MARKET URBANISM

The Cato Institute Goes After Arbitrary Historic Preservation Law

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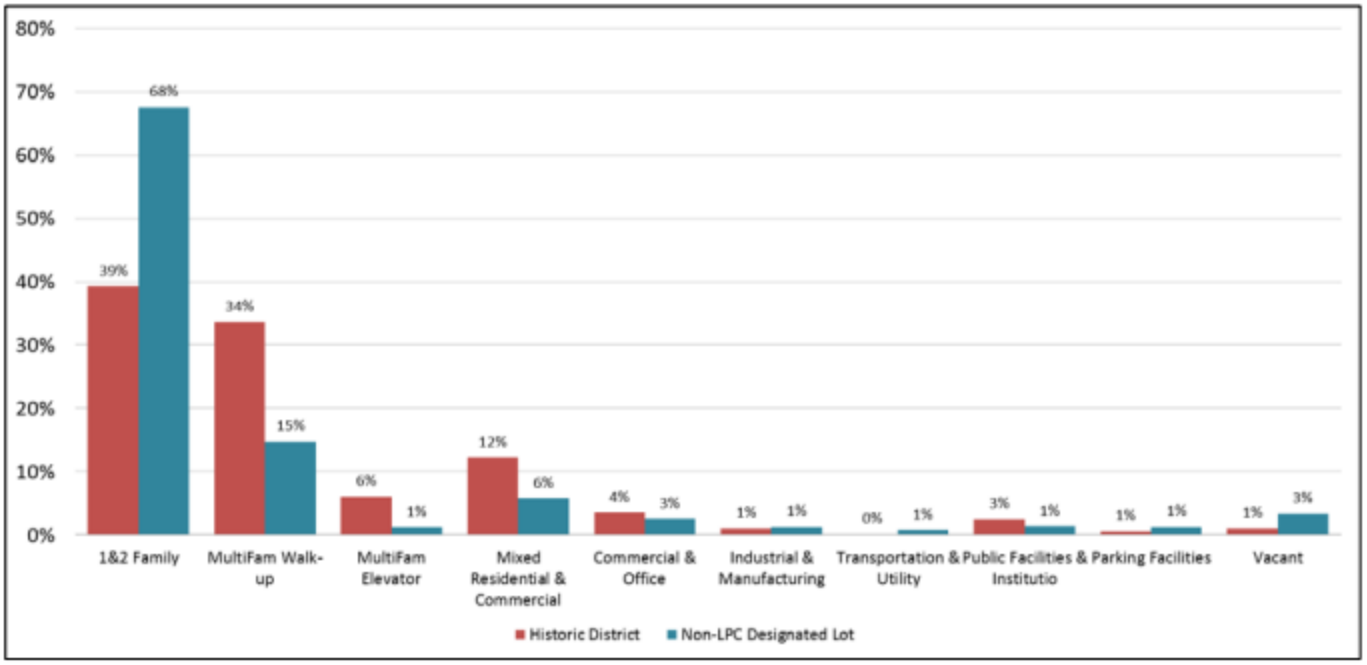
Historic preservation rules are part of the regulatory framework of most major American cities. But the historic districts in which they are generally applied get little inquiry from economists, meaning little is known about their nationwide scope and economic impact. And even between municipalities they can vary, depending on the precedents set by different circuit courts. Now the Cato Institute, a libertarian Washington think tank, is filing a brief that aims to bring consistency to these laws nationwide.

In a 2014 study by the National Bureau of Economic Research, a group of urban economists led by Ed Glaeser found that historic districts in New York City experienced less construction, and affected where in the city developers build. More importantly, the economists found that preservation laws were costliest in neighborhoods where redevelopment would have been most valuable.

Another paper, published in 2016 by NYU, to mark the 50th anniversary of New York City's preservation laws, explored the relationships between historic districts and the type of buildings built, the type of buildings preserved, demographics of the residents in historic districts, and more.

Figure 3.2: Land Use of Lots Inside and Outside of Historic Districts, 2014



Sources: New York City Landmarks Preservation Commission, MapPLUTO, NYU Furman Center

The evidence presented in both studies suggests that historic districts do indeed alter the human geography of cities. It validates William Fischel's observation that "historic districts thus operate as another example of the double-veto system that state land use regulations add to municipal regulation except that in this case the potential veto arrives prior to municipal review rather than afterward" (Zoning Rules!, Page 62).

In *Nectow v City of Cambridge*, the Supreme Court held that Massachusetts violated due process by "arbitrarily and unreasonabl[y]" imposing restrictions on certain land, in a way that did nothing to protect the public (which was the original rationale for land use regulations under the earlier Supreme Court case *Euclid v Ambler*). That said, the rules about which historic preservation regulations are or are not arbitrary remain unclear.

The lack of clarity stems from a difference in the ways various circuit courts interpret historic preservation. The nation is split between areas governed by property-owner-friendly rules (the Third and Seventh Circuit Courts of Appeals), areas governed by regulator-friendly rules (the First, Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeals), and areas where courts have not ruled (the Ninth and D.C. Circuit Courts of Appeals).

A case on petition to the Supreme Court, *Stahl York Avenue Co., LLC. v City of New York and New York Landmarks Preservation Commission*, seeks to iron out these legal ambiguities, and make the laws of the Third and Seventh circuit courts applicable nationwide.

The Cato Institute, where I am a research assistant, and the National Federation of Independent Business' Small Business Legal Center, submitted a brief in support of petitioner Stahl, a large New York City development company. The brief includes new evidence I gathered showing that historic preservation is used far more widely in large, old cities governed by regulator-friendly rules than by cities that are governed by owner-friendly rules.

For example, the Urban Land Institute's study of Baltimore's historic districts found that the city, which is governed under the regulator-friendly Fourth Circuit, has far more protected structures than Philadelphia, which is governed by the Third Circuit rules. This is despite the fact that both cities have a similar percentage of pre-1945 buildings.

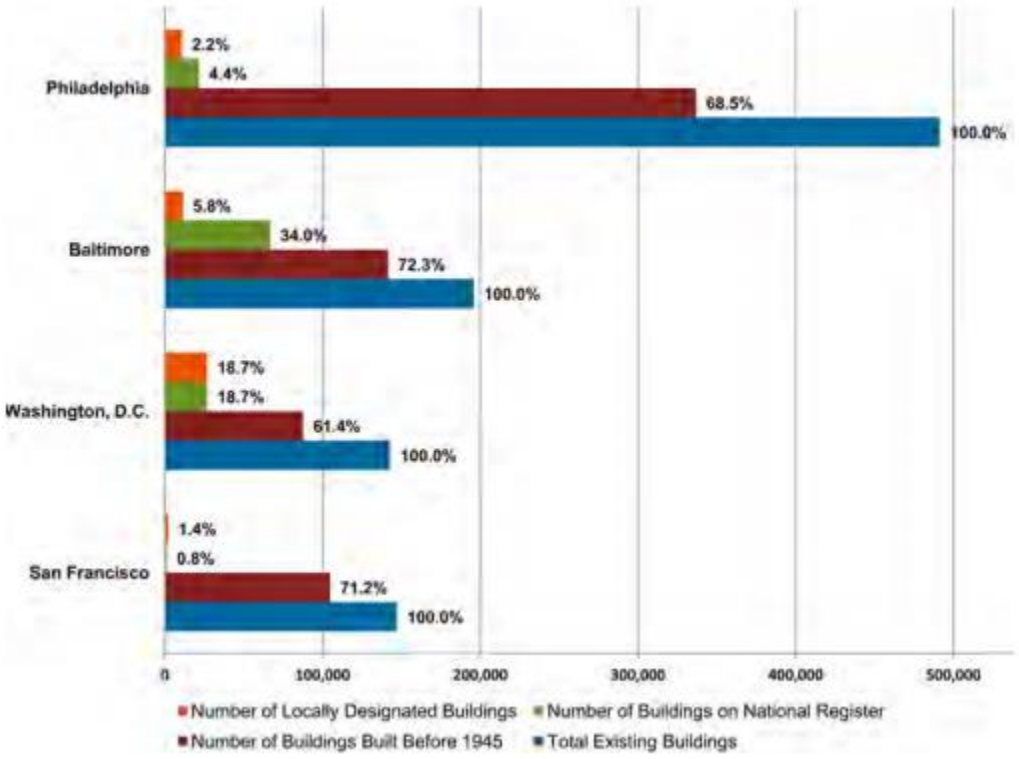


CHART Existing buildings, era of construction, and percent designated historic in selected US cities.

(Urban Land Institute)

Like Philadelphia, Pittsburgh, Indianapolis and Chicago are other large cities with old building stocks governed by the Third and Seventh circuit precedent. Building age data for Pittsburgh is unavailable, but only approximately 2,806 of the city's 143,256 lots, or 1.95 percent of city parcels, lie in historic districts, and 177 buildings are listed on the National Register of Historic Places. In Indianapolis, approximately 1.2 percent of lots lie in historic districts (42,62 out of 343,044 parcels), and .6 percent of lots are listed on the National Register. Only .4 to .5 percent

of Chicago's buildings are designated historic despite more than 60 percent of the city's buildings for which ages are known being built before 1945.

Compare this to New York City, where the Glaeser et al. paper notes that 27 percent of Manhattan lots are subject to some kind of historic restriction. In Brooklyn, 4.5 percent of lots are subject to historic restrictions, which is still far higher than the rates in cities like Pittsburgh and Indianapolis.

Historic districting is not particularly common in San Francisco, where courts have not ruled on the issue, suggesting that jurisprudence that sides with regulators could affirmatively encourage historic districting. While it is challenging to draw conclusions about the effect of different legal regimes, the data above suggests that tighter rules in places like New York City encourage more historic preservation than would otherwise happen under the looser laws in places like Philadelphia or Chicago.