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Reuse of Publicly-Owned Properties

MICHAEL S. GRUEN*

We realize a surplus of architectural heritage: buildings that we would like to preserve but that are no longer required for their original function because new, bigger, and better monuments have been built to replace the old.¹ This drive to build new monuments is tempered in the private sector by a healthy appreciation for economic practicalities.² Such an appreciation is less well developed in the public sector. The public servant may get away with considerable waste before the public becomes critical, particularly where the same actions generate public pride in new monuments. Thus, we grow accustomed to seeing abandoned and decaying courthouses, town halls, police stations, libraries, and firehouses.³

To some extent, we may be able to encourage reuse through institutional changes. Private use is encouraged by a federal tax policy which provides rapid depreciation for rehabilitation of landmarks.⁴ It should be possible to provide incentives for public reuse; the federal government has recently taken substantial strides in this direction, and state and local governments would do well to follow in the federal footsteps.⁵ This paper examines existing federal legislation and sets forth some thoughts for new approaches at all levels of government which will provide management incentives for reuse of government landmarks equivalent to the economic incentives in the private sector.

In 1976, a series of amendments were adopted to the Public Buildings Act of 1959,⁶ known as the Public Buildings Cooperative Use Act.⁷ In broad outline, the Cooperative Use Act encourages preservation in three ways: First, it promotes identification of landmark buildings suitable for public reuse. When the General Services Administration (GSA), which has general responsibility for managing federal government realty and space requirements, undertakes a survey of the government's space needs within a given geographical area, the Cooperative Use Act requires it to seek a report from the Advisory Council on Historic

Preservation⁸ identifying the buildings within that area that "are of historic, architectural, or cultural significance . . . and . . . would be suitable, whether or not in need of repair, alteration, or addition, for acquisition or purchase to meet the public buildings needs of the Federal Government."⁹

Second, the Cooperative Use Act directs the GSA to give preference to acquiring and utilizing space "in suitable buildings of historic, architectural, or cultural significance."¹⁰ This includes, but is not limited to, properties listed, or eligible for listing, on the National Register. The GSA must give preference "unless use of such space would not prove feasible and prudent compared with available alternatives."¹¹ Approval of the Senate and House Committees on Public Works must be obtained before any significant appropriation may be made to construct, alter, purchase, or acquire any building for use as a public building at a cost in excess of \$500,000 or to lease space for public purposes at an annual rental in excess of \$500,000. In seeking such approval, the statute directs GSA to submit to Congress a prospectus on the proposed project, including a comprehensive space plan for government facilities in the locality of the proposed facility having "due regard" for existing space in government-owned or occupied buildings, "especially such of those buildings as enhance the architectural, historical, social, cultural, and economic environment of the locality."¹²

Third, the act promotes mixed use of government buildings by directing the GSA to encourage location of commercial and other facilities in public buildings.¹³

The United States Custom House at Bowling Green at the southern tip of Manhattan is a good example of the implementation of the Cooperative Use Act. This monumental Beaux-Arts edifice with about 450,000 square feet of floor area was built in 1907. For 70 years it was a focal point of international commerce, housing the U.S. Custom Service. The Service moved to the World Trade Center in 1973, leaving the building substantially unoccupied. It has been used on an interim basis under the direction of the Landmarks Conservancy for various cultural events; recently, it was partially occupied on an interim basis by the Museum of the American Indian.

Since the Government expected to vacate the Custom House, the Landmarks Conservancy, with the sponsorship of the

U.S. Custom House Institute, carried out a reuse study completed in 1974.¹⁴ Tentative plans were developed for combining office, retail, hotel, and cultural facilities within the building. While development was to be accomplished privately, title was to be held by the City of New York.¹⁵ But with the adoption of the Cooperative Use Act, the GSA's approach has changed. It is now most likely that the Custom House will be retained in federal ownership and that government offices will be reinstalled. The mixed-use idea, however, has stuck. Current plans call for federal offices on the upper floors, with cultural facilities and commercial occupancy on the lower floors.¹⁶ The end result may be a government building reused for government purposes with the added benefit that a far greater percent of the public may be drawn into it by the commercial and cultural facilities than would otherwise be the case.

Use and reuse of landmark buildings has been effectively encouraged by the Cooperative Use Act. Disposition of government-owned buildings, on the other hand, is dealt with poorly by existing federal legislation.¹⁷ The general provisions for disposition of surplus property¹⁸ do not inhibit the disposal of architecturally or historically significant properties. The statute, however, does prohibit demolition by the GSA without notice to the Secretary of the Interior, who may veto the demolition plans if he finds that the building is "an historic building of national significance," within the meaning of the Historic Sites, Buildings and Antiquities Act.¹⁹ However, section 304a-2 only prohibits demolition; it does not prohibit sale. If GSA sells the property to a private investor, Section 304a-2 does not appear to prevent either sale or demolition by the private investor. For example, the section could not be invoked to prevent the sale by GSA of the Old San Francisco Mint Building, even if the GSA knew that the purchaser intended to demolish it.²⁰

A special provision for properties suitable for use as historic monuments is found in the Federal Property and Administrative Services Act of 1949.²¹ This provision allows, but does not require, the GSA to convey, to any state, municipality, or other state agency or subdivision, title to surplus federal property that the Secretary of the Interior determines suitable for use as an historic monument. In 1972, this law was amended to permit this type of historical property to be used not only for govern-

mental uses, but also, under certain conditions, for compatible revenue-producing activities. The conditions that must be met include: approval by GSA of the grantee's plan for rehabilitation and maintenance of the property and for the financing of such rehabilitation and maintenance, as well a requirement that the income in excess of the costs of rehabilitation and maintenance be used exclusively for public historic preservation, park, or recreational purposes.²²

The scope and applicability of this statute are open to serious question since the language contains numerous ambiguities. For example, what is an "historic monument"? One thinks of a battlefield or of a former President's house, and such an interpretation would certainly be justified by reference to the list of sites designated under the Historic Sites, Buildings and Antiquities Act²³ and the Act of June 8, 1906²⁴ pertaining to National Monuments and Memorials. But as the House Report on the Cooperative Use Act²⁵ noted, administrative interpretation of the predecessor of Section 484(k)(3) "equated historic monuments with museums."²⁶ Accordingly, income-producing utilization of these types of properties was considered to be out of character with a museum concept and, therefore, prohibited.²⁷ Can the term "historic monument" include a less exalted building that merely exemplifies an architectural style?²⁸ Does "use as an historic monument" signify use, at least in part, as a museum? May the structure be wholly integrated into the normal commercial life of its locality so that public view of the building is incidental to day-to-day activity in it? Does the phrase "revenue-producing activities . . . compatible with use of the property for historic monument purposes" condone only souvenir stands, food stands, and the like, or may the revenue-producing activities occupy the bulk of the building and be unrelated to tourist aspects of the "monument"?²⁹ Finally, may the grantee have the structure rehabilitated by a private developer and allow the developer to appropriate profit, or is this prevented by the requirement that income in excess of the costs of rehabilitation and maintenance be used only for specified public purposes?³⁰

Another problem arises from the ambiguity of the statutory phrase "income and excessive rehabilitation and maintenance costs" and from the requirement that such income be used exclusively for these defined purposes. Absent this provision, the

obvious way that one would utilize the act would be for the local government to team up with a private developer, allow the developer to spend his money on developing, and then pay an override in the form of rent to the local government which receives the building. The question is, however, whether the statute prohibits the developer from making a profit, at least if he uses his profit for anything other than parks and recreational purposes and historic preservation. The legislative history states that there should be almost no profit involved, but the GSA interprets this broadly and allows projects where the developer makes a profit, requiring only that the excess rents to the government agency be used for these defined purposes.

Legislative history is helpful in favorably resolving most of these problems, except the latter, but it would be desirable to remove the ambiguities by amendment, which would confirm a liberal interpretation of the statute. A similar statute should be enacted for conveyance of landmark-quality structures to private investors with similar controls to assure proper planning and financing of rehabilitation and maintenance. This statute should require the GSA to take reuse plans into consideration when disposing of landmark-quality surplus property, rather than merely permit it to do so.³¹

The Landmarks Conservancy has undertaken a project to utilize the present Section 484(k)(3) in an original and imaginative way.³² The Federal Archive Building at 641 Washington Street, in the Greenwich Village area of New York City, is an enormous Richardsonian Romanesque brick structure housing over 500,000 square feet of warehouse and post office. The plan for its reuse calls for leasing the entire property to a developer who would create housing on the upper floors, commercial and retail space on the lower floors, and semi-public space on the middle floors. The net revenues paid by the developer would go into a revolving preservation fund to be administered jointly by the City and the Conservancy.³³

Having dealt with those statutes that directly concern the use and disposition of government property, let us now turn our attention to the more generally applicable National Historic Preservation Act³⁴ (NHPA) and the National Environmental Policy Act³⁵ (NEPA), both of which establish general safeguards for historic places and the human environment.

The principal operative provision of the NHPA is as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.³⁶

The principal operative provision of the NEPA is as follows:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

. . .
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action.

. . .
Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.³⁷

These statutes have a substantial impact when the federal government seeks to alter, demolish, or add to any landmark-quality government structure in order to continue its use as a government facility, to develop mixed uses, or to turn it over to private use. If the structure is listed on the National Register, the impact on the landmark qualities must be taken into account and the Advisory Council on Historic Preservation must be consulted.³⁸ Although it may indirectly promote it, NHPA does not mandate affirmative use³⁹ rather, it deters negative acts.⁴⁰

If the structure is not listed on the National Register, NEPA still affords considerable protection against destructive reuse because historic preservation and aesthetic objectives have been held to fall within NEPA's purview.⁴¹ NEPA may be invoked regardless of whether the structure is listed or is eligible for listing on the National Register.⁴² In addition, federal actions tending to be destructive of the historic or cultural characteristics of a site will require an environmental impact statement.⁴³

NHPA has been held applicable when the federal government proposes to sell a landmark without concerning itself about the transferee's plans.⁴⁴ By analogy, one would expect that NEPA would also be applicable.⁴⁵ For example, an exchange of park land for nonpark land, where it is known that the other party plans the development of a commercial recreational area, is subject to NEPA.⁴⁶ But does NHPA or NEPA afford any protection if the transferee's plans are not known or have not been formulated? Does NHPA or NEPA impose an affirmative obligation on the federal agency disposing of the property to ensure reuse and a viable preservation plan? While the answers are uncertain, some guidance may be found in the statement of congressional policy found in these acts. The declaration of policy of the NHPA states:

The Congress finds and declares—

. . .

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people⁴⁷

Similarly, the Congressional declaration of environmental policy of the NEPA provides:

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations⁴⁸

It is also rather compelling to argue that the diminution of protection provided by NHPA and NEPA if the site were sold ad-

versely affects the viability of the landmark: while the site is in federal hands, any adverse action by the owner, the government, is likely to fall within NHPA's or NEPA's protection. But if it is sold, NHPA and NEPA protect only against federal actions and not against the owner's actions.⁴⁹

This interstice is purportedly closed, to a large measure, by Executive Order No. 11593, promulgated May 13, 1971.⁵⁰ It directs federal agencies of the executive branch to take measures by July 1, 1973, to nominate all eligible sites under their jurisdiction or control to the National Register⁵¹ and, in the interim, to exercise caution that eligible sites are not inadvertently transferred, sold, demolished, or materially altered.⁵² Agency heads are also required to "initiate measures and procedures to provide for the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites" and to "cooperate with purchasers and transferees of a [registered property] in the development of viable plans to use such property in a manner compatible with preservation objectives and which does not result in an unreasonable burden to public or private interests."⁵³

More generally, and without limitation to properties listed on the National Register, the order requires agencies of the executive branch to

- (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures, and objects of historical, architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3) in consultation with the Advisory Council on Historic Preservation institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance.⁵⁴

Sale of a federally-owned landmark by an agency of the executive branch without imposition of appropriate reuse would violate the order. Such a sale would be inconsistent with the "spirit of stewardship and trusteeship for future generations"⁵⁵ imposed by section 1 and with the directives throughout the order that agency measures be taken to ensure preservation of both feder-

ally and privately owned "sites, structures, and objects of historical, architectural or archaeological significance."⁵⁶

Assuming that the executive order mandates viable reuse plans when a federally owned landmark is transferred by action of executive branch agencies, does the order also give the public a means of enforcing this mandate? *Aluli v. Brown* held that the order was enforceable by private action⁵⁷ and, accordingly, that the Navy had to seek the advice of the Secretary of the Interior in connection with its use of a Hawaiian island having numerous archaeological sites for bombing and target practice. Those portions of the executive order generally enforced by the courts have been limited to specific directives, which required agencies to notify the Secretary of the Interior of any buildings under their jurisdiction that might qualify for listing on the National Register, and, in the meantime, not to inadvertently take any steps that could lead to their destruction.⁵⁸

State and local governments would profit by emulating some of the provisions in the Cooperative Use Act. First, management accountability for use and reuse of landmark-quality buildings proposed to be vacated might be strengthened by requiring that any plan for vacating a public building of landmark quality include an appraisal of its sale or rental value and a plan for realizing this value. Where the building is of landmark quality, disposing agencies should be required to ensure that reuse and preservation plans have been adopted wherever feasible. Second, local landmarks preservation laws should include a requirement that a report of the landmarks commission must be obtained before any city-owned landmark may be disposed of; the report should address the viability of the transferee's rehabilitation, maintenance, and use plans. A plan of this type was followed a few years ago in the case of an attractive row of federal-style houses owned by New York City at Liberty Plaza in Manhattan. The city partially rehabilitated the houses, then sold them at auction to prospective users. The highest bid did not necessarily take the property: the bidding procedure also took into account whether the buyer intended to occupy the house personally, whether his restoration plans were aesthetically satisfactory, and whether he was financially capable of realizing them.

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1. See NEW YORK, N.Y., ADMIN. CODE ANN. § 205-1.0 (Williams 1976).
2. See White, 1 Pace L. Rev. 651 (1981).
3. Solid statistics on such issues are hard to come by, but consider these. Last summer the New York Landmarks Conservancy completed a survey of public buildings of distinctive architectural quality in New York City. Of a total of 760 buildings, 60 (approximately 8%) were found to be in danger. This is a far higher proportion than for equivalent privately-owned buildings. New York City has approximately 526 individually designated landmarks and approximately 11,000 additional structures located in designated historic districts. Of these, 99% are privately owned. Yet, in the past year, only about three applications were received by the Landmarks Commission for tax abatement or demolition permits based upon alleged inability of the property to realize a reasonable return. New York Landmarks Conservancy "Public Building Inventory, Phase I" (June 1977).
4. I.R.C. § 2124 (1980).
5. See, e.g., Public Buildings Cooperative Use Act of 1976, 40 U.S.C. §§ 601-615 (1976); Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484(k)(3) (1976); Exec. Order No. 11,593, 3 C.F.R. 559 (1971-75 Comp.), reprinted in 16 U.S.C. app. § 470 (1976).
6. 40 U.S.C. §§ 601.
7. Public Buildings Cooperative Use Act of 1976, 40 U.S.C. §§ 601-615 (1976).
8. Established pursuant to section 201 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470(i) (1976 & Supp. III 1979).
9. Public Buildings Cooperative Use Act of 1959, 40 U.S.C. § 611(c) (1976).
10. *Id.* § 601a(a)(1).
11. *Id.*
12. *Id.* § 606(a)(3).
13. *Id.* § 601(a)(a)(2).
14. Jointly sponsored with U.S. Custom House Institute, New York Landmarks Conservancy, Custom House Institute Planning Study (Feb. 1, 1974).
15. A similar plan was devised for the Old Post Office Building in St. Louis, Missouri. See 1972 U.S. CODE CONG. & AD. NEWS 2897-98.
16. Custom House Institute Planning Study, *supra* note 14.
17. For a discussion of the applicability of more general federal laws, such as the National Historic Preservation Act, the National Environmental Policy Act, and Executive Order No. 11593 see notes 34-58 and accompanying text *infra*.
18. 40 U.S.C. § 304a (1976).
19. Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1976).
20. 41 Op. Att'y Gen. 481 (1960).
21. 40 U.S.C. § 484(k)(3) (1976).
22. *Id.*
23. Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1976).
24. Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1976).

25. H.R. REP. No. 1189, 92d Cong., 2d Sess., *reprinted in 1972 U.S. CODE CONG. & AD. NEWS* 2890.

26. 50 U.S.C. app. § 1622(h) (1976), *repealed by Federal Property and Administrative Services Act of 1949*, 40 U.S.C. § 484(k)(3) (1976).

27. H.R. REP. No. 1189, 92d Cong. 2d Sess., *reprinted in 1972 U.S. CODE CONG. & AD. NEWS* 2890-92; *see* letters of the G.S.A. and the Department of Interior, *id.* at 2895, 2896, 2898.

28. While the new statute retains the old formulation of "historic monument," the legislative history suggests that the term is to be construed liberally. As stated in the House Report:

[The bill] will primarily encompass a group of surplus buildings, or buildings soon to become surplus, that have been used as either post offices, customs houses, or other Federal office space. These buildings will qualify as historic monuments in one of two ways: (1) They are associated with some historical event or person; or (2) They exhibit an architectural style or type of construction that is representative of the technology, tastes or values of specific periods in our country's history. Accordingly, preservation of these buildings will constitute a visual reminder of the events, values, ideals, technology and architecture of the past.

Id. at 2891. As so defined, an "historic monument" certainly sounds like a structure having the same qualities as a locally designated "landmark."

29. Again, the legislative history suggests that use exclusively for commercial purposes is contemplated. *See* letters of the GSA and the Department of the Interior, *id.* at 2895-98, recommending adoption to permit use of the interiors in general for shops or offices and reuse of the Old Post Office Building in St. Louis, in particular, for "office space, shops, museum exhibits, and a cafeteria." *Id.* at 2898.

30. In this regard, the House Report contains an unfortunate exhortation to the Department of the Interior to assure that the rehabilitation plan does "not generate a significant amount of excess income." *Id.* at 2892.

31. It should also be noted that the GSA is an inappropriate agency to handle and supervise the disposing of historical government property. The Advisory Council on Historic Preservation does have a consulting process to assist and inform governmental agencies in such matters. However, if GSA concludes that disposal of historic government property is necessary, jurisdiction over such disposal should at that time be transferred to the Department of the Interior. 36 C.F.R. §§ 800.1-.7 (1981).

32. New York Landmarks Conservancy, Working Paper No. 1, New York Federal Archive Building: Proposal for Mixed Use.

33. *Id.*

34. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981).

35. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979).

36. 16 U.S.C. § 470f.

37. 42 U.S.C. § 4332.

38. 16 U.S.C. § 470f; 36 C.F.R. §§ 800.3-.4 (1981). All environmental impact statements involving historic, architectural, archeological, or cultural resources (whether or not eligible for, or listed on, the National Register) must be submitted to the Department of the Interior.

39. 16 U.S.C. §§ 470a-470b-1.

40. *Id.* § 470f.

41. *See Ely v. Velde*, 451 F.2d 1130, 1132 n. 4 (4th Cir. 1971); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1340 (S.D.N.Y. 1975); *Rhode Island Comm. on Energy v. General Serv. Admin.*, 397 F. Supp. 41, 52 (D.R.I. 1975); *Aluli v. Brown*, 437 F.

Supp. 602 (D. Hawaii 1977).

42. See *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. at 1340.

43. See, e.g., *Ely v. Velde*, 451 F.2d 1130; *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323; *Rhode Island Comm. on Energy v. General Serv. Admin.*, 397 F. Supp. at 55; *Aluli v. Brown*, 437 F. Supp. at 608.

44. The applicable directives of NHPA, however, come into effect only if there is an expenditure of federal funds. One may have to find that the process of selling itself involves a public expenditure. See 16 U.S.C. § 470f (1976).

45. Cf. *Rhode Island Comm. on Energy v. General Serv. Admin.*, 397 F. Supp. at 55.

46. *National Forest Pres. Group v. Butz*, 485 F.2d 408 (9th Cir. 1973).

47. 16 U.S.C. § 470.

48. 42 U.S.C. § 4331(b).

49. *National Forest Pres. Group v. Butz*, 485 F.2d at 411-12.

50. Exec. Order, *supra* note 5.

51. *Id.* § 2(a).

52. *Id.* § 2(b).

53. However, does "cooperate" mean that agency heads have to sit down with the purchaser and say, "You can buy this property but only if you agree to a cooperatively negotiated reuse plan," or does it mean simply that they have to offer their services to the owner without any strings attached? *Id.* § 2(d)-(f).

54. *Id.* § 1.

55. *Id.*

56. *Id.*

57. *Aluli v. Brown*, 437 F. Supp. at 609. See also *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. at 1332-33.

58. *Warm Springs Dam Task Force v. Gribble*, 378 F. Supp. 240, 251 (N.D. Cal. 1974), *aff'd*, 565 F.2d 549 (9th Cir. 1977); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323; *Aluli v. Brown*, 437 F. Supp. at 608; *Edwards v. Bank of Dundee*, 393 F. Supp. 680, 681-82 (N.D. Ill. 1975).