

LEGACY BUSINESS PROGRAMS: HOW A TRENDING REGULATORY TOOL SAVES SMALL BUSINESSES OF CULTURAL VALUE

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“How hard it is to escape from places. However carefully one goes they hold you—you leave bits of yourself fluttering on the fences—like rags and shreds of your very life.” - Katherine Mansfield¹

INTRODUCTION

Consider your favorite longstanding local business in your community. Whether it be a cozy coffee shop you frequent for your morning pastry, a bookstore that transports you into different worlds through the simple act of flipping a page, or a bar that frees you from the pressures of everyday life, that place likely matters to you. Place matters. But what makes a place matter? Is it the aesthetics of its architecture, the economic value it generates, its use, or the memories one creates while there? Surely all this and more.

Recognizing the value of place, localities around the world have implemented legacy business programs that seek to protect the existence of longstanding businesses that have served as cultural assets for their communities, otherwise referred to as legacy businesses.² As described by the City of Boston when it launched its Legacy Business Program in the summer of 2022, “A ‘Legacy Business’ is defined as those businesses that are long[]standing, independent enterprises that make a strong contribution to community character. These businesses are cultural anchors and repositories of community traditions and stories. They are a special and unique part of [our

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1. QUOTEFANCY, <https://quotefancy.com/quote/1055731/Katherine-Mansfield-How-hard-it-is-to-escape-from-places-However-carefully-one-goes-they> (last visited May 28, 2023).

2. Elizabeth Morton, *Legacy Business Programs: Emerging Directions*, AM. PLAN. ASS’N 2, <https://sfosb.org/sites/default/files/Legacy%20Business/APA%20Newsletter%20Legacy%20Business%20Programs%202022.01.pdf> (last visited May 28, 2023).

city's] historic identity."³ Legacy businesses generate both social and economic good by preserving traditions and memories, driving tourism and foot traffic, and serving as part of their community's identity.⁴ And for many localities, losing these kinds of businesses sparked their efforts to establish a legacy business program.⁵

Localities around the world have taken different approaches to implementing legacy business programs. For example, Buenos Aires's program offers tax breaks.⁶ The United Kingdom's (UK) program regulates owner's sale of designated assets of community value, though not purely a legacy business program because other property types (e.g., buildings, parcels of land) can be designated as well.⁷ While the U.S. has rather successfully protected the brick-and-mortar sense of place since the mid-1800s through historic preservation,⁸ only recently have localities in the U.S. taken a cue from localities abroad and considered ways to protect what transpires within a place—its use. In fact, there is a fast-growing trend in the U.S. of localities implementing legacy business programs.⁹ For example, in the summer of 2022, major cities including Boston¹⁰ and Los Angeles¹¹ began their own legacy business programs, launched in the summer of that year.¹² As is characteristic of new regulatory

3. *Legacy Business Program*, CITY OF BOSTON, <https://www.boston.gov/government/cabinets/economic-opportunity-and-inclusion/legacy-business-program> (last updated Feb. 14, 2024) [hereinafter *Boston Legacy Business Program*].

4. *Id.*

5. Morton, *supra* note 2, at 1.

6. Law No. 5213, art. 6 Buenos Aires, Jan. 14, 2015, B.O. 1, 14 (Arg.), <https://documentos.boletinoficial.buenosaires.gob.ar/publico/20150120.pdf>.

7. Mark Sandford, *Assets of Community Value*, HOUSE OF COMMONS LIBRARY 7, 8 (Mar. 10, 2022), <https://researchbriefings.files.parliament.uk/documents/SN06366/SN06366.pdf>.

8. Kathryn R. L. Rand, Note, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REFORM 277, 284 (1993).

9. Morton, *supra* note 2, at 1.

10. *Legacy Business Program to Support Iconic Businesses*, CITY OF BOSTON (Aug. 18, 2022), <https://www.boston.gov/news/legacy-business-program-support-iconic-businesses>; *Boston Legacy Business Program*, *supra* note 3.

11. *Los Angeles Legacy Business Program*, LOS ANGELES (July 1, 2022), <https://councildistrict9.lacity.gov/articles/los-angeles-legacy-business-program>; *A Big Win for Legacy Businesses*, LITTLE TOKYO SERV. CTR. (July 12, 2022, 12:19 PM), <https://www.ltsc.org/legacy-business-program/>.

12. Smaller localities also have legacy business programs, including the Missoula program which began in 2019. *Legacy Business Program*, CITY OF MISSOULA, <https://www.ci.missoula.mt.us/2567/Legacy-Business-Program> (last visited May 28, 2023) [hereinafter *Missoula Legacy Business Program*]. Other localities are considering implementing legacy business programs as well. New York City's legislature reviewed a bill for a legacy business program in the summer of 2022 but tabled the matter. N.Y. City Council, A Local Law to Amend the Administrative Code of the City of New York, in Relation to Establishing a Legacy Business Registry and Preservation Fund (in comm. June 9, 2022). Seattle chose to scale back its legacy business pilot program after allocating \$100,000 to and conducting a study on the effect of legacy business programs. Erica C. Barnett, *Some Seattle Companies May Benefit from City's Legacy Business Program*, SEATTLE (Jan. 30, 2017), <https://seattlemag.com/news/some-seattle-companies-may-benefit-citys-legacy-business-program/>; CITY OF SEATTLE, LEGACY BUSINESS

frameworks, the rise of legacy business programs in the U.S. raises several public policy and legal concerns, which this Note aims to address.

This Note will analyze whether local governments are justified in manipulating market forces to help protect legacy businesses. Next, this Note will demonstrate why the traditional historic preservation toolkit is ill-equipped to protect legacy businesses, and so legacy business programs are necessary for their protection. This Note will show how historic preservation was only meant to protect the structures of places of architectural significance.¹³ If a business derives cultural value for its surrounding community but the building in which it is housed is not particularly noteworthy or significant, traditional historic preservation tools have no way to protect them. And even if that business is housed within a building of architectural merit that is designated as a landmark, that does not protect the building's use. Existing regulatory tools and legal frameworks will not suffice if local governments decide that protecting a business's use is a worthwhile endeavor. Instead, local governments should implement legacy business programs to best protect small businesses that serve as cultural assets for their communities. The question then becomes how.

Through an international and comparative law lens, this Note will analyze how Buenos Aires, the UK, and San Francisco approached structuring a legacy business program. These programs have had a great influence on legacy business programs worldwide.¹⁴ Next, looking at these programs as case studies, this Note will examine legal issues that may arise from legacy business programs in the U.S., depending on the approach localities take. Finally, this Note will offer best practices for localities seeking to implement a legacy business program.

Considering the increase of localities in the U.S. establishing legacy business programs while other localities consider whether to do so, this Note will address public policy and legal concerns that localities in the U.S. should consider when deciding whether to establish a legacy business program. Part I of this Note will analyze whether legacy businesses justify localities interfering with market forces in order to protect them, concluding that they do. Part II will analyze existing historic preservation tools and how they are ill-equipped to protect legacy businesses. Part III will survey several of the existing legacy business programs, globally and in the U.S., and their legal implications. Part IV will flag potential legal issues under U.S. law that may arise from this regulatory framework. Part V will advance suggested best practices for localities seeking to implement a legacy business program.

STUDY (2017), https://www.seattle.gov/documents/Departments/economicDevelopment/22820_Legacy_Report_2017-09-25.pdf.

13. See *infra* Part II.

14. See *infra* Part III.

PART I: AN ECONOMIC JUSTIFICATION FOR IMPLEMENTING
LEGACY BUSINESS PROGRAMS

Legacy businesses are essential to a locality's identity and cultural heritage.¹⁵ With that said, protecting its legacy businesses inherently requires that local governments interfere with market forces. Local governments can only interfere with market forces if they have justification for doing so.¹⁶ This part will argue that governmental intervention in market forces to protect legacy businesses is justified.

Emphatically, local governments should refrain from interfering with the natural course of market forces if they lack justification.¹⁷ If a business cannot survive in the economic climate of its locality, it ordinarily and naturally resorts to closing. By their nature, legacy business programs actively seek to protect certain selected businesses from closing due to market forces, such as rising rental costs.¹⁸ If these businesses were to close, it seems likely new owners would repurpose those properties for another use. Perhaps that new use would have been able to generate more revenue, which could be considered a higher and perhaps even best use of that land. Perhaps that land would have been used to establish a new business that would have become a cultural asset for the community's next generation. But there is no way to know because the local government would have artificially changed the direction of the market forces at play.

Such governmental interference is antithetical to the creative destruction that Joseph Schumpeter and his followers believe is critical to capitalism.¹⁹ Schumpeter explained that capitalism can never be stationary.²⁰ Creative destruction is essentially the idea that capitalism moves in a way that forces the old to give way to the new, and the old should not be artificially protected from those market forces.²¹ In fact, Schumpeter is famous for stating, "Situations emerge in the process of creative destruction in which many firms may have to perish that nevertheless would be able to live on vigorously and usefully if they could weather a particular storm."²² Following the chain of Schumpeter's logic, governments lack justification for interfering in a "particular storm" to protect legacy businesses, and so legacy business programs lack justification by nature of preventing the natural course of creative destruction.

Even those who agree with Schumpeter's general idea of creative destruction may take issue with such a "sit back and let the chips fall where they

15. Morton, *supra* note 2, at 12.

16. Cf. Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 629 (2015) (discussing how economists and legal scholars commonly justify governmental intervention in the free market because of market failures).

17. *Id.*

18. See, e.g., Morton, *supra* note 2, at 2.

19. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950).

20. *Id.* at 82.

21. *Id.* at 87.

22. *Id.* at 90.

may” attitude. Such an attitude is particularly problematic when creative destruction fails to account for market defects.²³ For example, the formation of the City Beautiful Movement in New York City in the late nineteenth and early twentieth centuries sought to bring aesthetic regulation to the city and eventually led to the passing of the New York City Landmark Laws.²⁴ The movement aimed to protect structures of architectural significance that provide localities with an identity and cultural heritage because the natural forces of creative destruction failed to take the cultural value of those structures into account.²⁵ This part of the Note will demonstrate why a similar public policy justification for the protection of legacy businesses exists.

In press releases about their new legacy business programs, many localities claimed they started those programs in light of astronomically rising rents leading to the displacement of longstanding legacy businesses.²⁶ For example, San Francisco explained that when longstanding businesses began to close due to rising rents that skyrocketed by 10.6% in 2013, the City created its Legacy Business Program in 2014 as a solution.²⁷ Austrian economists such as Schumpeter pose the concern that consumers’ demand is directly related to its widespread use by others.²⁸ One may argue that such a concept does not necessarily apply here since legacy businesses don’t usually close because they lack a strong consumer base and instead they typically close because their land value prices out their services. Even still, those rising rents affect everyone in the area. And so governmental interference in market forces requires more justification than just high rents to protect legacy businesses.

For example, one can say that legacy businesses derive such social good beyond their economic prowess that would allow localities to recognize them as the “highest and best use” for the land.²⁹ That could then justify preserving what makes us human over laissez-faire allowing the scientific concepts of output, price, and costs to dictate the market. In fact, there seems to be

23. *But cf.* Ray Finkelstein, *Legal Protection of Business Research and Development: Can It Harm Competition?*, in BUSINESS INNOVATION AND THE LAW: PERSPECTIVES FROM INTELLECTUAL PROPERTY, LABOUR, COMPETITION AND CORPORATE LAW 244, 253 (Marilyn Pittard, Ann L. Monotti, John Duns eds., 2013) (“While there are obvious benefits, protection can adversely affect competition and lead to market distortions and market failure.”).

24. *City Beautiful Movement*, THE NEW YORK PRESERVATION ARCHIVE PROJECT, <https://www.nypap.org/preservation-history/city-beautiful-movement/> (last visited May 28, 2023).

25. *See generally* MAX PAGE, THE CREATIVE DESTRUCTION OF MANHATTAN, 1900–40 (1999).

26. *See, e.g., Sustaining San Francisco’s Living History*, S.F. HERITAGE 3 (Sept. 2014), <https://www.sfheritage.org/wp-content/uploads/2022/06/Cultural-Heritage-Assets-Final.pdf>.

27. *Id.* at 4; *Legacy Business Program*, S.F. OFF. OF SMALL BUS., <https://sfosb.org/legacy-business>.

28. Finkelstein, *supra* note 23, at 254; John Duns, *Business Innovation and Competition Law: An Australian Perspective*, in BUSINESS INNOVATION AND THE LAW: PERSPECTIVES FROM INTELLECTUAL PROPERTY, LABOUR, COMPETITION AND CORPORATE LAW 268, 270 (Marilyn Pittard, Ann L. Monotti, John Duns eds., 2013).

29. Sara Ross, *Resisting Renovation and Displacement Through Cultural Land Trusts: Art and Performance Spaces, Pop-Ups, DIYs, and Protest Raves in Vancouver*, 33 YALE J.L. & HUMAN. 92, 96 (2022).

something missing from Schumpeter's value system that may also justify interfering in market forces to protect legacy business programs related to arts and culture, which some have suggested Schumpeter purposefully left open for others to explore.³⁰ Schumpeter's value system essentially boils down to the old always needs to bend to the new for the sake of capitalism's ever-moving spirit of innovation.³¹ But that excludes consideration of how the arts and culture make us human and may at times require the protection of market force intervention because they are not accounted for within the scientific concepts of Austrian economics.³²

This argument will focus on the humanist elements of innovation that are also critical to capitalism and help demonstrate why local governments may be justified in creating legacy business programs. According to Max Weber, the creative spirit of charisma generates innovation, which the general trend toward rationalization in modern society has dramatically restrained.³³ Economists including Weber analyzed the treatment of the creative spirit through its interaction between religion as well as arts and culture.³⁴ For example, Weber theorized that the aesthetic sphere grew out of the religious sphere, and so "inherited the capacity of religion to supply meaning to human existence . . . [as well as] the hostility of religion to spheres with competing claims on the allegiance of people, such as the economy."³⁵ He likened arts and culture to religion as they "provide[] a salvation from the routines of everyday life, and especially from the increasing processes of theoretical and practical rationality."³⁶ That salvation from the routines of everyday life can help fuel the creativity and innovation necessary to sustain a healthy capitalist economy. While there are economic benefits to preserving legacy businesses that are integral to the conversation, the human-centric reasons for preserving legacy businesses should be broadcasted and not apologetically murmured. This section of the Note will explore the myriad of reasons that call for the efficient

30. See Richard Swedberg, *The Cultural Entrepreneur and the Creative Industries: Beginning in Vienna*, 30 J. CULTURAL ECON. 243, 249 (2006).

31. See Mirit Eyal-Cohen, *Legal Mirrors of Entrepreneurship*, 55 B.C. L. REV. 719, 726 (2014) ("According to Schumpeter, entrepreneurs are both the principal agents of Creative Destruction and the destabilizing force in the economy. These 'economic leaders,' as Schumpeter describes them, are avant-garde in that they create new combinations that confront and eventually defeat previously existing economic orders. These innovative new combinations destroy the basis of the old economy. And through destruction, they pave the way for a new economic order with higher levels of prosperity and welfare.") (citations omitted).

32. Swedberg, *supra* note 30. This can be viewed as analogous to how Critical Marxism, which focuses on the humanist elements of Marxism, views Scientific Marxism as being too fixated on the scientific elements of the theory. See Phillip E. Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 249 n.6 (1984) (comparing Critical Marxism to Scientific Marxism).

33. Swedberg, *supra* note 30, at 251.

34. *Id.* at 252–53.

35. *Id.* at 252; see generally Richard Shusterman, *Art and Religion*, 42 J. AESTHETIC EDUC. 1 (2008).

36. Swedberg, *supra* note 30, at 253 (quoting MAX WEBER, *ESSAYS IN SOCIOLOGY* 342 (1946)).

allocation of society's resources to meet demands to protect legacy businesses as cultural assets for their communities.³⁷

First, legacy businesses give a “sense of orientation to our society, using structures and objects of the past to establish values of time and place.”³⁸ Preserving this sense of orientation for those places to which the surrounding community is attached allows people to feel as though they are part of a continuum and understand themselves through the scope of time, which has psychological and emotional health benefits.³⁹ As Thompson M. Mayes described, “The experience of living, working, shopping, exercising, worshipping, and playing in and around these old places builds a sense of shared community, and it is a sense of community that transcends generations.”⁴⁰ Similarly, Émile Durkheim in his treatise *Elementary Forms of Religious Life* described how collective effervescence—moments in societal life when the group of individuals that makes up a society comes together in order to perform a religious ritual⁴¹—forms religion and thereby a sense of community belonging.⁴²

Likewise, legacy businesses are born out of collective effervescence in people coming together to experience a sense of belonging through the power of place.⁴³ A business becomes more than just a place for buying and selling goods when it serves as a source of belonging and community. Take the fictional example of The Shop Around the Corner in Nora Ephron's beloved *You've Got Mail*.⁴⁴ The community rallied behind preserving the use of the bookshop (although unsuccessfully) not because it just sold books but because it was a place of memory, where children fell in love with the act of reading during story time and where families could enjoy one another's company in intellectual pursuits.⁴⁵ That is the essence of collective effervescence.

Legacy business programs benefit both the individual and the collective.⁴⁶ This is because they actively preserve a living history in a way that allows people in the present moment to experience for themselves what has made these places cultural assets. This also allows people to gain an empathetic understanding of sense of place as they too become part of this collective understanding.⁴⁷ What happens within legacy businesses matters to people's

37. Duns, *supra* note 28, at 272.

38. THOMPSON M. MAYES, WHY OLD PLACES MATTER: HOW HISTORIC PLACES AFFECT OUR IDENTITY AND WELL-BEING 1 (2018) (quoting ALBERT RAINS & LAURANCE G. HENDERSON, WITH HERITAGE SO RICH 207 (1966)).

39. *Id.*

40. *Id.* at 97.

41. *Émile Durkheim (1858–1917)*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/emile-durkheim/#:~:text=According%20to%20Durkheim%2C%20a%20religion,to%20perform%20a%20religious%20ritual> (last visited Mar. 26, 2023).

42. Swedberg, *supra* note 30, at 256.

43. *Id.*

44. YOU'VE GOT MAIL (Warner Bros. original theatrical release Dec. 18, 1998).

45. *Id.*

46. MAYES, *supra* note 38, at 9.

47. *Id.* at 39.

understanding of themselves not only as individuals but also their sense of belonging as community members. And sharing this collective experience with those from the past can enrich our understanding of our community's history and ourselves. For example, entering the doors of the West Village's Marie's Crisis in New York City, one can experience in real-time the joy and escapism through singing Broadway songs that offered refuge to the LGBTQ+ community during the AIDs crisis.⁴⁸

The experiences communities have within a place are also part of the identity of that community's individual members.⁴⁹ As the Beatles crooned, "There are places I'll remember all my life, [full of] moments of loves and friends I still can recall."⁵⁰ And losing those places matters, as John Steinbeck's displaced families in *The Grapes of Wrath* asked, "How will we know it's us without our past?"⁵¹ As longstanding cultural assets, legacy businesses have become part of the identity of many consumers. Humeyra Birol Akkurt summarized the concept:

[A] set of links that allows and guarantees the distinctiveness and continuity of place and time, . . . the bond between people and their environment, based on emotion and cognition, . . . symbolic forms that link people and land: links through history or family lineage, links due to loss or destruction of land, economic links such as ownership, inheritance or politics, universal links through religion, myth and spirituality, links through religion and festive cultural events, and finally narrative links through storytelling or place naming.⁵²

Losing legacy businesses hurts their communities. That pain has served as a call to action for many, as this was the reason why San Francisco even brought the first legacy business program to the U.S., which will be discussed in Part III. Similarly, collective effervescence adds to the economic value of these legacy businesses in a way that Schumpeter's theory does not consider, even if its benefit is difficult to fully quantify in hard numbers.⁵³ For example, collective effervescence helps generate foot traffic and tourism because people want to visit those places that are part of a community's identity.⁵⁴ Overall,

48. Mikaela Dery, *Community and Show-Tunes in Crisis*, GUERNICA (Dec. 8, 2020), <https://www.guernicamag.com/community-and-show-tunes-in-crisis/>.

49. See also Michael N. Widener, *Populist Placemaking: Grounds for Open Government-Citizen Spatial Regulating Disclosure*, 121 W. VA. L. REV. 461, 470 (2018).

50. MAYES, *supra* note 38, at xvi (quoting THE BEATLES, *In My Life*, in RUBBER SOUL (Parlophone 1965)).

51. *Id.* (quoting JOHN STEINBECK, *GRAPES OF WRATH* 112 (1939)).

52. *Id.* at 16 (quoting HUMEYRA BIROL AKKURT, *Reconstitution of the Place Identity Within the Intervention Efforts in the Historic Built Environment*, in THE ROLE OF PLACE IDENTITY IN THE PERCEPTION, UNDERSTANDING, AND DESIGN OF BUILT ENVIRONMENTS 64–65 (Herman Casakin & Fatima Bernardo eds., 2012) (citations omitted)).

53. The difficulty in quantifying institutional memory as a relevant factor for economic outcomes could also apply to corporate law, particularly mergers and acquisitions. This is a potential avenue for further research but is outside the scope of this Note.

54. *Boston Legacy Business Program*, *supra* note 3.

these reasons provide a potential justification for governments interfering in market forces in order to protect their communities' legacy businesses.

Nevertheless, there are cons to doing so. Legacy business programs have the potential to create inequities in terms of what businesses they protect and to whom they hold meaning. There is concern that some groups may have more of a voice about what businesses receive protection.⁵⁵ If only one community (e.g., councilmembers, the affluent) defines what constitutes a legacy business, that likely will leave others out of the conversation. Such unequal distribution of power would mean that while one community's places of memory are elevated, another community's places of memory lack protection or existing stakeholders may be privileged over newcomers to the neighborhood. And because both sets of places may compete with one another, the former community's cultural assets have an advantage over that of the latter. Those dynamics hardly seem fair.

All citizens within a locality should have a voice, including "relationally marginalized and displaced communities whose voices frequently fail to figure equitably within decision[]making processes affecting their urban landscape."⁵⁶ As Sara Gwendolyn Ross stated in the context of a different cultural preservation program, "[t]he 'balance' and 'balancing' of tangible and intangible heritage concerns, past, present, and future heritage concerns, and the diversity amongst stakeholder perspectives, cultures, and interests engaged within" place is key for the success of a governmental program seeking to protect the cultural interests of their communities.⁵⁷

Historically underrepresented demographics of people should clearly have a voice in defining legacy businesses. Likewise, young people having a voice is also extremely critical to the fairness of selecting legacy businesses. Legacy business programs have the potential to stifle the ability of the next generations to create their own small businesses that become cultural assets for their surrounding community. Designation as a legacy business also acts to help protect use. And while a legacy business could still fail despite that protection, in an economic sense, a locality attempts to grandfather in the business's use in the context of the free market through its designation as a legacy business.⁵⁸ Such action can be seen as a locality's attempt to freeze in time part of its

55. Cf. Ross, *supra* note 29, at 94.

56. *Id.* at 92; *see also id.* at 103 ("Generally, their size and proximity to more mainstream, white, or male cultural practices leads to a greater likelihood of protection from and lessened likelihood of exposure to displacement in a city due to redevelopment initiatives, gentrification processes, or lack of funding.").

57. Sara Gwendolyn Ross, *Heritage Preservation Easements, Urban Property, and Heritage Law: Exploring Canadian Common Law and Civil Law Tools for Responding to International Cultural Preservation Frameworks for Cities*, 72 UNIV. TORONTO L.J. 436, 443 (2022) (quotations omitted).

58. Cf. Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1283 (2009) ("Protecting owners from legal change—whether in the form of compensation or grandfathering—creates predictable and potentially perverse investment incentives.").

business landscape.⁵⁹ Consequences could include that young people have less ability to rent or buy property that they could use to create their own business. In that respect, there would in the literal sense be less space for future generations to define a sense of place for themselves. And while more and more baby boomers retire and either close their businesses or seek new ownership,⁶⁰ transferring ownership to younger people still would only allow them to continue a preexisting use and would not grant them freedom to create a sense of place anew. Young people should not be expected to “come around” to the legacy businesses that the preceding generation picked out.⁶¹

Nevertheless, historic preservation also faces the same issue of potentially excluding certain voices (e.g., minorities, young people).⁶² If historic preservation has nevertheless been accepted and upheld as a regulatory tool to protect the cultural heritage of a place despite that issue, that issue also does not seem sufficient to preclude protecting legacy businesses. Moreover, not every business in a community would be protected as a legacy business. There would still be room for young people to define a sense of place for themselves, if they can afford the rent to begin with given rising rates in certain areas, including San Francisco.⁶³ It also takes time for a small business to prove that it is a longstanding cultural asset, and the owners of budding businesses can still prove the worth of their services through innovation. Younger generations may even want to buy a legacy business from a retiring owner if that business holds meaning for them. They would also be able to buy a business that already holds a high amount of goodwill from its surrounding community because of its recognition as a legacy business. Such concerns illuminate how the success of an effective legacy business program depends on who has a voice in the designation of legacy businesses as will be discussed in greater detail in Parts

59. *Cf. id.* at 1272 (“[W]hile the fact of some kinds of preexisting uses of property can be relevant to the efficiency of new regulations, it plainly is not dispositive and so does not justify categorical protection.”).

60. Morton, *supra* note 2, at 2, 6 (“A significant challenge in preserving local ownership of iconic businesses is succession planning. Some communities fear the impact of the ‘silver tsunami’ of baby boomer retirement, which may result in business closures or purchases by national franchises.”). See *What is the Silver Tsunami? What an Aging Population Means for California*, CAL. CAREGIVER RSCH. CTRS., <https://www.caregivercalifornia.org/2022/07/26/what-is-the-silver-tsunami-what-an-aging-population-means-for-california> (last visited Feb. 16, 2024); see also generally, Sara Zeff Geber, *The New Silver Tsunami*, FORBES (Nov. 28, 2022, 1:53 PM), <https://www.forbes.com/sites/sarazeffgeber/2020/11/28/the-new-silver-tsunami/?sh=7e0609996d69>.

61. *Cf. Widener, supra* note 49, at 485 (youth “opt[ing] out from social media sites gaining popularity from adults” when placemaking in the online realm).

62. See, e.g., J. Peter Byrne, *Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 GEO. ENV'T L. REV. 399, 442 (2021); see generally Alden A. Fletcher, Note, *Forced Betting the Farm: How Historic Preservation Law Fails Poor and Nonwhite Communities*, 109 GEO. L.J. 1543 (2021).

63. Sami Sparber & Megan Rose Dickey, *San Francisco Area Rents Still Steep Amid High Demand*, AXIOS (Jan. 31, 2023), <https://www.axios.com/local/san-francisco/2023/01/31/san-francisco-high-rent-apartments>.

IV and V. In the aggregate, the cost-benefit analysis may weigh in favor of protecting legacy businesses.

Local governments likely are justified in interfering with market forces to protect legacy businesses. There are nevertheless concerns about inclusivity and fairness in how local governments protect these businesses, including who has a voice in selecting what receives protection. When selecting legacy businesses to protect, local governments must be mindful of inclusivity and fairness towards all, including historically marginalized communities. Potential solutions to these concerns will be addressed in Part V.

PART II: EXISTING TOOLS

To protect its legacy businesses, a locality must have a standard, sustainable approach. Otherwise, its politicians may be tempted to save legacy businesses from closing on an ad hoc or arbitrary basis, without governmental oversight or an opportunity for public participation about what should be protected and how. For example, former Mayor of New York City Bill de Blasio threw \$90,000 at Neir's Tavern, a 190-year-old bar in Queens, New York, when it was about to close in January 2020.⁶⁴ Simply put, de Blasio made the sole decision to spend a chunk of taxpayer's money to help save this business.⁶⁵ While his intentions may have been virtuous, that kind of ad hoc action seems to have been an abuse of mayoral authority. A standard method for protecting legacy businesses is only fair, both to taxpayers and to give other businesses a chance at protection as well.

This part of the Note will explain why historic preservation does not hold the answer to protecting legacy businesses. Rather, legacy business programs are essential to further a locality's goal of protecting legacy businesses. First, this Note will take a closer look at historic preservation and its toolkit to examine whether it has the capacity to help protect legacy businesses. Historic preservation has successfully preserved brick-and-mortar structures by serving three purposes: (1) promoting patriotism; (2) preserving architectural styles; and (3) generating economic value.⁶⁶

First, historic preservation initially sought to promote patriotism by preserving the structure of buildings and thereby the memory of what had transpired inside.⁶⁷ The U.S. historic preservation movement grew out of interest in civic education and the patriotic ideal that commemorating a common American past through preserving buildings of national historical memory would help America move forward as a nation in the 1800s.⁶⁸

64. Elizabeth Kim, [UPDATE] *Neir's Tavern Will Not Be Closing After All*, GOTHAMIST (Jan. 10, 2020), <https://gothamist.com/food/de-blasio-vows-save-neirs-tavern-landlord-denies-raising-rent-yet>.

65. *Id.*

66. Emma Brandt Vignali, Note, *Historic Districts: Preserving the Old with the Compatible New*, 59 WM. & MARY L. REV. 345, 358 (2017).

67. *Id.*

68. While at first historic preservation efforts were almost exclusively made by private individuals, the first combined effort of private individuals and a state in preserving a historic site was Independence Hall. Daniel T. Cavarelo, *From Penn Central to United Artists' I & II: The Rise*

Second, the reach of historic preservation expanded to preserving structures of aesthetic value. For example, Justice Brennan, writing for the Court in *Penn Central*, recognized that aesthetics can make a building or structure culturally or historically significant.⁶⁹ Similarly, the *Berman* Court found that aesthetic objectives were part of the general welfare that the District of Columbia and the states could use the police powers to promote.⁷⁰

Third, historic designation functions as a catalyst for economic growth and thereby a means to a community's economic revitalization by making the land more appealing to developers, as the *Berman* court held was a permissive use of the police powers.⁷¹ This purpose of historic preservation is often criticized for leading to gentrification and displacement of lower income groups who had been living in the community before it was "revitalized."⁷²

In fact, displacement of marginalized groups is part of the problem that legacy business programs seek to redress. As San Francisco Heritage observed in its 2014 report, "Historic designation is not always feasible or appropriate, nor does it protect against rent increases, evictions, challenges with leadership succession, and other factors that threaten longtime institutions."⁷³ Skyrocketing rent and a hot real estate market were quickly changing San Francisco's business landscape at the time San Francisco Heritage wrote this report.⁷⁴ In fact, the report quoted San Francisco Mayor Ed Lee as calling for increased vigilance "to use the city's economic success [to] control land costs If we don't do that, if I don't get more of these land costs under control, then we're subject to the natural forces that are going on."⁷⁵ Mayor Lee had referred to the alarming number of historic businesses that were closing at the time, including the forty-eight-year-old Chinese restaurant *Empress of China*,⁷⁶ as well as the city's only lesbian bar, *The Lexington Club*.⁷⁷ The report

to *Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENV'T. AFFS. L. REV. 593, 597 (1995).

69. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978); Mark D. Brookstein, Note, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1858 (2001).

70. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

71. Vignali, *supra* note 66, at 361.

72. David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 80-81 (1985).

73. *Sustaining San Francisco's Living History*, *supra* note 26, at 4.

74. Emily Field, *24 of San Francisco's Store Closures Over the Past Few Years*, SFGATE (Jan. 21, 2016, 6:21 PM), <https://www.sfgate.com/local-donotuse/article/15-of-San-Francisco-store-closures-over-the-6384774.php>.

75. *Sustaining San Francisco's Living History*, *supra* note 26, at 26.

76. Allie Pape, *Empress of China Is Shutting Down After 48 Years*, EATER S.F. (Oct. 1, 2014, 12:54 PM), <https://sf.eater.com/2014/10/1/6882067/empress-of-china-is-shutting-down-after-48-years>.

77. Allie Pape, *San Francisco's Only Lesbian Bar, the Lexington Club, Is Closing*, EATER S.F. (Oct. 24, 2014, 9:10 AM), <https://sf.eater.com/2014/10/24/7059907/san-franciscos-only-lesbian-bar-the-lexington-club-is-closing>.

later persuaded the San Francisco Board of Supervisors to implement San Francisco's Legacy Business Program,⁷⁸ which Part III further explains.

Additionally, while existing historic preservation tools are designed to preserve brick-and-mortar structures, they were never designed to preserve what transpires inside these buildings (i.e., use).⁷⁹ In fact, current historic preservation tools only preserve a property if it passes a certain threshold of architectural significance and integrity of physical condition.⁸⁰ As San Francisco Heritage identified, the "integrity" requirement for landmark designation that measures a property's significance based on physical condition does not necessarily translate to "places of social or cultural significance, where the original physical fabric may no longer be intact."⁸¹ The threshold of architectural significance and integrity of physical condition often disqualifies properties from eligibility for landmark protections.⁸² For example, San Francisco Heritage named this requirement as part of the reason why "fewer than eight percent of the 87,000 property listings in the National Register of Historic Places are associated with the histories of communities of color, women, and LGBTQ[+] communities."⁸³ Moreover, historic designation of the brick-and-mortar structure does nothing to preserve business use—a place's intangible spirit that serves as a cultural asset to its surrounding community.

Traditional historic preservation is inept in helping to protect legacy businesses. Fear of losing their legacy businesses has led localities around the world to adopt legacy business programs,⁸⁴ which Part III will explore.

PART III: CASE STUDIES

This part of the Note examines the legacy business programs of Buenos Aires, the UK, and San Francisco, focusing on their structure as well as the major public policy and legal concerns they pose.

A. Buenos Aires: Bares Notables

The first legacy business program was Buenos Aires's Bares Notables, which began in 1998.⁸⁵ Translating into English as "Notable Bars,"⁸⁶ Bares Notables is a designation program under Law 35 that specifically helps protect the continuation of bars, cafés, billiard halls, and confectionaries that have had

78. See *infra* Part III.

79. See, e.g., Morton, *supra* note 2, at 2.

80. *Sustaining San Francisco's Living History*, *supra* note 26, at 8.

81. *Id.*

82. *Id.*

83. *Id.* However, of note, this author does not necessarily agree that there is sufficient evidence to conclude there is a causal relationship between the structural requirement for the landmark designation and the identified statistic.

84. Morton, *supra* note 2, at 1.

85. *Sustaining San Francisco's Living History*, *supra* note 26, at 35.

86. See *Herald Favorites: 'Notable Bars' in Buenos Aires*, BUENOS AIRES HERALD (Feb. 20, 2023), <https://buenosairesherald.com/what-to-do-in-argentina/what-to-do-in-buenos-aires/herald-favorites-notable-bars-in-buenos-aires>.

an enduring influence on the city's history, architecture, and most of all tourism.⁸⁷ Selected businesses receive tax breaks, window seals indicating certified status, grants for their conservation projects, and conservation advice from experts.⁸⁸ To qualify, the businesses must have distinctive architectural features, occupied a specific place in the neighborhood's identity, and contribute to Buenos Aires's sense of history.⁸⁹ Buenos Aires also looks at the business's age but, unlike other legacy business programs,⁹⁰ has not seemed to make an age cutoff publicly accessible.⁹¹ To retain their status, designated businesses cannot lose their quality or modify their brand, the characteristics that initially qualified them for the program, or their facades or building structures significantly in a way that affects their essence or identity.⁹² This is unique to Bares Notables as most legacy business programs are not connected to legacy businesses' brick-and-mortar structure.⁹³ However, if the business somehow loses its status, there are no legal consequences for its owner other than losing out on the perks of having a business designated by the program. In this way, an owner's rights over his property are not in any way limited if Buenos Aires designates it as part of the program, and so designation is in some ways voluntary for owners.

Buenos Aires also passed an additional law in 2014 governing Bares Notables, No. 5213, that made it so that any income generated in a month less than 120,000 pesos would not be taxed; any gross income that exceeds 120,000 pesos is still subject to the regular tax law.⁹⁴ Monthly surpluses cannot be carried over.⁹⁵ This part of Bares Notables essentially works as a tax expenditure program.⁹⁶ The amount of income designated businesses can

87. Law No. 35, art. 6, Buenos Aires, Feb. 7, 1998, B.O. 7382, 7383 (Arg.), <https://documentosboletinoficial.buenosaires.gob.ar/publico/19980713.pdf>; *Sustaining San Francisco's Living History*, *supra* note 26, at 35.

88. Law No. 35, *supra* note 87.

89. *Sustaining San Francisco's Living History*, *supra* note 26, at 35.

90. *See, e.g., infra* Part III (regarding San Francisco's Legacy Business Program).

91. *See* Law No. 35, *supra* note 87.

92. Law No. 5213, *supra* note 6, art. 8. This part of the law was implemented after the program's tax benefit was introduced, which will be described in further detail in the next paragraph.

93. *See e.g., Morton*, *supra* note 2, at 3–5.

94. Law No. 5213, *supra* note 6, art. 6. During COVID, the Buenos Aires government temporarily increased access to funds for those businesses the program designated. Claudio Corsalini, *Lanzan Líneas de Subsidios para Ayudar a los Bares y Cafés Notables de CABA [Subsidies Launched to Help the Notable Bars and Cafés of CABA]*, PERFIL (May 7, 2020, 1:30 AM), <https://www.perfil.com/noticias/sociedad/lanzan-lineas-subsidios-ayudar-bares-cafes-notables-ciudad-buenos-aires.phtml>. The Buenos Aires government also temporarily lowered legacy businesses' municipal gross income taxation rate from 3% to 1.5%. *Una Ayuda para Evitar que Sigam Cerrando Bares Notables: Pagarán la Mitad de Ingresos Brutos [Help to Prevent Notable Bars from Closing: They Will Pay Half of their Gross Income Tax Rate]*, CLARIN (Jan. 15, 2020, 7:00 AM), https://www.clarin.com/ciudades/ayuda-evitar-sigan-cerrando-bares-notables-pagaran-mitad-ingresos-brutos_0_xlKut6Zy.html.

95. Law No. 5213, *supra* note 6, art. 6.

96. *Cf. J. Clifton Fleming, Jr. & Robert J. Peroni, Reinvigorating Tax Expenditure Analysis and its International Dimension*, 27 VA. TAX. REV. 437, 439–40 (2008).

exclude depends on how much income they make. And so, the benefit is proportional to the businesses' profits. In practical terms, this means that businesses making 120,000 pesos a month get a bigger kick than those businesses making less than 120,000 pesos a month. This creates a vertical inequity in the tax policy because those legacy businesses that make more money would receive more of a benefit from the tax expenditure program. This is a problem when considering that those legacy businesses that make less money would be in more of a position to need governmental assistance to help them continue existing. Nevertheless, a tax expenditure program may be more sustainable than a grant program, which Part IV will explore in further detail.

B. UK: Assets of Community Value

The UK Parliament passed The Localism Act 2011 and The Assets of Community Value (England) Regulations 2012, which provide communities in the UK with more oversight over when assets of community value (ACVs) are sold.⁹⁷ This is not solely a legacy business program, as other types of real property (e.g., buildings, parcels of land) can be designated.⁹⁸ While the program itself is centralized by the UK Parliament, its administration is highly localized.⁹⁹ Each local authority “must maintain a list of land in its area that is land of community value.”¹⁰⁰ Similarly, the local authority must keep a list of unsuccessful nominations,¹⁰¹ and provide the nominator the reason why it was unsuccessful in writing.¹⁰² This also helps prevent an authority from acting arbitrarily and capriciously in denying nominations.¹⁰³ Nominators can also appeal if the locality denies their nomination.¹⁰⁴

Nominations must be made “by a parish council in respect of land in England in the parish council’s area, by a community council in respect of land in Wales in the community council’s area, or by a person that is a voluntary or

97. Localism Act 2011, c. 3 (UK), <https://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>; The Assets of Community Value (England) Regulations 2012, No. 2421 (Eng.), <https://www.legislation.gov.uk/uksi/2012/2421/contents/made>. The 2012 law is essentially a more in-depth version of the 2011 law. This law treats Wales and Scotland somewhat differently than England, and England will be the primary focus of this discussion. Sandford, *supra* note 7, at 19–21.

98. Sandford, *supra* note 7, at 7.

99. Localism Act 2011, *supra* note 97, art. 87, para. 1.

100. *Id.*

101. *Id.* art. 94, para. 1 (Eng.).

102. *Id.* art. 90, para. 6 (Eng.).

103. In practice, however, authorities tend to offer generalized reasons for denying a nomination. Unsuccessfully nominated properties can be viewed here. There are substantially fewer unsuccessful nominations than successful nominations. For example, although the Southeastern London township of Bromley keeps a list allowing for a column explaining why the nomination was unsuccessful, all reasons have been kept general (e.g., “Property does not meet the definition of an asset of community value.”). See, e.g., BROMLEY PLANNING DIVISION OF HOUSING, PLANNING, AND REGENERATION, TOWN AND COUNTRY PLANNING (GENERAL PERMITTED DEVELOPMENT), ORDER 2015 AS AMENDED, 2022 (London Borough of Bromley).

104. Sandford, *supra* note 7, at 11.

community body with a local connection.”¹⁰⁵ To designate a property as an ACV, a local authority must find that the property has an actual current non-ancillary use that “furthers the social wellbeing or social interests of the local community,” or had such a use in the recent past.¹⁰⁶ It is fair to think that land can be used in a way “that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community” within the next five years.¹⁰⁷

The owner of an ACV cannot dispose of that property (i.e., sell) unless the following three conditions are met: (1) the owner “has notified the local authority in writing of that person’s wish to enter into a relevant disposal of the land;”¹⁰⁸ (2) “the interim moratorium period [of six weeks]¹⁰⁹ has ended without the local authority having received during that period, from any community interest group, a written request (however expressed) for the group to be treated as a potential bidder in relation to the land, or the full moratorium period has ended”;¹¹⁰ and (3) “the protected period [of eighteen months after the owner has notified the local authority of his desire to dispose of the property]¹¹¹ has not ended.”¹¹² During the six-week interim moratorium, if the community wants to bid for the property before it is sold on the open market,¹¹³ they must notify the local authority who will then notify the owner.¹¹⁴ There is then a six-month moratorium period during which the owner cannot sell the asset.¹¹⁵ Importantly, the owner does not have to sell the asset to the community group because this law only gives them the right to bid and not, for example, a right of refusal.¹¹⁶

There are limited exceptions when the owner does not have to meet those conditions, including when transferring the property as a gift or using the property to pay off debt.¹¹⁷ Nevertheless, designation substantially limits an owner’s property rights.¹¹⁸ Local authorities may also have to compensate the owner of an ACV for limiting his property rights, including when the owner can show his property was erroneously designated and he has damages due to the delay in selling that property.¹¹⁹ To make a claim for compensation in that case,

105. Localism Act 2011, *supra* note 97, art. 89, para. 2.¶

106. *Id.* art. 88, para. 1.

107. *Id.* art. 88, para. 2.

108. *Id.* art. 95, para. 2.

109. *Id.* art. 95, para. 6.

110. *Id.* art. 95, para. 3.

111. *Id.* art. 95, para. 6.

112. *Id.* art. 95, para. 4.

113. *Id.* c. 3, art. 95, para. 6.

114. *Id.* art. 98, para. 1.

115. *Id.* art. 95, para. 6.

116. *Id.*, art. 103, para. 1; *Assets of Community Value and Challenging a Listing*, PENNINGTONS MANCHES COOPER (Jan. 7, 2019), <https://www.penningtonslaw.com/news-publications/latest-news/2019/assets-of-community-value-and-challenging-a-listing>.

117. Localism Act 2011, *supra* note 97, art. 95, para. 5.

118. *Assets of Community Value and Challenging a Listing*, *supra* note 116.

119. *Id.*; The Assets of Community Value (England) Regulations 2012, *supra* note 97, arts. 14–17.

the owner must submit a claim “in writing to the local authority within [thirteen] weeks of the loss or expense being incurred” to the First Tribunal.¹²⁰

The UK’s ACV program has been fraught with legal issues. Of note, owners can request the City Council review the listing of their property,¹²¹ and can even take further action by appealing the listing at the First-Tier Tribunal.¹²² For example, when the owner of the Soho Hospital of Women requested that Westminster City Council review the decision to designate the property as an ACV, the Westminster City Council found that the community’s pro se nomination was not deficient.¹²³ The City Council made this determination despite the nomination not meeting all necessary requirements and also found that the property “benefi[ted] the local community” even if only thirty percent of the property was used by the public (which raises the question of how courts have been interpreting the term “not an ancillary use”).¹²⁴

Similarly, the owner of Swan and Edgar Pub requested review from the Westminster City Council of his property’s ACV status because he argued it did not serve to further the community’s social well-being or interest.¹²⁵ There, the court found that the property had fulfilled this requirement as it had been a public house in the recent past and could foreseeably become one again.¹²⁶ The Westminster City Council found that even though the owner had no intention of reopening it as a pub, that factor was not determinative, and instead determining whether the pub could be reopened in the next five years required an evaluation of the totality of circumstances.¹²⁷ Because it was possible for the owner to sell the property as the planning commission kept denying his development plans,¹²⁸ and the pub was presumably profitable in the past,¹²⁹ the court found that it was realistic to conclude that the pub could be reopened within the next five years and thereby serve a public purpose.¹³⁰

In both cases, the Soho Hospital for Women and the Swan & Edgar Pub, the Westminster City Council stated the owners could bring an appeal to the First-Tier Tribunal, but they chose not to do so. By contrast, when the new owner of Greyhound Inn appealed the property’s ACV status to demolish it, the First-Tier Tribunal granted the appeal because “it [wa]s not realistic to think that the Greyhound would serve further the social well-being or social interests of the local community, by reopening as a pub within the requisite five year

120. *Assets of Community Value and Challenging a Listing*, *supra* note 116.

121. The Assets of Community Value (England) Regulations 2012, *supra* note 97, art. 10.

122. *Id.*, art. 11, para. 1.

123. WESTMINSTER CITY COUNCIL, WCC/ACVs/SOHO WH/REV, 2019, at 6 (UK) (concerning review of Soho Hospital for Women’s designation as an ACV).

124. *Id.* at 4.

125. WESTMINSTER CITY COUNCIL, 30097062, 2015, at 3 (UK) (concerning review of the Swan & Edgar Public House’s designation as an ACV).

126. *Id.*

127. *Id.* at 2.

128. *Id.*

129. *Id.*

130. *Id.* at 3.

period,” and no other social use was suggested.¹³¹ Moreover, the court noted that it was unlikely for owners to change their plans for redevelopment, including by reopening it as a pub,¹³² and unlikely that a community group could afford to purchase the property even if it was available on the market within five years.¹³³ In that case, the court did find the owner’s intention carried great weight.¹³⁴

Although the UK’s ACV law can help monitor the sale of legacy businesses, this seems to be an example of a program that is too restrictive of owners’ property rights. Its ability to prevent a sale of the property for six months if the community wants to make a bid limits an owner’s right to dispose of one’s property, which is a stick in the bundle of property rights.¹³⁵ However, there are useful lessons to be learned from the UK’s ACVs. For example, a program could track when an owner of a legacy business wants to sell it or close it down so that they can retire. The program can then notify the surrounding community to see if any community members are interested in purchasing the business and carrying on its legacy. Part V further explores this concept.

C. *San Francisco: Legacy Business Program*

When in 2013 the chain clothing store The Limited replaced the Gold Dust Lounge, an iconic fifty-four-year-old dive bar, San Franciscans were in an uproar.¹³⁶ This led nonprofit San Francisco Heritage to publish a report in 2014, *Sustaining San Francisco’s Living Heritage: Strategies for Conserving Cultural Assets*,¹³⁷ that showed how the city’s economic climate of rent increases, as well as a substantial trend of lease terminations, led to the displacement of legacy businesses.¹³⁸ San Francisco County Supervisor David Campos built on these efforts by proposing and leading the Board of Supervisors’ unanimous passing of the official San Francisco Legacy Business Registry in March 2015.¹³⁹

131. *Greyhound Inn Dev. v. Bromsgrove District Council, et al.*, [2017] UKFTT 7 (appeal taken from Eng.).

132. *Id.*

133. *Id.*

134. *Id.*

135. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 788, 794 (2005) (noting owner’s right to dispose of one’s property is a stick in the bundle of rights of property).

136. Morton, *supra* note 2, at 2. See also Eve Batey, *After 54 Years in Business, the Gold Dust Lounge Has Closed For Good*, S.F. EATER (Jan. 10, 2020, 12:37 PM), <https://sf.eater.com/2020/1/10/21060458/gold-dust-lounge-fishermans-wharf-closure>.

137. See generally *Sustaining San Francisco’s Living Heritage*, *supra* note 26.

138. *Id.* at 3.

139. S.F. OFF. OF SMALL BUS., LEGACY BUSINESS PROGRAM: ANNUAL REPORT, FISCAL YEAR 2018–19 8 (2019). See also S.F. OFF. OF SMALL BUS., LEGACY BUSINESS PROGRAM: REPORT ON THE RENT STABILIZATION GRANT AND LEGACY BUSINESS GRANT, FISCAL YEAR 2021–22 (2022) for the most recent data, although that does not include important background information the earlier report does include.

The Registry only permits the mayor or a member of the Board of Supervisors to nominate businesses for consideration.¹⁴⁰ Eligible businesses must have operated in San Francisco for at least thirty years without a break in its operations exceeding two years.¹⁴¹ Nominations are capped at 300 annually.¹⁴² The Registry includes a wide range of different types of businesses, from tea shops to tattoo parlors, from art galleries to wig shops.¹⁴³ The San Francisco Office of Small Business oversees the Registry.¹⁴⁴ While the San Francisco Historic Preservation Commission is welcome to submit opinions on nominated businesses, their silence is taken as support.¹⁴⁵ This also demonstrates how San Francisco saw this program as more aligned with governmental assistance to small businesses rather than a governmental approach to historic preservation.

San Franciscans passed by 56.97% the second phase of the program as J on ballot in 2015, which established the Legacy Business Historic Preservation Fund.¹⁴⁶ Proposition J also expanded the definition of a legacy business to not just those businesses over thirty years old, but also to include those that have operated in San Francisco for more than twenty years and would risk displacement if not listed on the registry.¹⁴⁷ Moreover, as codified by San Francisco, businesses included on the Legacy Business Registry can apply for “an annual grant”¹⁴⁸ “equal to \$500 per full-time equivalent employee employed in San Francisco by the Qualified Legacy Business . . . up to a maximum of 100 full-time equivalent employees.”¹⁴⁹ Landlords of legacy businesses could also apply for “an annual grant . . . [if they entered] into an agreement with a Legacy Business that leases real property in San Francisco to the Legacy Business for a term of at least ten years or extends the term of the Legacy Business’s existing lease to at least ten years . . . equal to \$4.50 per square foot, up to a maximum of 5,000 square feet.”¹⁵⁰ In simple mathematical terms, this means that annual grants for Legacy Businesses and property owners are capped at \$50,000 and \$22,500, respectively. Apart from monetary benefits, legacy businesses also have access to business and technical assistance, including regarding leases and acquisition of new property.¹⁵¹

140. *City of San Francisco Legacy Business Historic Preservation Fund, Proposition J (November 2015)*, BALLOTPEDIA, [https://ballotpedia.org/City_of_San_Francisco_Legacy_Business_Historic_Preservation_Fund_Proposition_J_\(November_2015\)](https://ballotpedia.org/City_of_San_Francisco_Legacy_Business_Historic_Preservation_Fund_Proposition_J_(November_2015)) (last visited May 30, 2023) [hereinafter *Proposition J*].

141. S.F., CAL. STAT. § 2A.242(b)(1) (Am. Legal Publ’g through S.F. Admin. Code).

142. *Id.* § 2A.242(c) (Am. Legal Publ’g through S.F. Admin. Code).

143. *San Francisco Legacy Business Registry*, S.F. LEGACY BUS., <https://legacybusiness.org/registry> (last visited May 29, 2023).

144. S.F., CAL. STAT. § 2A.242(a) (Am. Legal Publ’g through S.F. Admin. Code).

145. *Id.* § 2A.242(b)(2) (Am. Legal Publ’g through S.F. Admin. Code).

146. *Proposition J*, *supra* note 140; S.F. OFF. OF SMALL BUS., *supra* note 139, at 8.

147. *Proposition J*, *supra* note 140.

148. S.F., CAL. STAT. § 2A.243(b)(1) (Am. Legal Publ’g through S.F. Admin. Code).

149. *Id.* § 2A.243(b)(3) (Am. Legal Publ’g through S.F. Admin. Code).

150. *Id.* § 2A.243(c)(1) (Am. Legal Publ’g through S.F. Admin. Code).

151. *Id.* § 2A.243(e) (Am. Legal Publ’g through S.F. Admin. Code).

A major concern of this program is how much this will cost San Franciscan taxpayers. As written, there are no limits on how many total businesses and landlords could become eligible for grants, as accepted businesses can retain the benefits year after year.¹⁵² When Proposition J was presented on the ballot, the San Francisco controller had warned,

Should the proposed ordinance be approved by the voters, in my opinion, the cost to government would be significant if the Mayor and Board of Supervisors chose to fully fund the program. The cost would grow by \$2.1 million to \$3.7 million annually beginning in fiscal year 2015–2016, ultimately reaching a cost of between \$51 million and \$94 million annually once all qualifying legacy businesses are enrolled in approximately twenty-five years.¹⁵³

The program's cost is a major concern and, consequently, poses questions about the program's long-term sustainability.

D. Summation

Buenos Aires, the UK, and San Francisco demonstrate different ways in which localities attempt to protect their legacy businesses. While Buenos Aires's legacy business law narrowly protects only bars, sugar confectionaries, and coffee shops,¹⁵⁴ San Francisco protects a plethora of legacy businesses from tea shops to tattoo parlors,¹⁵⁵ and the UK protects all kinds of assets of community value, regardless of whether they are businesses.¹⁵⁶ Buenos Aires and San Francisco both provide some financial assistance to selected businesses, the former through tax expenditures¹⁵⁷ and the latter through grants not only for legacy businesses but also their landlords.¹⁵⁸ While San Francisco and Buenos Aires keep a list of selected businesses, neither of them track when those businesses are sold or when their owners might retire and thereby resort to closing the business if they have no one to whom they could transfer the management of operations. In contrast, the UK's program only seeks to monitor an owner's disposal of assets of community value.¹⁵⁹ There are many legal implications for this system as Part IV will analyze. Nevertheless, the UK shows how a legacy business registry might be used to help track the transfer of property, and a less draconian version of this mechanism could be that owners of a legacy business looking to sell could send out a call for bids connected to its status as a legacy business. Part V will further explore this idea. Additionally, the UK's program shows how a centralized program administered

152. *Proposition J*, *supra* note 140.

153. *Id.*

154. Law No. 35, *supra* note 87.

155. *San Francisco Legacy Business Registry*, *supra* note 143.

156. Sandford, *supra* note 7, at 7.

157. Law No. 5213, *supra* note 6, art. 6.

158. S.F., CAL. STAT. § 2A.243(b)(3) (Am. Legal Publ'g through S.F. Admin. Code); S.F., CAL. STAT. § 2A.243(c)(1) (Am. Legal Publ'g through S.F. Admin. Code).

159. Localism Act 2011, *supra* note 97.

by localities could function,¹⁶⁰ while Buenos Aires and San Francisco demonstrate how these programs can look when created and overseen by localities themselves.¹⁶¹ Overall, there is much to be learned from all three models when a locality is considering whether and how to implement a legacy business program.

PART IV: POLICY AND LEGAL ISSUES ARISING FROM LEGACY BUSINESS PROGRAMS

Just as the rise of historic preservation regulations ushered in an onslaught of new legal problems, legacy business programs may do the same. For this reason, identifying those issues *ex ante* is important, particularly when considering the recent rise of localities in the U.S. implementing or considering implementing legacy business programs.¹⁶²

A. Takings Claims

First, there is concern that the designation of legacy businesses may lead to owners bringing takings claims under the Fifth Amendment,¹⁶³ which have been brought under historic preservation designations albeit often unsuccessfully.¹⁶⁴ The likelihood of such a cause of action depends a great deal on how a locality structures its legacy business program. Both Buenos Aires and San Francisco have structured their programs in a way that would likely steer them away from facing a flood of those claims. For example, although owners of bares notables in Buenos Aires have certain conservation responsibilities to stay eligible as delineated in Part III, owners can choose to opt out of those programs by not following the criteria.¹⁶⁵ The voluntary nature of this choice makes it unlikely that a similar program in the U.S. would ever lead to a takings challenge. Similarly, San Francisco does not have any such requirement for legacy businesses at all for them to be eligible for the program's grants.¹⁶⁶ Neither Buenos Aires's nor San Francisco's respective programs impose restrictions on the owners of designated businesses, so it seems unlikely that any owner would bring a takings claims in a locality in the U.S. that adopted one of these models.

The source of these financial benefits also makes Buenos Aires's and San Francisco's programs different from traditional historic landmark programs,

160. *See generally id.*

161. *See generally* Law No. 35, *supra* note 87; *see generally* S.F., CAL. STAT. § 2A.242 (Am. Legal Publ'g through S.F. Admin. Code).

162. Morton, *supra* note 2, at 1.

163. U.S. CONST. amend. V.

164. *See, e.g.,* J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *FORDHAM ENV'T. L. REV.* 313, 316 (2004) (noting the infrequency of challenges that are brought against historic preservation designations, and how even fewer are successful).

165. Law No. 5213, *supra* note 6, art. 6.

166. *See generally* S.F., CAL. STAT. § 2A.243 (Am. Legal Publ'g through S.F. Admin. Code).

including New York City's Landmark Laws. In his dissent in *Penn Central*, Justice Rehnquist objected to how designating a property as a historic landmark forces the owner to take on all the costs to preserve the property for public benefit, arguing that New York City's Landmark Laws cannot meet reciprocity of advantage. Justice Rehnquist observed:

If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.¹⁶⁷

By contrast, the financial mechanism of Buenos Aires's and San Francisco's respective legacy business programs are designed to spread the financial burden of protecting legacy businesses among their taxpayers. San Francisco does this by providing grants from taxpayer dollars.¹⁶⁸ Buenos Aires does this through tax breaks, which essentially have the same economic effect as providing a grant to those businesses of the same amount as their tax break.¹⁶⁹ This means that the externalities of a legacy business continuing to provide the social and economic benefits to a locality's constituents are reciprocal to those constituents helping to support the long-term existence of those businesses.¹⁷⁰ The use of taxpayer dollars to help protect legacy businesses may give further justification supporting constituents having a voice in deciding which businesses are designated. This is because taxpayers are essentially paying additional dollars to support the existence of those businesses, not just by purchasing a good or service from that business. Moreover, their representatives might not be aware of the meaning some businesses hold in the community and that taxpayers would want to protect them.

It is difficult to see when an owner of a legacy business would have a takings claim under a program emulating that of Buenos Aires or San Francisco. There also have not been any takings claims brought against San Francisco's program to date. Although San Francisco's mayor or Board of Supervisors nominate all legacy businesses in the locality,¹⁷¹ receiving that status does not limit the property owner's rights over his business. It just offers the business owner, and even his landlord, an opportunity for a grant to help support the business's continuance.¹⁷² Likewise, bare notables can choose to opt out of

167. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 148–49 (1978) (Rehnquist, J., dissenting) (citations omitted).

168. S.F., CAL. STAT. § 2A.243(b)(3) (Am. Legal Publ'g through S.F. Admin. Code); *id.* § 2A.243(c)(1) (Am. Legal Publ'g through S.F. Admin. Code).

169. Law No. 5213, *supra* note 6, art. 6.

170. Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 137, 141–42 (2014).

171. *Proposition J*, *supra* note 140.

172. S.F., CAL. STAT. § 2A.243(b)(3) (Am. Legal Publ'g through S.F. Admin Code); *id.* § 2A.243(c)(1) (Am. Legal Publ'g through S.F. Admin Code).

Buenos Aires's program.¹⁷³ Even if Buenos Aires's conservation requirements for businesses to keep their status as *bares notables* restrict owners' use of those properties, the owner can choose to opt out of the program if they want, so the restriction is voluntary.¹⁷⁴ For these reasons, it seems likely that owners would not bring takings claims if a locality in the U.S. adopts a program such as that of Buenos Aires or San Francisco.

Circumstances are more fraught under the UK's ACV program. If a locality in the U.S. was to adopt such a program, that would likely give rise to a flooding of takings claims. This is because the program delays an owner's ability to sell his property,¹⁷⁵ sometimes by months, and potentially affects to whom he can sell his property.¹⁷⁶ To analyze these effects fully, it is helpful to compare the UK ACV program's right to bid to how some localities in the U.S. generally have used rights of first refusal (in lieu of eminent domain or buying the property on open market).¹⁷⁷ The right to bid is reserved for the community.¹⁷⁸ The right of first refusal is reserved for the government itself.¹⁷⁹ As "rights of first refusal require owners to spend time and money navigating an additional layer of bureaucracy,"¹⁸⁰ it seems likely that the UK's model of community right to bid would do the same, including requiring owners to wait while the community decides whether it wants to make a bid for the property.¹⁸¹ Just like the right of first refusal, the right to bid may "create uncertainty and drive up the cost of developing real estate."¹⁸² Moreover, the right to bid could affect a property owner's ability to attract buyers, but perhaps not as much as the right of first refusal.¹⁸³ The right of first refusal forces the owner's hand and can quash a deal for which a potential buyer would have needed to invest time and resources,¹⁸⁴ while an owner is under no obligation to accept an offer made by the community if all the community has is a right to bid.¹⁸⁵ However, the right to bid also brings more uncertainty and delay, which a potential buyer

173. Law No. 5213, *supra* note 6, art. 8.

174. *Id.*

175. Strahilevitz, *supra* note 135, at 788, 794.

176. Cf. Peter Damrosch, *Public Rights of First Refusal*, 129 YALE L.J. 812, 818–26 (2020) (explaining how a public right of first refusal affects who is then willing to make a bid on the property).

177. *Id.* at 826.

178. Localism Act 2011, *supra* note 97, art. 89, para. 2.

179. Damrosch, *supra* note 176, at 816. Compare with DANIEL B. KELLY, *Acquiring Land Through Eminent Domain: Justifications, Limitations, and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 344, 344 (Kenneth Ayote & Henry E. Smith eds., 2011) (describing government's typical options for acquiring land as eminent domain and buying property on the open market).

180. Damrosch, *supra* note 176, at 844.

181. *Id.*

182. *Id.*

183. *Id.* at 846.

184. *Id.* at 845.

185. *Assets of Community Value and Challenging a Listing*, *supra* note 117 ("This is emphatically not a right of refusal; if owners aren't happy with the community bid, they have every right to reject it.").

might want to avoid. Moreover, there is also the concern of legal consequences if an owner fails to notify the locality of its plans to sell the property,¹⁸⁶ because a community's right to bid can only be exercised if they are notified by the locality. As a result, the locality may bring legal claims against owners who fail to notify the locality of their plans.

Because the right of disposal is a fundamental stick in the bundle of property rights,¹⁸⁷ and the UK's model directly interferes with that right in a way that can cause the owner to lose funds, an owner might have a takings challenge under the Fifth Amendment in a locality in the U.S. that adopts a similar right to bid mechanism as that of the UK's ACV program. This includes for the loss of funds from the delay in sale, or perhaps even the falling through of a sale that otherwise likely would have gone through had it not been for the program (which although may be difficult to prove may not deter owners from bringing such claims). There is good reason to think a program modeled after the UK's ACV program would lead to owners bringing takings claims because even the UK's legal system allows owners to obtain compensation if their locality erroneously designated them as an ACV.¹⁸⁸

The way in which businesses can lose designation in all three programs also emphasizes how the UK's program would be more likely to lead to takings claims if implemented by a locality in the U.S. as compared to if the locality had adopted a program similar to either Buenos Aires's or San Francisco's. Among all three, the designation of a property can be undone if the owner closes the business. Assuming American localities implement similar programs, whether the designation can be undone would likely influence a court's analysis in deciding if a designation constitutes a taking without just compensation under the Fifth Amendment.¹⁸⁹ For Buenos Aires's and San Francisco's programs, for example, the legacy business loses its designation if it closes because the owner can no longer afford to continue operations, or dies without anyone to take over the business.¹⁹⁰ For the UK's program, however, more is required to sever designation. For example, closing a business to the public does not sever designation if the business had been used for public benefit in the past and it is realistic to think that it would be used for a public benefit within the next five years, even if it is not the same public benefit as before.¹⁹¹ An owner of a designated property can still demolish the building without facing legal consequences but those circumstances may be seen as more drastic than simply

186. Cf. Damrosch, *supra* note 176, at 846 (regarding legal issues that may arise when an owner does not notify the government of a proposed sale).

187. Strahilevitz, *supra* note 135, at 788, 794 (discussing the right to dispose of one's property as a stick in the bundle of rights).

188. The Assets of Community Value (England) Regulations 2012, *supra* note 97, arts. 14–17.

189. U.S. CONST. amend. V.

190. Law No. 5213, *supra* note 6, art. 8; S.F., CAL. STAT. § 2A.242(b)(1) (Am. Legal Publ'g through S.F. Admin Code).

191. Localism Act 2011, *supra* note 97, art. 88, para. 1; *id.* art. 88, para. 2.

closing a business.¹⁹² The UK program limits an owner's property rights more than the Buenos Aires and San Francisco programs do. Because of that, if a locality in the U.S. adopts a program similar to the UK's and an owner of a designated property brings a takings claim, a court might be more willing to find in favor of the owner than it would if the locality adopted a program similar to Buenos Aires's or San Francisco's. While there is much to be learned from the UK's ACV program, its implementation in a locality in the U.S. would likely result in so many takings claims that the cost would outweigh the benefit. The implementation of a program similar to Buenos Aires's or San Francisco's likely would not cause the same concern.

B. Causes of Action from Denial of Designation

Depending on how a locality accepts nominations for legacy businesses, owners whose property is denied designation, or perhaps even zealous community members who care a great deal about a particular business may bring a claim regarding arbitrary and capricious governmental action in denying the designation of a business. Programs such as San Francisco's avoid this issue by only allowing the mayor or the Board of Supervisors to nominate businesses for consideration.¹⁹³ While the UK's ACV program allows communities to nominate ACVs,¹⁹⁴ only owners of designated properties have standing to appeal decisions based on the regulation.¹⁹⁵ Contrastingly, the Commission for the Protection and Promotion of Notable Cafés, Bars, Billiards[,] and Confectioneries selects candidates for the Bares Notables program, and there does not appear to be an application process for owners or community members.¹⁹⁶

Owners of bars, cafes, billiard halls, and confectionaries can secure designation for their properties if they can demonstrate to the Buenos Aires Ministry of Culture that they fulfill all necessary requirements.¹⁹⁷ There does not seem to be a procedure for appeals based on this law.¹⁹⁸

Even if an owner or community member brought a cause of action under the Due Process Clause of the Fourteenth Amendment,¹⁹⁹ it would likely fail unless the denial somehow burdens a fundamental right under 42 U.S.C. 1983

192. *Must a Local Authority Remove a Property from the List of ACVs if the Building on the Land is Demolished?*, THOMSON REUTERS PRAC. L. (May 28, 2019), [https://uk.practicallaw.thomsonreuters.com/a-125-1294?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/a-125-1294?transitionType=Default&contextData=(sc.Default)&firstPage=true).

193. The decision cannot be challenged. See *Proposition J*, *supra* note 140.

194. Localism Act 2011, *supra* note 97, art. 89, para. 2.

195. *Id.* art. 92 (Eng.).

196. *Los Pasos Necesarios para Llegar a Integrar la Lista de "Notables" [The Necessary Steps for a Business to Be Designated into the Bares Notables Program]*, La Nacion (Oct. 9, 2017), <https://www.lanacion.com.ar/buenos-aires/los-pasos-necesarios-para-llegar-a-integrar-la-lista-de-notables-nid2070455/>.

197. Law No. 5213, *supra* note 6, art. 2. *Id.* art. 4.

198. *Id.*

199. Localism Act 2011, *supra* note 97, art. 89, para. 2.

(e.g., race, religion).²⁰⁰ A business can bring a claim that a denial burdens its free exercise of religion. For example, San Francisco has included a house of worship in its Registry, the St. John Coltrane Church.²⁰¹ However, in the case of San Francisco's model, a house of worship could not appeal a denial of its designation because it could not submit a nomination for itself in the first place. But say a business owner or the community could nominate businesses for designation as per a locality's program. That could potentially expose the locality to lawsuits based on denials of applications on grounds of burdening a fundamental right, such as religion.²⁰²

Even though limiting the ability to nominate businesses for consideration may shield the locality from certain lawsuits, public policy concerns arise. As explained in Part I, there is great concern that if only the government can nominate businesses, that risks the program only protects a certain group's idea of legacy businesses.²⁰³ This can leave younger people and historically marginalized communities out of the conversation.²⁰⁴ If only a locality's legislature or mayor can officially nominate businesses, that locality needs to find a way to ensure that people from all its communities, including owners, can notify the government of businesses worth considering. Part V will consider best practices for nominating businesses.

C. Program's Sustainability

The sustainability of legacy business programs, particularly San Francisco's which many localities in the U.S. have looked to as a leading example,²⁰⁵ is cause for concern. Although there would not be legal recourse available for the lack of sustainability, there could be political ramifications, including the effect on other existing and potential legacy business programs in the United States.

Sustainability is key for legacy business programs to truly be effective. And although the age of a program is not the only signifier of sustainability, it is an important one. While grant programs "are more heavily shaped by the political and policy climate," tax credits can be reliably renewed annually and are integrated into a locality's tax code.²⁰⁶ For example, as described in Part III, Buenos Aires has had a successful, sustainable legacy business program for twenty-five years that is tax-based.

By contrast, San Francisco's grant program requires reallocation of funds to support its continuance. Moreover, because there is no limit on how many businesses can be inducted in the aggregate and thereby no set total annual

200. 42 U.S.C. § 1983 (1974).

201. *San Francisco Legacy Business Registry*, *supra* note 142.

202. *Cf. Greyhound Inn Dev. v. Bromsgrove District Council, et al.*, [2017] UKFTT 7 (appeal taken from Eng.).

203. *Cf. Ross*, *supra* note 29, at 94.

204. *Cf. Widener*, *supra* note 49, at 485.

205. Morton, *supra* note 2, at 1.

206. *What Are Tax Expenditures and How Are They Structured?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-tax-expenditures-and-how-are-they-structured> (last visited Apr. 5, 2023).

grant, policymakers have expressed concern about the program's sustainability.²⁰⁷ The rise of programs across the U.S., particularly during the spike in the summer and fall of 2022 that included Boston and Los Angeles, have been grant-based,²⁰⁸ which poses the same concern of sustainability as that of San Francisco's programs. Localities in the U.S. considering implementing a legacy business program should look to Buenos Aires's tax policy for its Bares Notables Program,²⁰⁹ because such an approach would be more sustainable.

Delving into the technicalities of how localities could craft tax breaks for their legacy businesses is out of this Note's scope but would be fascinating to explore. For example, there is potential to explore how San Francisco could offer tax breaks to landlords rather than offering grant funds to incentivize landlords to keep the legacy businesses to whom they lease.

D. Summation

Takings claims, causes of action from denial of designation, and program sustainability are only some of the legal and policy issues that may arise due to the establishment of a legacy business program. The next section will explore best practices for these programs.

PART V: BEST PRACTICES

As each locality in the U.S. that is considering implementing a legacy business program has different needs, legacy business programs should not be one-size-fits-all. Nevertheless, there are important factors to consider in designing a program.

A. Registry

A crucial element of all legacy business programs thus far is a virtually accessible list of those businesses for the public.²¹⁰ These lists provide free advertising to businesses and generate excitement about them.²¹¹ While a program similar to the UK's ACV program would be too fraught with litigation if implemented in a locality in the U.S., there are lessons to be learned. For example, the owner of a legacy business might be looking to retire but has no one to whom he can transfer the business. This is becoming more and more common as the "silver tsunami" grows more imminent, which is how economists describe the growing number of retiring baby boomers in the U.S.²¹²

Legacy business programs could help prevent the closing of legacy businesses owned by retiring baby boomers by facilitating acquisition

207. *Proposition J*, *supra* note 140.

208. *Legacy Business Program to Support Iconic Businesses*, *supra* note 10; *Los Angeles Legacy Business Program*, *supra* note 11.

209. Law No. 5213, *supra* note 6, art. 6.

210. *See, e.g., San Francisco Legacy Business Registry*, *supra* note 143.

211. *Id.*

212. Christopher Hurn, 'Silver Tsunami' Means More Business Acquisition Opportunities, FORBES (Nov. 10, 2021, 8:00 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2021/11/10/silver-tsunami-means-more-business-acquisition-opportunities/?sh=4bd69b4526df>.

entrepreneurship.²¹³ To do so, they could provide a means for retiring owners to advertise that they are selling their legacy businesses. For example, the locality can include a webpage on its legacy business program website for this purpose, a virtual “Legacy Business for Sale” page. That would take the benefits of the UK’s ACV program monitoring change of ownership without any of the draconian consequences of limiting the owner’s property rights when he wants to dispose of his property (i.e., the community’s right to bid). However, this part of the program should be voluntary, and no owner’s property should be listed without their consent.

B. Community Input

As explained in Part IV, allowing business owners and community members to nominate businesses may give way to litigation based on the denials of applications. Some localities may find that ensuring that constituents have a direct voice in identifying legacy businesses may be worth the litigation, particularly if most of those claims could be dismissed at the motion to dismiss or summary judgment stage. Other localities might not find this to be worth the trouble. Those localities must still find ways to include their different communities in the conversation. A government-run or government-affiliated official version of Place Matters, run by CityLore in New York City,²¹⁴ could achieve this. That type of website would allow community members to nominate places and explain why they believe those businesses should be considered for designation as legacy businesses. This would remove the official nature of an application on behalf of a business while still allowing constituents the ability to bring certain places to their locality’s attention.

C. Age of Eligible Businesses

San Francisco requires eligible businesses to have operated in San Francisco for over thirty years or for more than twenty years and would risk displacement if not listed on the registry.²¹⁵ Most localities in the U.S. that have begun legacy business programs also have a minimum age requirement for a business to be eligible for designation.²¹⁶ Setting a minimum age requirement can help define what qualifies as a longstanding business within the locality and limit how many businesses are eligible for the benefits, including funds through grants or tax breaks. However, deciding the minimum age should be left up to each locality based on their specific circumstances.

213. See David Nows, *Acquisition Entrepreneurship: One Solution to the Looming Business Succession Crisis*, 97 IND. L.J. SUPP. 1 (2021).

214. *Celebrating Community Anchors Across the Five Boroughs*, PLACE MATTERS, <https://placematters.net/> (last visited May 30, 2023).

215. *Proposition J*, *supra* note 140.

216. For example, for a business to be eligible for Missoula, Montana’s legacy business program, it must have operated in Missoula for one hundred years or more. *Missoula Legacy Business Program*, *supra* note 12.

D. Tax-Based, Not Grant-Based

As explained in Part IV, if a locality decides to award funds to its legacy businesses, that should be done through tax breaks and not through grants. This is because tax expenditure programs are more sustainable than grant programs.²¹⁷ Alternatively, the locality can decide to only award benefits, including free advertising, for designated businesses. However, only awarding such limited benefits is unlikely to help with the longevity of those businesses for localities with skyrocketing rents. For smaller, more sprawling communities, though, this might be all the legacy businesses require.²¹⁸ Deciding what kind of aid legacy businesses should receive should be up to each locality, including when considering how much each locality can afford to give. However, grants are not the wisest idea for these programs. Given the choice between tax breaks and grants, a locality should choose tax breaks for legacy businesses.

E. Benefits

A major question is what benefits legacy businesses should receive and through what means. Most legacy business programs offer advertisement on the locality's virtual list as well as technical and legal assistance, including for negotiating long-term leases.²¹⁹ Assistance with securing affordable rents is particularly important when considering how rising rents led many American localities to implement legacy business programs.²²⁰ And some smaller, more sprawling localities in the U.S. might even choose to only offer these kinds of technical assistance benefits rather than tax breaks or grants to their designated legacy businesses.²²¹ That is a decision that is theirs alone to make.

There is no one-size-fits-all model for legacy business programs, nor should there be. The UK's ACV program demonstrates how an ambitious, centralized legacy business program can be fraught with legal issues, and the localized programs of Buenos Aires and San Francisco do not face those difficulties to the same extent. Each locality must decide for itself what works best for the needs of its constituents and the types of businesses it chooses to protect.

CONCLUSION

More localities should consider implementing legacy business programs to help protect their legacy businesses. Localities are likely justified in interfering with market forces to help protect legacy businesses. But the traditional historic preservation toolkit does not provide a solution for doing this. Those tools were never meant as a solution to preserve business use and

217. *What Are Tax Expenditures and How Are They Structured?*, *supra* note 206.

218. For example, Missoula's legacy business program only offers technical assistance and free advertising. *Missoula Legacy Business Program*, *supra* note 12.

219. *Sustaining San Francisco's Living Heritage*, *supra* note 26 at 3.

220. Morton, *supra* note 2, at 2.

221. *See, e.g., Missoula Legacy Business Program*, *supra* note 12.

should not somehow be stretched to cover that. Instead, localities should implement legacy business programs designed to protect legacy businesses in a manner that is both effective and sustainable.

This Note focused on Buenos Aires's Bares Notables, the UK's ACV program, and San Francisco's Legacy Business Program. But really what makes this topic pressing is that an increasing number of localities in the U.S., from Missoula to Los Angeles, are implementing these programs, and even more are considering doing so, including New York City and Seattle. As highlighted in Part IV, there are legal and public policy issues that those localities should take into consideration when implementing their legacy business program. And Part V seeks to provide guidance for best practices on how to implement effective, sustainable programs depending on a locality's needs and capabilities. Overall, legacy business programs have the potential to benefit localities in the U.S. and their constituency. More localities in the U.S. should take the plunge and create a legacy business program for themselves.