visited Nov. 9, 2023) (The Longhorn Ballroom hosted artists ranging from Loretta Lynn, Merle Haggard, George Jones, and Willie Nelson to the Sex Pistols, the Red Hot Chili Peppers, and Aerosmith, serving as the site of the band’s “What It Takes” music video).

114. Scheidnes, *supra* note 113.

115. *City of Huntsville Announces Hiring of New Music Officer*, HUNTSVILLE (Jan. 26, 2022), <https://www.huntsvilleal.gov/city-of-huntsville-announces-hiring-of-new-music-officer/> [<https://perma.cc/JSE2-KV4N>].

116. *Id.*; Lynsey Smith, *Huntsville Music Office Reflects on City’s Music Scene in 2022*, NEWS19 (Dec. 6, 2022, 10:33 PM), <https://whnt.com/news/huntsville/huntsville-music-office-reflects-on-citys-music-scene-in-2022/> [<https://perma.cc/V5NE-477F>].

117. *Music Audit*, HUNTSVILLE, <https://www.huntsvilleal.gov/government/mayors-office/mayors-initiatives/music-initiative/music-audit/> [<https://perma.cc/QT7-GZ7Q>] (last visited Nov. 9, 2023).

Florence, Alabama serves as a nonprofit aimed at “preserv[ing], present[ing], and promot[ing] the musical heritage of northwest Alabama.”<sup>118</sup>

Toronto, in Ontario, Canada, embarked on a “Music City” strategy that focused on cultural heritage and intangible merits of the city, aiming to avoid overemphasis on economic potential at the expense of cultural wealth.<sup>119</sup> In 2019, New York City moved to protect landmarks not known for their status as iconic venues but rather as the sites of historic songwriting sessions: “Tin Pan Alley” on West 28th Street now has several buildings designated as historical landmarks by the city Landmarks Preservation Commission.<sup>120</sup> The Commission is an agency of the Mayor’s Office that was created in 1965 and has made thirty-seven thousand buildings and sites historic landmarks; interestingly, some of these designations are for interior landmarks, not only protecting the physical structure of the properties.<sup>121</sup> Nonetheless, eight major venues closed between 2004 and 2014 in New York City, including CBGB and the Roseland Ballroom.<sup>122</sup>

Austin, Texas, the “live music capital of the world,” is home to some of the more innovative city-led solutions to the problem of massive development encroaching on independent venues’ ability to remain in business.<sup>123</sup> Much like in Nashville, several longstanding music venues

118. MUSIC PRES. SOC’Y, <http://www.musicpreservationsociety.org/about/about-mps> [<https://perma.cc/3267-XRGB>] (last visited Nov. 9, 2023); see also Matt Wake, *The 20 Best Songs Ever Recorded in Muscle Shoals*, AL.COM (Dec. 20, 2016, 7:16 PM), [https://www.al.com/entertainment/2016/12/the\\_20\\_best\\_songs\\_ever\\_recorde.html](https://www.al.com/entertainment/2016/12/the_20_best_songs_ever_recorde.html) [<https://perma.cc/4MRQ-H4W5>] (ranking songs recorded in Muscle Shoals studios, including Wilson Pickett’s “Land of 1000 Dances,” Etta James’ “I’d Rather Go Blind,” and Aretha Franklin’s “Do Right Woman, Do Right Man,” at FAME Studios, and Bob Seger’s “Old Time Rock and Roll” and The Rolling Stones’ “Wild Horses” at Muscle Shoals Sound Studio).

119. Sarah Gwendolyn Ross, *Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of Their Intangible Cultural Heritage Value*, 24 INT’L J. CULTURAL PROP. 31 (2017).

120. “Tin Pan Alley’ Buildings Now Have City Landmark Status, SPECTRUM NEWS NY 1 (Dec. 11, 2019, 7:41 AM), <https://www.ny1.com/nyc/manhattan/news/2019/12/11/tin-pan-alley-designated-historic-city-landmark-#:~:text=‘Tin%20Pan%20Alley’%20Buildings%20Now%20Have%20City%20Landmark%20Status&text=NEW%20YORK%20%2D%20Five%20buildings%20along,the%20birthplaces%20of%20American%20music> [<https://perma.cc/DF8C-QBQL>].

121. *LPC Designates Five Historic Buildings Associated with Tin Pan Alley*, NYC LANDMARKS PRES. COMM’N (Dec. 10, 2019), <https://www.nyc.gov/site/lpc/about/pr2019/lpc-designates-five-historic-buildings-associated-with-tin-pan-alley.page> [<https://perma.cc/RMB7-N9FL>].

122. Gregory Scruggs, *When the Music’s Over: Cities Suffer as Venues Fall to Developers*, REUTERS (Sept. 17, 2018, 12:21 PM), <https://www.reuters.com/article/us-usa-music-cities/when-the-musics-over-cities-suffer-as-venues-fall-to-developers-idUSKCN1LX24D> [<https://perma.cc/5G2S-SLP6>].

123. Mike Christen, *Austin’s Live Music Venues to See New Layer of City Support*, AUSTIN BUS. J. (Aug. 5, 2022), <https://www.bizjournals.com/austin/news/2022/08/05/austin-music-venues-definition-city-hall.html> [<https://perma.cc/NLH6-5ULB>].

closed during the pandemic.<sup>124</sup> The city's response emphasizes the *venues' operation* as opposed to the preservation of *structures*.<sup>125</sup> In 2022, Austin's City Council created a standardized definition for live music venues, meaning that they can be considered arts organizations, which allows them to access municipal programs and funding not ordinarily available to music venues, including from the hotel occupancy tax imposed by the city.<sup>126</sup> Austin had already taken a significant step in 2022 in creating the Iconic Venue Fund and Cultural Trust and "identif[ying] 14 live music venues and creative spaces that are eligible to receive millions of dollars in funding."<sup>127</sup> The city argued that these changes will allow it to provide incentives such as density bonuses for prospective developers with respect to venues in a similar way to its ability to do so for affordable housing, and it could also provide fee waivers, modified parking requirements, affordable commercial space restrictive covenants, and other regulatory incentives for music venues.<sup>128</sup>

### *B. Novel Strategies for Preservation of Music Landmarks*

#### 1. Tax Credit Programs, Inventories, Resolutions, and Music Councils

As discussed, cities have approached the preservation of music landmarks in various ways, including inventories, resolutions, and music councils. Music officers and music advisory boards may be used to connect music industry members with local governments and promote economic development and consensus.<sup>129</sup> State and federal historic tax credit programs and other funding aids, including local sources, may also serve to incentivize developers to engage in revitalization of these properties.<sup>130</sup> These piecemeal approaches and their varying levels of success have implications for their overall efficacy.

Instead of the typical, broad historic-preservation regimes, some urbanists argue that better alternatives exist, including applying market-driven preservation policy to specific buildings instead of

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124. *Id.*

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* Amy Terrill & Alex Jacob, *How Cities Benefit from Helping the Music Industry Grow*, WIPO (Sept. 2015), [https://www.wipo.int/wipo\\_magazine/en/2015/05/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2015/05/article_0009.html) [<https://perma.cc/TCQ2-378D>].

130. *See Historic Tax Credits*, NAT'L TR. FOR HIST. PRES., <https://savingplaces.org/historic-tax-credits#.YxVnp3bMJPY> [<https://perma.cc/CXR6-5NEZ>] (last visited Nov. 9, 2023).

districts.<sup>131</sup> This could be achieved in the form of property tax relief, transfers of development rights, and federal and state historic tax credit programs.<sup>132</sup> One example of state facilitation of market-based preservation solutions is California's Mills Act, under which cities grant property owners property tax relief for choosing to restore historic buildings.<sup>133</sup>

## 2. English System of Grading Buildings

The English system of grading buildings may serve as one alternative model for preservation.<sup>134</sup> This involves assigning a building deemed to be of historical interest as either a Grade II, II\*, or I building, depending on how significant the building is determined to be by local planners, allowing different levels of preservation stringency.<sup>135</sup> Once a building is listed in the United Kingdom, owners must apply to receive consent to make changes to the building.<sup>136</sup> The planning system does not consider buildings under thirty years old to be of special interest.<sup>137</sup> The English grading system does not appear to be used for music venues but could foreseeably be adapted or drawn upon as inspiration for US cities attempting to inventory their venues.<sup>138</sup> The London mayor's

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131. Scott Beyer, *Historic Preservation Is Great, Except When It Isn't*, GOVERNING (Sept. 25, 2020), <https://www.governing.com/community/historic-preservation-is-great-except-when-it-isnt.html> [<https://perma.cc/DA7W-CRUD>].

132. *Id.*

133. *Id.*; CAL. GOV'T CODE §§ 50280–50290; CAL. REV. & TAX. CODE §§ 439–439.4.; *Mills Act Program*, CA.GOV, [https://ohp.parks.ca.gov/?page\\_id=21412](https://ohp.parks.ca.gov/?page_id=21412) [<https://perma.cc/6CJB-DEE4>] (last visited Nov. 9, 2023).

134. Patrice Frey, *Why Historic Preservation Needs a New Approach*, BLOOMBERG (Feb. 8, 2019, 10:15 AM), <https://www.bloomberg.com/news/articles/2019-02-08/why-historic-preservation-needs-a-new-approach> [<https://perma.cc/4TWH-TBJU>].

135. *See id.* (Grade I buildings, comprising about 2.5% of English-listed buildings, are of the most exceptional interest (highest grade); Grade II\* buildings, comprising about 6% of listed buildings, are considered an intermediate level of importance; and Grade II buildings, over 90% of listed buildings, are of special interest.)

136. *Listed Buildings*, HIST. ENG., <https://historicengland.org.uk/listing/what-is-designation/listed-buildings/> [<https://perma.cc/XL3V-6G6D>] (last visited Nov. 9, 2023).

137. *Id.*

138. *See* DEPT FOR DIGIT., CULTURE, MEDIA, & SPORT, PRINCIPLES OF SELECTION FOR LISTED BUILDINGS 5–7 (2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/757054/Revised\\_Principles\\_of\\_Selection\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757054/Revised_Principles_of_Selection_2018.pdf) [<https://perma.cc/W6PZ-NZV8>] (outlining statutory criteria and general principles for the English listing system); *Listing Priorities*, HIST. ENG., <https://historicengland.org.uk/listing/apply-for-listing/listing-priorities/> [<https://perma.cc/2AWX-DBY7>] (last visited Nov. 9, 2023) (summarizing areas of prioritization under the English listing system).



office reported that the city lost 35% of its independent music venues between 2007 and 2018.<sup>139</sup>

### 3. Preservation Funds and Cultural Trusts

Preservation funds and cultural trusts, like those employed by Austin, Texas, may be emulated in the future by other development-heavy cities.<sup>140</sup> In 2020, the city of Austin allocated \$5 million for threatened local music venues through a sub-fund of the Save Austin's Vital Economic Sectors Fund, the Austin Live Music Venue Preservation Fund.<sup>141</sup> Through these funds, the city provided conditional grants to twenty-eight music venues during the COVID-19 pandemic, determined based on a scale of how vulnerable each venue was to closure.<sup>142</sup> The funds, like those used in other cities, were aimed more at the effects of the pandemic than those of development pressures and face the shortcoming of likely being one-time solutions.<sup>143</sup> The Austin Cultural Trust, however, was created pre-pandemic and serves as a vehicle for purchasing or leasing spaces long term, though it is not limited to music-related spaces.<sup>144</sup> The Trust was funded with millions of dollars provided by the city, at least some of which were sourced from the hotel occupancy tax and the General Fund, sources which could be possible for other similar cities.<sup>145</sup> Texas is a mixed home rule-Dillon's Rule state, and Austin is a home rule city operating under a city charter, so the city may pursue any initiatives not specifically prohibited by the Texas Constitution or federal law.<sup>146</sup> This home rule status may play a role in Austin's ability to pursue innovative

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139. Scruggs, *supra* note 122.

140. See Christen, *supra* note 123; *Austin Cultural Trust*, AUSTIN ECON. DEV. CORP., <https://www.austinedc.org/cultural-trust> [<https://perma.cc/J3AJ-J8VP>] (last visited Nov. 9, 2023).

141. Rachel Rascoe, *Faster Than Sound: Live Music Preservation Fund Outlays Another \$3.5 Million*, AUSTIN CHRON. (Apr. 23, 2021), <https://www.austinchronicle.com/music/2021-04-23/faster-than-sound-live-music-preservation-fund-outlays-another-3-5-million/> [<https://perma.cc/H3EU-VRDE>].

142. *Id.*

143. See *id.*

144. *Austin Cultural Trust*, *supra* note 140.

145. Nick Barbaro, *Public Notice: Putting the Trust in Cultural Trust*, AUSTIN CHRON. (Jan. 21, 2022), <https://www.austinchronicle.com/news/2022-01-21/public-notice-putting-the-trust-in-cultural-trust/> [<https://perma.cc/3CGR-XA2G>].

146. See TEX. CONST. art. XI, § 5; AUSTINTEXAS.GOV, OVERVIEW OF THE AUSTIN CITY GOVERNMENT 1 (2023), <https://www.austintexas.gov/edims/document.cfm?id=114612#:~:text=Home%2Drule%20authority%20means%20the,Charter%20is%20considered%20Austin's%20constitution> [<https://perma.cc/W4WW-57GE>]; TEX. MUN. LEAGUE, ALPHABET SOUP: TYPES OF TEXAS CITIES 5 (2017), <https://www.tml.org/DocumentCenter/View/244/Types-of-Texas-Cities-PDF#:~:text=A%20home%20rule%20city%20may,granted%20or%20implied%20by%20statute> [<https://perma.cc/AY6R-6YD4>].

legislative strategies in the cultural preservation arena. Other cities with less development and lower amounts of tourism dollars would likely struggle to use Austin’s Cultural Trust as an effective model.

#### 4. The Shortcomings of Relying on Private Action, Zoning, and Preservation Funds Alone

Cities’ current preservation strategies often lack consistent application and can require reliance on unpredictable funding or grants like some cities received during the pandemic.<sup>147</sup> Zoning-based solutions or historic overlays tend to prioritize preservation of buildings’ exterior or prevention of demolition without any focus on preserving the building’s use as a music venue when faced with surrounding development pressure.<sup>148</sup> Nashville Metro Council member Jeff Syracuse wrote an opinion piece in *The Tennessean* in which he argued for Nashville to pass a tax abatement program for qualified historic properties, discussed his proposed resolution to take an inventory of music venues, and argued against the perceived benefits of a historic overlay being applied to the Exit/In: “It will only be applied to half the property and will likely result in further redevelopment [. . .] Local, independent music venues aren’t generally in buildings architecturally worth saving. [. . .] It will be nearly impossible for independent music venues to return when rents and construction costs have skyrocketed.”<sup>149</sup>

To the extent that the preservation of music venues has been the result of private action in the absence of sufficient local government involvement, continuing to use this piecemeal approach may be neither sustainable nor desirable for music venues’ survival in the future. Much of the preservation of venues that has been historically successful without the use of COVID-19-related or similar one-time grants has been the result of private actors, like nonprofits, “benevolent millionaire[s],” or funds created by local groups, like the Live Music Venue Recovery Fund, created by music venue operators and North Carolina developer Grubb Properties during the pandemic.<sup>150</sup> The Live Music Venue Recovery Fund, based on a real estate impact fund, helps

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147. See Stephenson, *supra* note 5.

148. See *The State of Nashville’s Independent Music Venues*, *supra* note 99.

149. Jeff Syracuse, *I Support Exit/In, but the Historic Overlay Brings Unintended Consequences*, TENNESSEAN (Feb. 22, 2022, 12:07 PM), <https://www.tennessean.com/story/opinion/2022/02/22/exit-in-historic-overlay-nashville-music-venues-metro-council/6884537001/> [<https://perma.cc/M92B-J65Y>].

150. See Rebecca Greenwald, *Will This Impact Fund Save America’s Music Venues?*, NEXT CITY (Apr. 30, 2021), <https://nextcity.org/urbanist-news/will-this-impact-fund-save-americas-music-venues> [<https://perma.cc/9X4F-KN9S>]; Rau, *supra* note 97.

independent music operators with a roadmap to purchasing their venues over three to five years: Grubb purchases the venues using a real estate fund, collecting rent for operating the fund, and uses a contract and negotiated timeline for the eventual purchase by the venue operator.<sup>151</sup> Grubb Properties donates all returns from the program that exceed a 12% internal rate of return to the National Independent Venue Foundation, a nonprofit.<sup>152</sup> A registered charitable group called the Music Venue Trust has been active in the United Kingdom for several years aiming to protect local music venues.<sup>153</sup> Although a drawback of relying on private actors and nonprofits for music venue preservation is a fostering of a certain degree of unpredictability, and perhaps powerlessness, for the city in planning its cultural legacy, there are certain benefits of this approach as well, which could include efficiency and fewer roadblocks to implementation and allocation of funding than for city-driven efforts.<sup>154</sup>

#### IV. A PROPOSAL FOR BALANCING PRESERVATION OF MUSIC LANDMARKS WITH DEVELOPMENT

State legislatures should enact statutes to make it easier for non-home rule cities to create innovative zoning schemes to prioritize sites not meeting federal historic preservation thresholds for local preservation individually. This could include using California's approach as a model for use in other states.<sup>155</sup> Cities that are capable should adopt effective strategies, like those used in Austin, which focus on conducting detailed analyses for each site to determine its preservation needs, rather than applying broad, all-encompassing preservation rules. In tandem, they should rezone the areas around these sites to allow for higher density, thereby promoting the construction of essential housing. Additionally, they could consider employing a three-tiered classification system, or an equivalent

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151. Greenwald, *supra* note 150 (“Venues looking to participate in the program need to meet three criteria areas: They need to be viewed as culturally significant to the communities in which they operate, they have to be spaces that are susceptible to redevelopment, and they need to demonstrate strong operations and financial statements from before the pandemic.”).

152. *Live Venue Recovery Fund*, GRUBB PROPS., <https://www.grubbproperties.com/funds/live-venue-recovery-fund> [<https://perma.cc/9PQK-TJW3>] (last visited Nov. 9, 2023); NAT'L INDEP. VENUE FOUND., <https://www.nivf.org/about> [<https://perma.cc/875M-BCQT>] (last visited Nov. 9, 2023).

153. MUSIC VENUE TR., <https://www.musicvenuetrust.com/team/> [<https://perma.cc/8XFB-FP22>] (last visited Nov. 9, 2023).

154. See Greenwald, *supra* note 150.

155. See Chris McKenzie, *Why Home Rule Is the Birthright of California's Cities*, W. CITY (July 1, 2014), <https://www.westerncity.com/article/why-home-rule-birthright-californias-cities> [<https://perma.cc/9AB5-GL7G>].

method, to assess the importance of each site for either preservation or redevelopment.<sup>156</sup>

### *A. California's Mills Act*

In 1880, the California Supreme Court held that the drafters of the state Constitution, in granting inherent home rule power to all California cities, intended to free cities from control of the state legislature.<sup>157</sup> Despite a lack of home rule status serving as a potential issue for adoption in some states, Dillon's Rule states should still consider passing state legislation similar to California's Mills Act, which would expressly convey to cities the requisite power to set criteria for granting property tax relief to those who choose to restore historic buildings.<sup>158</sup>

### *B. Density Bonuses, Fee Waivers, Parking, and Covenants*

Within the home rule or Dillon's Rule framework applicable to a given locale, cities should take advantage of the existing tools at their disposal and should consider strategies like those employed by Austin, including: (1) the provision of incentives like density bonuses for developers who preserve venues; (2) transfer of development rights programs allowing for unused height and density on preserved sites to be transferred to other sites for greater development; (3) fee waivers; (4) lesser parking requirements; and (5) restrictive covenants preserving affordable commercial space.<sup>159</sup>

Although inexperience with using these strategies in this context could lead cities unfamiliar with them to face political or administrative challenges to their adoption, these approaches would allow for market-driven development to continue while providing landowners and developers with a greater number of options (given the increased economic feasibility of preservation as a result of these or similar incentives).

### *C. Individual Site Analysis in Lieu of Broad Overlays*

Cities should avoid broad overlays in favor of an individual site analysis approach. Because broad overlays tend to be overinclusive when determining which sites are actually of cultural importance to the

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156. See *Listed Buildings supra* note 136; Rascoe, *supra* note 141.

157. McKenzie, *supra* note 155; CAL. CONST. art. XI, § 8; *People v. Hoge*, 55 Cal. 612 (1880).

158. See Beyer, *supra* note 131; *Mills Act Program, supra* note 133.

159. See Christen, *supra* note 123; Rascoe, *supra* note 141; Barbaro, *supra* note 145.

city and also tend to focus more on preventing demolition than preservation as a music venue, cities should shift focus to an individual site analysis approach for venues and other sites of musical importance.<sup>160</sup> While this approach may involve increased inherent subjectivity and administrative complexity, as analyzing individual sites may be more time-consuming and resource-intensive than neighborhood-scale analyses, this approach's benefits would likely outweigh those challenges due to its potential for narrowly tailored preservation. The beginning stages of individual site analysis could include similar approaches that some cities are already taking for inventories of music landmarks. Important factors in this analysis could include, as have been suggested for Nashville, whether the owner is local or a large corporation; how long the venue or landmark has been culturally significant; the age of the venue; how it and the surrounding area are currently zoned; whether the venue is currently leased or owned by its operators, and if leased, whether that is a long-term lease, indicating the site is less vulnerable to development pressures.<sup>161</sup>

#### *D. New Zoning Designations or Preservation Ordinances*

Cities should implement zoning-related strategies similar to an approach suggested by Nashville Metro Councilman Jeff Syracuse, including creating a zoning designation for "culturally significant venues," with parameters that could be defined by the city.<sup>162</sup> Adding this designation and using it for areas like Music Row could supplement grant programs or local property tax incentives for properties that enter the designation.<sup>163</sup> Zoning-related solutions would be a straightforward approach for cities, as zoning is already within cities' power regardless of whether they are located in Dillon's Rule or home rule states.<sup>164</sup> However, novel regulations outside of the typical zoning realm may be more difficult for cities to implement in non-home rule states. Any preservation ordinance would need to promote a valid public purpose, should not deprive a property owner of all economic use of their

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160. See Millsap, *supra* note 50 ("To succeed in the modern economy cities must be free to adapt as economic conditions change. Widespread historic designations impede adaptation and may result in a city's past determining its future.").

161. See Rau, *supra* note 97.

162. See *id.* ("...perhaps those with at least 15 years of continuous operation as a music performance space").

163. *Id.*

164. See *id.*

property, should include rational processes, should not violate state laws, and should be applied equally.<sup>165</sup>

#### *E. Upzoning of Surrounding Areas and Cultural Trusts*

Cities should preserve individual music venues while upzoning surrounding areas to promote the development of housing, as development pressures in growing cities like Nashville often center on the market opportunity for developing multifamily residential projects.<sup>166</sup> Cities could incorporate “cultural trusts” into their solutions as one method that could aid in this individualized approach to venue preservation.<sup>167</sup> This strategy would involve transferring the venues to the operators, taking advantage of alternative sources and methods of funding available to nonprofits, and using a board to steer the trust in the best interest of the culture.<sup>168</sup> The Austin Cultural Trust could serve as a model for other cities.<sup>169</sup> This approach, while requiring significant funding, would help with the aim of preserving venues’ status as operating music venues, as opposed to focusing on the architecture of the space alone.<sup>170</sup>

#### *F. Tripartite Classification Scheme for Sites of Significance*

Finally, music sites of cultural relevance should be evaluated by the city for preservation or redevelopment using a tripartite (or other similar) classification scheme. While challenges like those identified for a building-specific analysis as opposed to a broad overlay approach may also be present in building a classification program, this scheme could be created in a similar vein to England’s long-established grade classification scheme for buildings, based on significance.<sup>171</sup> However, instead of focusing mostly on age, this system of evaluation should focus more on factors relevant to music venues and landmarks’ cultural contributions to the city, such as the significance of events that took place there, the years in operation, and whether the venue is still in operation. This classification scheme could aid in determining which

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165. BEAUMONT, *supra* note 25 (These are generally the necessary methods to avoid regulatory takings in the form of a historic preservation ordinance).

166. *See* Rau, *supra* note 97.

167. *See* Rascoe, *supra* note 141.

168. *See The State of Nashville’s Independent Music Venues*, *supra* note 99.

169. *Austin Cultural Trust*, *supra* note 140 (created by resolution in 2018 and falling under the umbrella of the Austin Economic Development Corporation).

170. *See id.*

171. *See Listed Buildings*, *supra* note 136.

sites to preserve as well as the extent of such preservation in the midst of upzoning to provide for increased development.

## V. CONCLUSION

Many significant music history sites in US cities, like Memphis's Stax Recording Studio, have been lost, while others, such as Nashville's Ryman Auditorium, RCA Studio A, and Nina Simone's childhood home in North Carolina, have been saved by narrow margins through private efforts or public campaigns.<sup>172</sup> To prevent the loss of such music landmarks or ensure their continued use as performance spaces, cities should adopt proactive preservation strategies.<sup>173</sup> Cities do not have to consider increased development incongruous with those preservation goals. To reconcile preservation with urban density, cities should forgo wide-ranging preservation districts and instead adopt a site-specific approach for music landmarks. They should also establish classifications for such sites, considering factors like the duration of operation as independent music venues, to prevent excessive preservation.<sup>174</sup>

In cases where cities lack the authority to innovate in preservation while increasing density in surrounding areas, states should enact legislation to equip them with these capabilities. Meanwhile, cities should leverage available tools like density bonuses, fee waivers, and cultural trusts to protect key sites without resorting to extensive preservation zones. Recognizing the significant cultural, economic, and educational value of music landmarks, which may not be sustained by market forces alone, "music cities" ought to exercise their existing powers to balance the need for preservation with the demands of housing and real estate development at higher densities.

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172. See Rau, *supra* note 97.

173. See *id.*

174. See *id.*

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