

Technical assistance in historic preservation planning, related planning/land use topics, and preservation strategies for Federal agencies, Indian tribes, States, and local governments

LAW AND THE HISTORIC PRESERVATION COMMISSION: WHAT EVERY MEMBER NEEDS TO KNOW

James K. Reap and Melvin B. Hill, Jr.

A VIBRANT REPRESENTATIVE DEMOCRACY DEPENDS UPON THE active involvement of its citizens in a variety of ways, from simply voting to running for elective office. One important type of governmental involvement is that of service on boards and commissions established by state or local law to provide input and direction regarding state or local public policy. The historic preservation board or commission is one of these important service opportunities for citizens at the local level. Those appointed to serve on preservation commissions want and need to know what is expected of them and what legal issues they may encounter. Serving can be a rewarding experience and commissioners should not fear the law—or lawyers!

No commission member wants to have his or her actions challenged. But it happens. When it comes to protecting what they perceive to be their “property rights,” Americans can be very territorial! A 1998 survey by the National Alliance of Preservation Commissions, for example, found that 15% of responding commissions had been sued. However, many of those challenges were unsuccessful.

The primary purpose of this primer is to provide readers with an introduction to basic legal concepts and issues they may encounter as preservation commissioners. The authors hope this brief publication will help answer basic questions and point readers to other useful sources. Our overall goal is to demystify the law governing historic preservation and give commissioners the information they need to make sound and legally defensible decisions.



BASIC CONCEPTS

Commission Authority

The first issue facing any local historic preservation commission is whether it has the legal authority to act. If it doesn't, its actions will be determined to be null and void when challenged, and every commission member will have wasted his or her time. So where does a historic preservation commission get its authority to make decisions affecting the property of other individuals and organizations in the community?

The Tenth Amendment of the United States Constitution provides that, "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States respectively, or to the people." One of those powers **not** held by the Federal government, but reserved to the states is known as the *police power*. Based on the Latin maxim *sic utere tuo ut alienum non laedas* (so use your own property as not to injure another's), the concept is of Anglo-Saxon origin and was adopted by the American colonies from British common law. Basically, it can be described as the power of a government to provide for the public health, safety, morals, and general welfare of its citizens. As Justice Douglas stated in the famous Supreme Court decision of *Berman v. Parker*, 348 U.S. 26 (1954), in probably

the most eloquent defense of the police power ever written:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹

States exercise the police power by passing laws and adopting regulations affecting such matters as public health, environmental protection, building safety, and zoning. Historic preservation, too, falls within the scope of the police power.

Every state has enacted some form of historic preservation legislation, and many state courts have upheld the regulation of individual properties and areas having special historic, architectural, or cultural significance.

The U.S. Supreme Court explicitly recognized preservation as a legitimate government purpose within the scope of the police power in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). In that case the Court upheld the constitutionality of

What Does That Mean?

In reading this publication or cases cited here, you may encounter unfamiliar legal terminology. Legal dictionaries are available in your public library and there are several searchable Internet sources for legal definitions. Two sites that are simple to use are:

Lawyers.com — based on Merriam-Webster's Dictionary of Law 2001: www.lawyers.com/legal_topics/glossary/index.php

Law.com — with three different search methods for finding words: <http://dictionary.law.com>

References to cases and statutes mentioned in the text are in the technical language of legal citation. Professor Peter W. Martin of Cornell University has produced a useful online guide to help you decipher these strange "hieroglyphics:" www.law.cornell.edu/citation/

the New York City landmarks ordinance and the city's denial of the railroad's request to build a 55-story office tower above historic Grand Central Terminal. The Court's majority observed that it is "not in dispute" that "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."²

But how does local government get into the business of exercising the police power? It comes as a surprise to many people to learn that the United States Constitution makes no mention of cities, counties, school districts, or any other forms of local government. Rather, the form, number, powers, and other matters pertaining to local government structure and administration are left up the individual states themselves. As so-called "creatures" of the states, local governments owe their very existence to the state governments of which they are a part (whether they like it or not!).

In interpreting the powers that have been given to local governments by the states, the courts initially adopted a very restrictive view. This bias against local government power was essentially codified in an 1868 Iowa case, *Merriam v. Moody's*

Executors, 25 Iowa 163 (1868). Written by Judge John Dillon, a recognized expert on local government law, his pronouncement came to be known as *Dillon's Rule*:

[A] municipal corporation [i.e., city] possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.³

Although Dillon's Rule is couched in terms of "municipal corporations," the concept—and bias—has applied historically to counties and other forms of local governments (townships, boroughs, etc.) as well.

This restrictive view toward local government power was the prevailing sentiment in most state legislatures for generations, but, as the needs of urban residents grew more extensive and complex over time, the idea

took hold and grew that matters of "local concern" could and should be delegated down to the local governments themselves.

The course of this path differed from state to state, but the overall trend throughout the twentieth century was toward more local control. In many cases, this new approach involved changes in the state's constitution. Some states adopted very broad and generous provisions delegating significant powers to local governments over revenue-raising, form of government, and other key factors, while others took modest or even confused steps.

Many state legislatures were willing to entertain seriously the notion of a true partnership with local governments, one in which the powers and responsibilities of governance were shared in a significant and meaningful way. Others continued to apply a strict standard of limited local government powers.

In terms of historic preservation commissions, what this legal backdrop means is that not only local law but also state law must be consulted to determine the extent to which commissions have been empowered to regulate historic property. If there is doubt about the existence of this power, the courts may rule against the commission. Commission members should

be certain of the scope of their authority and that all systems are “go” for a vigorous pursuit of historic preservation objectives. As commissions move forward in designating and regulating historic properties and districts they should be certain their actions are consistent with state law. The local government’s legal office should be able to provide this documentation; commission members are not expected to be legal researchers!

Individual Rights

While government clearly has the constitutional authority to protect historic resources as part of its inherent police power, both law and tradition circumscribe that power. The motto of the State of New Hampshire provides an apt starting point for a discussion of the limitations of historic preservation law—“Live Free or Die!” This statement reflects the attitude most Americans share. We begin with a presumption of freedom on the part of the American citizen.

This foundational premise is bolstered by several provisions of the Bill of Rights of the United States Constitution, as well as by similar provisions in the respective state constitutions.

- **The First Amendment** of the United States Constitution proclaims,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances. This most esteemed provision of the Bill of Rights drops a protective cloak around United States citizens and keeps the federal government at bay concerning these most basic human rights.

- **The Fifth Amendment** of the Constitution provides that *No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* This provision protects the citizens of the United States from encroachment by the federal government upon their property, and ensures them that the property will be paid for if the encroachment goes beyond a certain point. If the encroachment goes too far, it becomes an unconstitutional taking.
- **The Fourteenth Amendment** of the Constitution provides, that

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws. This provision assures Americans that their rights are protected against state encroachment as well as that of the federal government, so that nothing the state does can deprive them of the right to use their property, nor may it treat them in an arbitrary or capricious manner. And this protection extends to local government action as well, since all local governments are creations of the states.

While these rights guaranteed in the United States Constitution and in the respective state constitutions must be honored, the government may establish reasonable laws, rules, and regulations to promote the *common weal* or general welfare.

Litigation involving preservation commissions often involves situations where the governmental interest in promoting the general welfare clashes with the desires of the individual citizens. The good news for preservationists is that the citizens espousing private property rights do not often win these legal battles, nor should they. In the United States, property rights

have never been unlimited. If we want to live in a society that respects both the built and the natural environments that were passed down to us, then there must be reasonable restrictions on private property. The stewardship of the cultural and historic, as well as the natural, resources of the planet demand as much.

So what can historic preservation commissions do to minimize their chances of being brought into court, without relinquishing their rightful role as the guardian of historic and prehistoric resources? In order to better answer this question, let us look at the kinds of problems that have arisen in the past, and see how they have been resolved. We will begin our examination of individual rights with three key phrases found in the Fifth and Fourteenth Amendments to the Constitution, quoted above: *takings*, *due process*, and *equal protection*.

Takings

...nor shall private property be taken for public use without just compensation.

This sounds straightforward enough, but in the context of private land use control and historic preservation, how does a taking occur?

There are two primary ways—*physical takings* and *regulatory takings*.

The first way is the most obvious—the government *condemns* the land and buys it outright. This is known as the power of *eminent domain*, and it is part of state government's inherent power as a sovereign entity. When a road is widened or a new government building is needed, the government pays the owner(s) of the land to be acquired for this improvement an amount equal to its value, termed *just compensation*. Usually this compensation represents *fair market value*, or what a willing seller and willing buyer agree is a fair price. What constitutes just compensation is not always clear, however, so the resolution of this issue sometimes leads to litigation by the parties.

For preservationists, eminent domain is a two-edged sword. Local governments have used it to protect historic properties by acquiring them for museums or other public functions, or, as a last resort, by preventing their demolition through the action or inaction of their owners. On the other hand, the power also has been used to acquire land for redevelopment, even if the area contained structures that were still usable. In many of these situations, land acquired

from one private owner by eminent domain was transferred to another private owner for future economic development. This raised the question whether the resulting development was a *public use*, as required by the Fifth Amendment.

A challenge from citizens of New London, Connecticut who lost their properties in a redevelopment project reached the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). The court broadly interpreted public use as *public purpose* and confirmed its longstanding policy of deferring to the judgment of legislative bodies as to what public needs justify using the takings power. It held that the requirements of the Constitution could be met by the general benefits a community would receive from increased jobs and other economic opportunities created by redevelopment.

This decision outraged many people who felt that state and local governments should not use the power of eminent domain in this way. As a result, many state legislatures have amended their general laws or constitutions to restrict eminent domain in situations involving transfer of property from one private owner to another or for economic development purposes. In many cases local

governments retain the power to acquire *blighted* properties, though the new legislation has tightened the definition of blight. As a result of these developments, preservation commissions should review their state legislation and consult with legal counsel when potential eminent domain situations arise.

The second type of taking is less obvious. In fact, it was not until the early twentieth century that this type was even recognized legally. This type is known as a *regulatory taking* or *inverse condemnation*. Courts have found this kind of taking in situations where a general governmental regulation has the unintended effect of denying the owner a reasonable economic use of a property. The effect on the owner, then, is much the same as in the first kind of taking, except the owner retains physical possession of the property. In this situation, one of two things happens—either the regulation is nullified, or the property owner is compensated for his or her loss.

One of the first and most important regulatory takings cases is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In this seminal case, the United States Supreme Court overturned a Pennsylvania law that had prohibited the mining of coal in cities to pre-

vent the subsidence of nearby structures caused by a myriad of honeycomb mining shafts beneath populated areas. This law offered no compensation to the mining companies who had retained the mining rights at the time they sold the surface, and as a result of the new law, could no longer mine all the coal. The mining companies sued, alleging a taking of their sub-surface property without compensation in violation of the takings clause of the Fifth Amendment of the U.S. Constitution.

In *Pennsylvania Coal*, Justice Oliver Wendell Holmes made the following oft-quoted pronouncement

*The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*⁴

Nevertheless, the Court also recognized that, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such

change in the general law.”⁵ Government regulation can be constitutional even if it reduces property value.

So when does regulation go too far and become a taking? The U.S. Supreme Court has indicated that decisions on takings should be made on a case-by-case basis, and established criteria for lower courts to use in making this determination. These criteria provide useful guidance to local governments and commissions.

There has been no more important case for modern takings jurisprudence—particularly for preservation commissions—than the *Penn Central* case, cited above. The decision set out a *three-part inquiry* for analyzing a broad range of regulatory takings claims.⁶ Under this inquiry, courts must examine:

- the economic impact of the regulation on the property owner,
- the effect of the regulation on the owner’s distinct investment-backed expectations, and
- the character of the governmental action.

The opinion also established a rule requiring that reviewing courts look at the effect on the *entire* property interest (*parcel as a whole*), not just the part affected by the regulation

in question.⁷ Owners were not entitled, according to the court, to the so-called *highest and best* use, but rather to a reasonable and beneficial use of the property. The idea that a property owner could “establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”⁸

Fifteen years after *Penn Central*, the Supreme Court gave a partial answer to the question of when does a regulation go too far, declaring in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that a categorical taking occurs if *all* economically beneficial use of property is denied.⁹ If some viable use remains, then the three-part inquiry of *Penn Central* must be applied. Although a number of years have elapsed since the decision, as recently as 2001, Justice O’Connor of the U.S. Supreme Court referred to *Penn Central* as the “polestar” for analyzing takings claims in a land use case, *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring).¹⁰

Many state courts have also addressed the takings issue. These decisions are binding on the respective states, and perhaps are persuasive on court

decisions in some states, but may have no effect on cases in other states. Two relatively recent cases are included in the Appendix. On the legislative front, in 2004, Oregon voters approved a regulatory takings initiative known as Measure 37 (ORS 197.352). This legislation allows landowners to claim compensation for any decrease in property value resulting from land use, environmental, or other government regulations. Local governments must either pay the property owners for this loss or waive the regulation.

Property rights organizations seized the opportunity presented by Proposition 37 to introduce legislation or ballot initiatives in a number of other states and capitalized on citizen anger over the *Kelo* decision to add takings measures to unrelated eminent domain legislation. Although only one takings initiative modeled on Proposition 37 was successful in the 2006 elections, proponents continue to advocate legislative or constitutional changes.

This development could effectively undermine historic preservation ordinances and other land use regulations throughout the country that have been upheld in court challenges such as *Mahon* and *Penn Central*. Preservation commissions should review the situation in their state with

counsel and closely monitor proposed regulatory takings legislation or initiatives that might invalidate protection for historic resources.

Due Process and Equal Protection

...nor shall any state deprive any person of life, liberty, or property, without due process of law.

If constitutional protections had to be prioritized, due process and equal protection might well be at the top. Nothing in our system of government is more important in terms of protecting the citizens from arbitrary and capricious government behavior. Supreme Court Justice Felix Frankfurter captured this reverence for fundamental fairness in his opinion in *McNabb v. United States*, 318 U.S. 332 (1943): “The history of liberty has largely been the history of observance of procedural safeguards.”¹¹

Due process has two distinct dimensions—*procedural* and *substantive*. These dual doctrines often appear together and are related to one another.

Procedural due process relates to the manner in which actions are taken, and is intended to protect citizens against unfair governmental action. If a property interest is involved,

then that interest cannot be adversely affected without proper notice and an opportunity to be heard by a competent tribunal. Proper procedures must be followed. These procedures are set by law and are usually very specific. For example, notice may require publication once per week for three consecutive weeks in the official organ of the county, etc.

What this means in practical terms is that commissioners should know the procedural requirements in their enabling legislation, local ordinance, bylaws, rules, and regulations and follow those procedures to the letter. It does not mean that the commission must reach a result based on the information provided by an applicant. One court put it this way: “[T]he procedural requirements we have identified serve not to protect the public from unwise decisions but from uninformed decisions. ... Although the board was not bound to listen to plaintiff’s concerns, it was bound to hear them before making its decision.”¹² If the procedures are not working, don’t ignore them; change them or request a change from your legislative body. Some tips for putting due process to work are found in the accompanying box, but ask your local government legal department for further guidance on proper procedure.

Putting Due Process Principles to Work

If your commission wants to avoid running afoul of due process and equal protections problems, you should ask whether every action the commission takes passes legal muster—is it orderly, fundamentally fair, and impartial?

Adequate Notice

- Have you followed the notice requirements of state law (including sunshine laws) and the local ordinance in all details, including specified methods and deadlines?
- Have you given appropriate notice to affected applicants, property owners, neighbors, and the general public?

Opportunity to Be Heard

- Have you given all parties a reasonable opportunity to present their arguments and evidence?
- Are time restrictions reasonable and equitable?

Impartiality

- Are all commissioners free from conflict of interest and bias on every issue in which they participate—both financial and personal? If you are not sure, talk to your local government attorney or ethics officer for guidance.
- Have you avoided ex parte contacts—having discussions with interested parties outside the official process and the public eye—and revealed any inadvertent contacts for the record?

Informed Decision Making

- Are you prepared for each decision on which you vote, having read the application, visited the site, and been present for all of the proceedings?
- Do you understand all the issues; have you listened carefully and asked questions?
- Have you treated all similarly situated properties or projects similarly or given reasons for any different treatment?
- Is your decision supported by reasons and findings of fact and based on the criteria in your ordinance and any applicable design guidelines?

Prompt Decision Making

- Have you made decisions within the time limits allowed by law and within a reasonable time given the circumstances of the case?

Preparing for Challenges

- Have you prepared an adequate record—written, audio, video—of each case and the proceedings that can support your decisions if challenged?
- Does the record document and make clear that you have passed all of the “smell tests” above?

Substantive due process is not as clear-cut as procedural due process in that the substantive aspect of due process relates to the basic fairness or *equity* of a decision. If the court believes that some fundamental principle of fairness has been violated, then it can take action to correct it. Of course, fairness, like beauty, is very much in the eye of the beholder, so courts are less likely to overturn a decision on these grounds than they are on procedural due process grounds.

For example, an Illinois court overturned a zoning decision of a local government board because the board failed to provide for cross-examination—a procedural defect. Plaintiffs had also challenged the action on substantive due process grounds. On those grounds, the court refused to substitute its judgment for that of the board in an area where the board had been given discretion by the legislature. The court put it this way: “If the board’s decision is unwise but does not violate substantive due process [that is, basic fairness], the plaintiff’s remedy lies in the political arena; simply put, if unhappy, the plaintiffs may campaign to throw the rascals out.”¹³

Equal protection under the Fourteenth Amendment states:

...nor shall any state deny to any person within its

jurisdiction equal protection of the laws.

The constitutional protection provided by the equal protection clause of both the Fifth and Fourteenth Amendments is a fundamental aspect of due process; that is why the two terms appear together so often. Equal protection in practice means freedom from improperly differential treatment and from arbitrary and capricious treatment by the government. In other words, everyone is entitled to fair treatment under the law; treatment is not based on bias, prejudice, or cronyism. Similar situations should produce similar outcomes, no matter who the parties might be.

What equal protection does not mean is that the government can never treat any person or property differently than anyone else. The government does have the right to make classifications of people, and it does so all the time. People who make higher incomes pay a higher percentage of their salaries in taxes, for example. People who own property in residential areas are not permitted to erect a gas station on their lot if a zoning ordinance prohibiting this use is in effect. These are perfectly valid distinctions.

What the government must be able to show is that any classification that it makes has a rational basis. If it can show a ratio-

nal basis, then the classification will be upheld. In the case of classifications which the courts consider suspect (such as race or national origin), the government will have to meet a higher standard of proof. In those types of cases, the government will have to show that the classification was necessary to promote a *compelling* state interest. This is a high standard to meet.

Because every situation is different, and because every landowner thinks that his or her property or case is special, the courts are full of equal protection challenges. Several cases relating to historic preservation issues are discussed in the Appendix. One general principle to keep in mind is to treat similarly situated properties similarly. If you have a legitimate reason for treating them differently, make sure your basis for doing so is clearly entered into the record.

Religious Freedom

During the past two decades there has been a vigorous debate on the role of religion in American society and an increasing number of challenges by churches and other religious organizations to laws and regulations. Land-use regulations affecting religious institutions have come under particular scrutiny. Prior to this time, the

relatively few cases involving religious organizations that reached the courts were often decided as taking claims under the Fifth and Fourteenth Amendments rather than as religious freedom claims. Instead of applying an economic return test used for commercial properties, the courts examined whether the regulations either “physically or financially prevented or seriously interfered with” carrying out an organization’s charitable or religious purpose. Cases taking this approach include *Trustees of Sailors’ Snug Harbor v. Platt*, 288 N.Y.S.2d 314 (App. Div. 1968) and *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980).

More recently, challenges and decisions have focused squarely on First Amendment protections. The First Amendment’s *establishment clause* requires that government be neutral toward religion. Laws must have a secular purpose. They must not advance or inhibit religion, give preference to one religion over another, or foster “an excessive entanglement” with religion.¹⁴ The *free exercise clause*, on the other hand, prohibits government from interfering with the free exercise of religion or coercing individuals into violating their religion.

In applying these guarantees, Federal courts have held that

government may not “substantially burden” the free exercise of religion unless there is a “compelling governmental interest” and the government employs the “least restrictive means” of furthering that interest.

In 1990, the U.S. Supreme Court recognized an exception to that rule in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). The Court held that “neutral laws of general applicability” do not require a showing of compelling state interest, even though they might substantially burden the exercise of religion. Preservation ordinances may generally be considered as neutral laws of general applicability where they seek to preserve all historic properties without regard their secular or religious nature or the owner’s religious orientation.

Religious groups reacted strongly against the “neutral law” exception, and Congress sought to nullify it by passing the Religious Freedom Restoration Act (RFRA) in 1993, 42 U.S.C. §2000bb, *et. seq.*

Four years later, the Supreme Court struck down RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a case involving the application of a local preservation ordinance to a Roman Catholic church in Texas. The church, which was located in a local historic district, had

applied for a permit to enlarge its building. When the permit was denied, the church brought suit under RFRA. The Court held that there was no showing of a widespread pattern of religious discrimination in the country that would justify such a sweeping approach by Congress and that the act contradicted the principles necessary to maintain separation of powers and the federal-state balance. Incidentally, the church ended up using a “compromise” plan that was initially negotiated with preservationists before the years of court battles.

In the decade after *Boerne*, at least 13 states passed their own religious protection laws: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas.

The U.S. Supreme Court has yet to rule directly on these state laws. These “little RFRA’s” are based on the widely recognized principle that states may afford a higher degree of protection of individual rights under their own constitutions than that guaranteed by the U.S. Constitution. Therefore, states are free to apply the higher “compelling state interest” test when deciding religious freedom cases within their own jurisdiction.

The Washington State Supreme Court took this

approach in *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (1992), based on interpretation of the state constitution, and not a “little RFRA.” There, the landmark designation of a church building in Seattle was held a violation of both federal and state constitutional free exercise protections. On appeal, the U.S. Supreme Court sent the decision back to the Washington Court to reconsider in light of *Smith*. In its subsequent opinion, the Washington Court based its decision in favor of the church solely on the “greater protection for individual rights” contained in the Washington Constitution.

Congress also responded to the *Boerne* decision by enacting in 2000 the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc, *et seq.* Crafted to overcome the constitutional problems of the earlier law, RLUIPA focused narrowly on laws regulating land use and institutionalized persons, which were laws alleged to pose specific threats to religious practices. RLUIPA provides that a land use regulation may not substantially burden the religious exercise of a person or institution unless the government can demonstrate a compelling interest for doing so, and the regulation is the least restrictive means of furthering

that governmental interest.

Whether the new law passes Constitutional muster has yet to be decided by the U.S. Supreme Court, but a number of challenges are working their way up through the federal courts. Regarding institutionalized persons, RLUIPA, section 3 has been held valid by a unanimous court in *Cutter v. Wilkinson* 544 U.S. 709 (2005).¹⁵

While most cases to reach the courts focus on discriminatory zoning and land use issues other than historic preservation, many religious organizations have used RLUIPA’s existence to argue for exemptions before preservation commissions and local governing bodies. To avoid intimidation and misunderstanding, it is important for commissions to know what the law does and does not do. Some clarity of purpose may be found in a joint statement issued at the time of the law’s passage by the sponsors in the United States Senate. The main points of the statement are included in the Appendix.

A key to proving a RLUIPA violation is a showing that the preservation ordinance is considered a “substantial burden on religious exercise”. This may be difficult to prove. The U. S. Court of Appeals in *Rector of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert denied, 499 U.S. 905

(1991), has held that financial burdens alone do not rise to a constitutionally significant level. In that case the church had been denied a permit to demolish its historic community house in order to build a new office tower to generate revenue for its charitable and religious activities.

The Seventh Circuit Court of Appeals in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a case involving Chicago’s zoning ordinance, has also held that, “in the context of RLUIPA’s broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.” The court went on to say that to hold otherwise would render the word “substantial” meaningless.

Preservation ordinances are designed to protect the appearance of designated religious buildings and surrounding historic districts, and such protections would generally not render impractical their use for religious exercise.

Once a substantial burden is established, however, commis-

sions may find it difficult to argue that historic preservation is a *compelling* government interest. While *Penn Central* held preservation to be a legitimate government interest, no court has yet found it to be compelling. In fact, the Washington State Supreme Court held specifically in *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992), that the city's interest in preserving historic structures was not compelling.

This area of the law is developing rapidly and commissions facing religious freedom challenges should seek legal advice as soon as the issue arises. It is important, however, to remember that churches are not exempt from local land-use laws, as many argue. They must follow the same certificate of appropriateness and variance processes as secular property owners.

Freedom of Speech

While few cases address freedom of speech directly in a preservation context, there is a substantial body of state and federal law on sign regulation. Many local preservation ordinances regulate signs on landmark properties and within historic districts.

The seminal case of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), set down the parameters for local

government control of signs and billboards. First, the U.S. Supreme Court recognized aesthetic reasons alone as sufficient support for this exercise of the police power. Secondly, the opinion would permit reasonable "time, place, and manner" restrictions such as the regulation of sign color, size, shape, height, number, placement, and lighting as long as the ordinance does not control content. The court also agreed that off-premises signs (such as billboards) could be banned entirely.

In the case of signs, the law distinguishes between *commercial speech* (as in advertisements for goods and services) and *non-commercial speech* (such as political or religious signs). Non-commercial speech is generally accorded a higher degree of protection. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), contains a four-part test on constitutionality of controls on advertising. A similar test for non-commercial signs can be found in *United States v. O'Brien*, 391 U.S. 367 (1968).

In the case of *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the U.S. Supreme Court struck down a city ban on most non-commercial signs enacted in response to a resident's yard sign reading "Say No to War in the Persian Gulf, Call Congress Now."

Commissions should be careful to establish how the regulation of signs directly advances preservation goals and go no further than necessary. Communities should never try to prohibit whole categories of speech such as controversial political statements.

In three Eleventh Circuit cases, the Federal Appeals Court withstood challenges to restrictions on expression in historic districts. Ordinances restricting the use of tables to sell message-bearing t-shirts (*One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999)), limiting restaurant advertising by "off premises canvassers" (*Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996)), and prohibiting street performances in an historic district (*Horton v. City of St. Augustine*, 272 F.3d 1318 (11th Cir. 2001)) were upheld as appropriate "time, place, and manner" restrictions on speech that did not discriminate based on content, and were considered narrowly-drawn means of addressing congestion and unruly conduct in historic districts.

Like signs, a proliferation of newsboxes can negatively impact the appearance of historic districts. Since these boxes are the means of distributing speech, they enjoy the same

First Amendment protection as signs; nevertheless they are subject to regulation. Guidelines for their appearance and location would be appropriate.

The First Circuit Court of Appeals even approved an effective ban on all sidewalk newsboxes in Boston's Beacon Hill historic district. The opinion in *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F. 3d 175 (1st Cir. 1996), found the regulation was content neutral, the aesthetic concern was a significant government interest, and alternative means existed in the district for distributing newspapers; therefore, there was no violation of the freedom of speech.

ISSUES THAT CAN TAKE A COMMISSION TO COURT

Enforcement and Liability

While Americans believe strongly in the due process and equal protection guarantees of the 5th and 14th Amendments, they also believe strongly in justice. And justice sometimes calls for sanctions and punishment for actions that violate the law. The following case discusses one of these kinds of situations.

City of Toledo v. Finn, No. L-92-168, 1993 WL 18809 (Ohio Ct. App. Jan. 29, 1993), demonstrates the scope of historic preservation commissions' authority to bring about criminal sanctions that punish the noncompliance

of those under their jurisdiction. In this case, a property owner of a building located within a historic district sought a certificate of appropriateness for planned changes to a building. The local historic commission objected to the owner's plans to enclose five windows and ordered him to keep the windows' original configuration. The property owner disregarded the commission's instructions and enclosed the entire wall where the five windows had been positioned.

The city issued three stop work orders, which the owner also disregarded. The property owner appealed his misdemeanor conviction for failure to comply with the stop work orders, claiming alternatively no viola-

Seeking Legal Advice

The watchwords for members of historic preservation commissions when dealing with legal issues should be vigilance, caution, and education. It is easy to get into trouble in this field, especially for the layperson. However, don't let yourself be intimidated by bogus claims of takings, RLUIPA violations, etc. Do not hesitate to ask your local government attorney or some other person with legal knowledge and understanding to explain or clarify a point. If you think there's going to be trouble at a preservation commission meeting, definitely ask your attorney to attend. It could save time, money, and reputation for all concerned. Other possible sources of help and advice include the following:

- National Alliance of Preservation Commissions: www.uga.edu/napc
- Law Department of the National Trust for Historic Preservation: www.nationaltrust.org/law/index.html
- Your state's Certified Local Government (CLG) contact http://grants.cr.nps.gov/CLGs/CLG_Search.cfm
- National Park Service Certified Local Government Program: www.nps.gov/history/hps/clg/index.htm

tion of the orders, no intention to violate the orders, and most significantly, that the stop work orders were unconstitutional and unreasonable exercises of the city's police power.

The court affirmed the validity of aesthetic regulation as an exercise of police power, including historic district regulations such as certificates of appropriateness. The commission, as an entity of the city government, had the right to enjoin the owner from altering the original window configuration of his building as an application of the city's police power. The owner's failure to comply with the commission's orders regarding his plans was "illegal" and/or "contrary to the public welfare" and properly countered with a stop work order.¹⁶

Demolition by Neglect

Demolition by neglect describes a situation in which an owner intentionally allows a property to deteriorate, sometimes beyond the point of repair. In some cases, the owner passively defers maintenance beyond a reasonable point or abandons the property. More often it is an active strategy to redevelop the property in the face of preservation and zoning laws that would preserve historic character and/or current use. Communities need an affirmative maintenance

provision in their local code to prevent owners from neglecting their properties and then arguing that restoration or repair is an economic hardship.

Also to be effective, preservation commissions must coordinate with their code inspection and enforcement office. There can be conflict when a code enforcement officer orders a designated building be demolished as a fire or safety hazard without coordinating with the preservation commission or staff. Good working relationships with other local government officials and resolution of ordinance conflicts are keys to success.

Courts generally have been supportive of ordinances prohibiting demolition by neglect. Several cases are described in more detail in the Appendix.

Economic Hardship

It is important for communities to address economic hardship for several reasons.

First, it helps make preservation ordinances more acceptable to the community by assuring property owners of relief where strict application of the ordinance or guidelines would have an unusually harsh result.

Second, it allows communities to develop and implement a range of approaches to relieve the burden on all property own-

ers, including tax relief, loans, grants, public acquisition, or zoning variances.

Third, hardship provisions can head off litigation by providing an administrative process for resolving differences that is less formal and costly than going to court, and communities can strengthen their positions if they do go to court.

Courts generally defer to preservation commissions where there is a reasonable basis in the record for their decision. Further, by lightening the economic burden on the property owner, the commission can help defeat a takings argument. Several cases on economic hardship are discussed in the Appendix.

Open Meetings and Open Records

Most states have strict requirements regarding open meetings and open records, including the requirements for notice of meetings. These must be followed closely and carefully, or the commission runs the risk of having its decisions nullified later. In some states, courts can award court costs and attorney fees to those improperly denied access.

The open meetings laws, often referred to as *sunshine laws*, typically provide a definition of what constitutes a public meeting, specify the actions

TIPS FROM THE EXPERTS # 1
Effectively Addressing DEMOLITION BY NEGLECT
in Local Ordinances and Procedures

- Require compliance with all codes, laws, and regulations regarding the maintenance of property.
- Require that all structures be preserved from decay and deterioration and be free from structural defects.
- Identify specific problems that will constitute demolition by neglect, such as
 - Deteriorated or inadequate foundations, walls, floors, ceilings, rafters and other supports;
 - Ineffective waterproofing of roofs, walls, and foundation including deteriorated paint, brick, mortar, and stucco, along with broken doors and windows;
 - Holes and other signs of rot and decay; the deterioration of any feature so as to create a hazardous condition;
 - Lack of maintenance of the surrounding environment (such as accessory structures, fences walls, sidewalks, and other landscape features).
- Specify how the provisions of the ordinance will be enforced. Identify how stop work orders and citations are to be made, the time frame for problem correction, and an appeals procedure.
- Mandate coordination between the preservation commission and staff, and the local government's inspection and code enforcement office. A good working relationship with code officials is critical to ensuring effective problem identification and correction.
- Specify the penalties for failure to comply with citations. While fines and equitable remedies are typical, an additional and more effective alternative (if allowed by state law) may be to authorize the government to make the repairs directly and charge the owner by putting a lien on the property.
- Authorize acquisition of the property by local government, by eminent domain if necessary.
- Provide economic incentives to encourage the maintenance and rehabilitation of historic properties. Encourage volunteer programs to assist lower income residents.
- Specify that demolition by neglect will bar a property owner from raising an economic hardship claim in a certificate of appropriateness process. Only circumstances beyond an owner's control should entitle him or her to economic relief.

For a more detailed analysis, see Becker 1999 in the Sources of Information.

TIPS FROM THE EXPERTS # 2

Effectively Addressing ECONOMIC HARDSHIP in Local Ordinances and Procedures

- Do not consider economic hardship arguments during the designation process. Economic impact is only speculative until a property owner makes a specific proposal. Further, it clouds the issue of significance, the primary concern for designation.
- In considering economic hardship, it is crucial that the preservation commission focus on the property and not the particular economic circumstances of the owner. While the impact on a “poor widow” may appear unreasonable, the inquiry should be whether the restrictions prevent the owner from putting the property to a reasonable economic use or realizing a reasonable profit.
- Put the burden of proof on the property owner, not the commission.
- Evidence of cost or expenditures alone, is not enough. The commission should require information that will assist it to determine whether application of the ordinance will deny reasonable use of the property or prevent reasonable economic return. The evidence should address the property “as is” and if rehabilitated (which may mean just bringing it up to code). Some other factors to consider include: purchase price, assessed value and taxes, revenue, vacancy rates, operating expenses, financing, current level of return, efforts to find alternative use of the property, recent efforts to rent or sell the property, availability of economic incentives or special financing (such as tax benefits, low-interest loans, grants, or transferable development rights).
- Additional consideration may be appropriate in assessing the impact on non-profit organizations such as the ability to carry out their charitable or religious purposes (although a non-profit is not entitled to relief simply because it could otherwise earn more money).
- Determine who caused the hardship. If the owner has neglected the building, paid too much for the property, or is just gambling on getting a permit in spite of knowing the ordinance provisions, he may have created his own hardship. Government isn’t required to bail an owner out of a bad business decision or speculative investment.
- Commissions should consider bringing in their own expert witnesses where necessary. If the matter goes to court, the decision will be based on evidence in the record. Local government housing, engineering, and building inspection staff may provide useful testimony.

For a more detailed analysis of economic hardship provisions see Julia Miller 1996 and 1999 in the Sources of Information.

that can be taken and who may attend, address required public notice—adopting a schedule of regular meetings, giving notice of special and emergency meetings, and identifying very limited instances where meetings can be closed, such as for discussion of personnel actions or property acquisition. In addition to invalidation of commission action, Georgia law, for example, provides that “any person knowingly and willfully conducting or participating in a meeting in violation of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$500.00.”¹⁷

Open records laws require governments to provide prompt access to public records when requested by a citizen. This would include the materials submitted as part of a commission’s decision-making process. It is important that commissions create accurate records and maintain them in an accessible location.

All commissioners should review these open meetings/open records laws and refer any questions to their attorney. The chairman in particular needs to understand clearly the do’s and don’ts of these laws. Commissions may have somewhat different rules when archeological sites are being consid-

ered, and may need to maintain a certain level of confidentiality in order to reduce the possibility that the sites may be looted or vandalized.

Off-the-Record Communications

Another important aspect of the need to conduct business in public relates to contacts and conversations about a case that are *off-the-record*, or outside of the normal proceedings. These are known as *ex parte communications*. The process of issuing a certificate of appropriateness, for example, is considered in many jurisdictions as a *quasi-judicial* proceeding. The commission is acting as judge and jury by applying the law to the facts in a particular case. The same analogy applies to a local governing body hearing appeals from a preservation commission decision.

Just as it would be improper for an interested party to communicate with the judge or a juror outside official channels while a case is going on, a similar communication with a preservation commissioner is also improper. When a commission member receives a telephone call or is approached in church or at the grocery store by someone who wants to discuss a pending issue before the commission, warning flags should

go up. These contacts can affect individuals’ rights to due process and equal protection and could result in the invalidation of commission action. While such a communication may cause a serious problem, it is not always fatal to a commission decision. One thing a commissioner who has such a contact can do is to reveal the content of the conversation in the course of a public hearing on the matter. In that case, the information becomes a part of the record and other interested parties can respond to or rebut the information.

Regulating Non-historic Properties and Vacant Land in Historic Districts

In order to protect the character of historic districts, it is important that preservation commissions have the power to regulate non-historic properties and undeveloped land within the districts. Courts have consistently ruled that these types of properties are not exempt from control.

In *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979), for example, the North Carolina Supreme Court rejected such a claim, stating that “preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district.”¹⁸ The court also noted

that, as opposed to banning new structures, the ordinance simply required the plaintiff “to construct them in a manner that will not result in a structure incongruous with the historic aspects of the Historic District.”¹⁹

Another relevant case is *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Commission*, 590 A.2d 1080 (Md. Ct. Spec. App. 1991), which upheld restrictions on building materials in new subdivision near an historic area because of the public interest in protecting the historic district.

Protection of Properties Pending Designation and Anticipatory Demolition

In order to keep the bulldozers at bay while a preservation designation is under consideration, a number of communities establish a temporary time-out called a moratorium while the community decides whether to provide permanent protection. Courts have generally been supportive of this approach.

In a case involving the Swiss Avenue Historic District in Dallas (*City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974)), the court declared that, “it would be inconsistent to allow a city...the power to make zoning regulations, and then deny it the power

to keep those impending regulations from being destroyed by an individual or group seeking to circumvent the ultimate result of the rezoning.”²⁰ However, several courts, including *Southern National Bank of Houston v. City of Austin*, 582 S.W.2d 229 (Tex. Civ. App. 1979) and *Weinberg v. Barry*, 604 F.Supp. 390 (D.D.C. 1985), have noted that moratoria should have reasonable time limits.

In 2002, the U.S. Supreme Court upheld the constitutionality of a 32-month moratorium on development of property in the Lake Tahoe Basin pending the completion of a comprehensive land use plan in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Rejecting a claim that any total moratorium on development was a temporary taking, the court held that restrictions on development must be considered on a case-by-case basis under the test set out in the Penn Central case. To hold otherwise, the court said, “would render routine government processes prohibitively expensive or encourage hasty decision making.”²¹

An alternative to a total development ban pending designation is an approach to interim protection employed by some cities, such as Chicago in its Landmark Ordinance §21-67.

After a preliminary determination of a property’s eligibility, the owner must follow the same procedure for development as if the property were already landmarked until the city council acts on designation. Whatever approach is employed, the commission should be certain its process follows the mandates of state and local law.

Another approach is the *demolition review law*, which may be separate from the historic preservation ordinance. Such an ordinance would apply to the proposed demolition of any building over a certain age, or a significant portion of a building, or otherwise meeting the criteria spelled out in the ordinance. During a specific period of time, a determination would be made as to whether the property was eligible for protection. Following the review, the property might or might not be designated under the historic preservation ordinance or otherwise receive protection. This can be an effective tool to address buildings that may have been “missed” by the community’s survey and designation program or buildings that do not meet the standards or designation but otherwise have characteristics that enhance the community. It can certainly buy time for preservationists to try and negotiate an alternative to their destruction.

LITIGATION ISSUES

There are several issues that will be relevant to a preservation commission facing litigation, or considering the possibility of instituting litigation. The local government's legal department will usually handle the commission's interests in litigation. Nevertheless, it is important for commission members to understand what is going on in order to assist the attorney, who may not be familiar with historic preservation issues.

Liability

Few issues cause greater concern among local government officials than that of liability, both for the government itself and for public officials individually. In most jurisdictions, this problem has been addressed through the purchase of liability insurance policies or by tort claims acts. As long as a government official acts within the scope of his or her authority and without malice, qualified immunity will normally attach to the actions taken, and no liability will be found. If an error is made, however, the official will be protected by the insurance policies that are in place, since he or she was performing a public function or duty.

One major exception to this is in the area of civil rights viola-

tions. The Civil Rights Act of 1871, which has been codified in the United States Code as section 1983 of Title 42, provides, in pertinent part, as follows:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²²

What this means in lay language is this: if a public official's action deprives someone of his or her civil rights, that official can be sued for redress, and that includes money damages. In such a case, the official will be responsible for the payment, not the government (and not the government's insurance policies).

Members of historic preservation commissions are considered public officials, because they

are acting *under color of law* (under the authority of the historic preservation ordinance). So it behooves all members of historic preservation commissions, as well as all public officials generally, to be cautious in how they exercise the powers of their positions. If they are found to have violated someone's civil rights, they will pay for it, and out of their own pockets. However, by carefully following the provisions of the local ordinance and established procedures and treating everyone fairly and equally, commissioners should be able to avoid individual liability.²³

Jurisdiction

One of the most important issues in American jurisprudence is that of *jurisdiction*. This concept relates to the authority of the court to act. The court system (both federal and state) exists to resolve disputes between opposing parties. But in order for the courts to be able to do that and impose any penalties or sanctions on anyone, they must have jurisdiction over both the subject matter of the lawsuit and over the parties themselves. Strict rules have been developed to guide this process, and they must be carefully followed if a plaintiff (or claimant) hopes to prevail. When considering or facing a lawsuit, a commission

should be sure the action is filed in a court with jurisdiction over the matter.

Preservation commissions have issues of jurisdiction, too. State enabling legislation and local ordinances specify the parameters within which the commission may act. A commission may have authority to prevent demolition of designated properties, for example, but not of properties that might be eligible but not designated. In such a case, the commission would lack jurisdiction and be unable to prevent the issuance of a demolition permit. Commissioners should make themselves aware of their jurisdiction—the subject matters and parties over which they have authority.

Standing

Standing to sue refers to the legal right of an individual to bring a lawsuit. Not everyone has that right. What is required is that the plaintiff be able to show an actual stake in the outcome of the proceeding. The U.S. Supreme Court set out the test for standing to sue in federal courts in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992). The *Lujan* test requires

- that the plaintiff personally has suffered actual or threatened injury that is concrete and particularized,

not conjectural or hypothetical;

- that the injury fairly can be traced to the challenged action; and
- that the injury is likely to be redressed by a favorable decision from the court.

Federal courts have generally recognized that aesthetic or environmental “injuries” can meet these tests.

One of the most striking aspects of the American inter-governmental system is the relative independence of the states, especially in matters of land use law. “Standing denied” in the court of one state can well be “standing approved” in another.

While many preservation ordinances allow appeals by *persons aggrieved* by the decision of the preservation commission, state courts differ widely on the meaning of that term.

A plaintiff’s participation in the administrative process or ownership of property adjacent or close to the property in question can be significant factors in conferring standing in some cases. Other courts impose a very narrow interpretation. In *Allen v. Old King’s Highway Regional Historic District*, 2000 Mass. App. Div. 330 (Mass. Dist. Ct.), for example, the court held that *person aggrieved* applied only to those who have

demonstrated “special harm that would occur to him if the Certificate of Appropriateness awarded by the regional commission is allowed to stand.”²⁴

Ripeness/Exhaustion of Administrative Remedies

Ripeness is a concept that refers to the timetable of a legal dispute. Courts are reluctant to step in and make a decision before the established administrative process has been followed to its conclusion. The courts want to avoid making a decision unless they have to. Thus, they will often require that all administrative remedies provided by state law be *exhausted* before they proceed to address the merits or demerits of a particular fact situation.

Likewise, federal courts are reluctant to consider Constitutional claims until plaintiffs have exhausted their state remedies. A federal court in the District of Columbia²⁵ found that a case was ripe for federal review where the historic preservation commission denied requested permits, that decision was adopted by the major’s agent, and District of Columbia law did not provide for compensation for denied building permits.

Where issues have been resolved outside the judicial process by an administrative agency

or even an act of God, a court will generally dismiss a case as *moot*. For example, when a building that is subject of litigation is demolished, a court will generally dismiss the case.

However, in situations otherwise moot, courts have discretion to resolve an issue of continuing public interest likely to reoccur in other cases and affect the future rights of the parties before them.²⁶

With both ripeness and mootness, timing is everything. Courts are generally not eager to take up a controversy when other remedies exist or the issue has been otherwise resolved unless there is a compelling public policy reason to do so.

Laches

Laches also relates to the timetable of a case, but at the other end of the proceeding. If a party waits too long to bring a lawsuit, the court may well dismiss it because of excessive delay.

Laches is similar to a *statute of limitations*, except it is judicial rather than statutory. In general, the party attempting to use laches to bar a lawsuit must prove that the plaintiff's delay in bringing suit was unreasonable or inexcusable and that the delay has been prejudicial.

Most courts are reluctant to uphold a laches defense in environmental cases, particularly

when it is shown that the plaintiffs have been actively engaged in the administrative process and have not "sat on their hands" after it became clear that there were no further administrative remedies available to them.

Doctrine of Judicial Restraint and Deference to Other Branches of Government

Judges are not shy by nature, but generally they do not like to preempt the role of other branches of the government. They believe in, and practice, the separation of powers doctrine, and are generally reluctant to invade the decision-making sphere that has been carved out for the legislature and the executive branch. Many cases can be found in which the doctrine of judicial restraint is front and center.

In the famous *Berman v. Parker* decision cited earlier, Justice Douglas not only defended the police power, he also defended the right of the legislative branch to determine what that concept means. He said this:

We do not sit to determine whether a particular housing project is or is not desirable... [T]he Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise

*them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.*²⁷

Modern courts have continued to apply the doctrine of judicial restraint and deference to other governmental branches in reviewing the decisions of local historic preservation commissions.

In *Collins v. Fuller*, No. 912479B, 1993 WL 818633 (Mass. Dist. Ct. Aug. 6, 1993), owners of a lot located in a historic district sought a certificate of appropriateness for new construction; the local historic preservation commission denied their request. The owners appealed to the local superior court to annul the decision and to issue the certificate.

Deferring to the commission's determination "unless it is legally untenable, arbitrary, or capricious," the state district court held that the commission had the statutory authority to base its decision on consideration of "exterior architectural features subject to public view that might impact on the historic and architectural integrity of the surrounding district,"²⁸ including the preservation of a historic

Massachusetts landscape. The commission had the right to conclude that any structure prominently visible from a historically significant wooded parkway would “spoil the very aspect of [the district] that caused its designation as an historic place,”²⁹ and to deny any applications for certificate of appropriateness that would have this effect.

This deference to legislative decisions can even extend to administrative agencies. *Farash Corp. v. City of Rochester*, 713 N.Y.S.2d 423 (N.Y. App. Div. 2000), was a New York case in which the appellate division reversed the holding of the lower court, because it had not deferred to the local commission’s “administrative determination” to deny a demolition permit. The court found the commission’s decision had support in the record, had a reasonable basis in the law, and was not arbitrary or capricious. In other words, the decision of the administrative agency appeared sound on the record, and should not have been overturned by the lower court, barring evidence of some abuse of discretion by the agency.

Therefore, in reaching its decisions, the commission should:

- identify the relevant facts of the case based on the evidence presented in the

application and any public testimony;

- make a determination whether those facts warrant the approval or denial of the owner’s application;
- identify the sections of the ordinance, guidelines or standards that support that determination; and
- make certain that these actions are entered into the official record.

CONCLUSION

Protecting historic resources can be challenging, especially in an increasingly litigious environment. The situation, however, is neither impossible nor hopeless. It does require a careful reading of the U.S and State Constitutions and laws, as well as local ordinances, and an understanding of the ways that the courts have interpreted these documents.

A person appointed to serve on a local historic preservation ordinance should not be frightened or worried, but he or she must be prepared to act in a legal manner. Commission members do not need to be lawyers in order to act legally. Commission members do need to know what kind of rules and behavior legally protects them and their decisions and when to consult their local legal experts.

This primer on the legal aspects of historic preservation in America is intended to provide commission members with enough legal armor to keep them out of trouble and out of the courts. Forewarned is forearmed!

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MORE LESSONS LEARNED

For Keeping Your Commission Out Of Court

- Ensure your ordinance is written in clear, simple language and is in accord with state legislation. Some of the key elements to consider are:
 - Statement of purpose
 - Definitions
 - Establishment of preservation commission; powers and duties
 - Criteria and procedures for designating and removing designation of historic properties and districts
 - Identification of actions reviewable by commission (e.g., new construction, alterations, demolition, moving, landscape features)
 - Criteria and procedures for review
 - Legal effect of commission decisions (e.g., advisory, binding)
 - Economic hardships provisions
 - Affirmative maintenance or demolition by neglect provisions
 - Appeals procedures
 - Enforcement provisions
- Be familiar with your laws, rules, and procedures:
 - Basic Federal and State constitutional principles,
 - State laws
 - Local ordinances
 - Commission bylaws
 - Rules of procedure
 - Design guidelines
- Give your procedures and guidelines careful consideration, adopt them formally and follow them carefully; revise them if they are not working or not being followed.
- Be sure you comply with all open meetings and open records laws.
- Maintain the highest ethical standards and comply with all relevant state and local ethics legislation.
- Decide issues on their merits, not on public opinion. Courts generally defer to the preservation commission where there is a reasonable basis in the record for their decision.
- Be aware of commission precedent and follow it or explain any dissimilar treatment.
- Ensure decisions are fairly and consistently enforced.
- Seek legal advice on difficult or controversial issues.
- Document, document, document. The written record will be the basis for understanding and upholding you commission's decisions.
- Regularly evaluate your own performance and make necessary changes.
- Take advantage of training opportunities; stay informed and polish your skills.

APPENDIX

Case Examples

Commission Authority

The importance of carefully following state statutory requirements is illustrated in the case of *Russell v. Town of Amite City*, 99-1721 (La. App. 1 Cir. 11/08/00); 771 So. 2d 289.

There, the Louisiana Court of Appeals affirmed the trial court's holding that an ordinance creating a local historic district and preservation commission was null and void because the city failed to comply with state enabling legislation that required creation of a study committee, an investigation, and a report prior to designating the district. As a consequence, preservation commissioners should particularly beware of national models—what works in one state might not work in a neighboring state.

State Takings Cases

City of Pittsburgh v. Weinberg, 676 A.2d 207 (Pa. 1996).

Property owners sought a certificate of appropriateness from the City of Pittsburgh Historic Review Commission to demolish a house, locally designated as a historic structure. Testimony at the commission hearing for the property owners' certificate of appropriateness application dealt with the economic feasi-

bility of renovation versus new construction on the site, and the marketability of the house in its current state. The commission denied the property owners' request for demolition, finding that the house was architecturally and historically significant, was structurally sound, and that renovation costs were comparable to those of new construction. The property owners appealed the commission's decision to the local trial court, which found in the property owners' favor.

The Supreme Court of Pennsylvania reversed. It applied the standard of *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993): "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."³⁰

In addition, the court used the test of *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976), requiring "the property owner to show 'that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.'"³¹ Using these standards, the court found that the evidence presented by the homeowners before the com-

mission did not prove economic hardship. The property owners did not demonstrate that "they could not make any economic use of their property;"²⁷ selling the house in its current condition could conceivably turn a profit for the owners, thereby allowing some economically viable use of the property, so as not to be a taking.

Historic Albany Foundation, Inc. v. Coyne, 558 N.Y.S.2d 986 (N.Y. App. Div. 1990).

A non-profit historic preservation organization sued the County of Albany, New York over its decision to demolish a county-owned block of houses located within the City of Albany without first complying with provisions of the city's Historic Resources Commission Ordinance. The county argued that the buildings were structurally unsound and posed a risk to the public. Under the city's ordinance, however, demolition without a showing of either economic hardship or that a building was a non-contributing structure was forbidden.

Under the city's ordinance, a hardship determination had to be based on three factors: ability to earn a reasonable return, adaptability to another use that would make for a reasonable return, and whether an attempt has been made to sell the property to a party interested in its

preservation. The county also challenged the constitutionality of the ordinance on a takings claim since even publicly owned property cannot be taken by another governmental entity without just compensation being paid.

The appellate division court found that the ordinance's provisions for demolition met the tests of the Penn Central case, by tying "demolition in effect to a showing either that the building is not of historical, archeological or aesthetic value, or that the owner will suffer hardship by being required to repair or maintain property incapable of yielding a reasonable return."³³ The county failed to demonstrate that the prerequisite of preparing, presenting, and having approved a new development plan for the post-demolition site would "deprive[] the county of all economically viable use of the subject property."³⁴

The county's arguments for taking without just compensation, based only on its being "subjected to some as yet unknown expense of new development before it can demolish the property if [the historic preservation ordinance] is enforced," were rejected as well.³⁵ The ordinance stood, and the order for demolition (and the takings claim) did not.

Procedural Due Process

Sometimes a case will be won or lost simply because procedural requirements were not followed. A pair of recent procedural due process cases that originated in Deadwood, South Dakota illustrates the impact of the failure of historic preservation commissions to follow statutory procedures for decision making.

Achtien v. City of Deadwood, 814 F. Supp. 808 (D.S.D. 1993), involved the permit process for new construction within a historic district. A developer sought a certificate of appropriateness for new construction from the local historic preservation commission as a prerequisite to a building permit from the city commission. At a joint meeting of the city commission and the historic preservation commission, only three members of the five-member historic preservation commission were present. Two members voted to issue the certificate of appropriateness, one voted against. Then the city commission approved the building permit.

The state historic preservation officer challenged this decision, citing the legal requirement that a majority (three members of the five-member commission) concur. The city then rescinded its issuance of the building permit, in part because the developer

had not filed an application or paid a permit fee prior to the city commission's vote, and in part because the certificate of appropriateness was not properly approved. The developer sued, claiming a violation of his procedural due process rights.

The district court found for the city, arguing that the certificate of appropriateness was not properly issued, because "an affirmative vote by only two members of the five-member commission in favor of...the certificate is insufficient to constitute a valid action by the commission."³⁶ Since a validly approved certificate of appropriateness was a prerequisite to the issuance of a building permit, the issuance of the building permit was void.

The court held that, because the permit process was procedurally flawed, both as to the certificate of appropriateness and as to the building permit, the developer did not "possess a property right in the [building] permit,"³⁷ failing to trigger the right to procedural due process.

Decided two years after the *Achtien* decision, ***Donovan v. City of Deadwood, 538 N.W.2d 790 (S.D. 1995)***, dealt with local designation of a historic property and demolition permit decisions. A property owner sought a building demolition permit for

a “historic” icehouse, which was neither listed on the National Register of Historic Places nor locally designated as a historic resource. A city ordinance purported to empower the local historic preservation commission to issue or deny building and demolition permits.

The Deadwood Historic Preservation Commission denied the permit, basing its decision, among other things, on eligibility of the building for listing on the National Register of Historic Places, on its status as the only historic commercial property in the Pluma neighborhood, and on the lack of a proposal for a replacement building for the site. The owner won in the trial court, with the court holding that the Commission’s denial went beyond its constitutional and statutory powers and was therefore invalid, and a violation of due process.

The South Dakota Supreme Court affirmed, holding that the Commission violated the property owner’s procedural due process rights. The state historic preservation enabling statute set out a series of procedural steps for the designation of historic properties, triggering the local preservation ordinance. Under the statute, a local historic preservation commission must investigate and report on the significance of the property, hold a

public hearing on the proposal for designation, and give written notice to the affected property owner. Furthermore, a 180-day waiting period from the time of notice to the property owner “had to be observed prior to its [the designated historic property’s] demolition, material alteration, remodeling, or removal.”³⁸ The City of Deadwood did not follow the procedural steps mandated by the South Dakota enabling legislation dealing with the designation of historic properties, and its decision was therefore nullified.

Substantive Due Process

The case of *Bellevue Shopping Center v. Chase*, 574 A.2d 760 (R.I. 1990) originated in Newport, Rhode Island, where a developer sought a certificate of appropriateness for a new shopping center within the town’s historic district. The local historic district commission as well as zoning board of review denied his request after conducting hearings, on the basis that the center would “seriously impair the historic and/or architectural value of the surrounding area,” the materials and design would be incompatible with those of neighboring structures, and increased traffic from the center would pose a threat to the structure of a neighboring historic site.³⁹

The developer challenged the city’s decisions as based on, among other issues, “impermissibly vague and indefinite” “historic-zoning legislation.”⁴⁰ Vagueness can be a violation of due process because citizens are not put on clear notice about what is or is not permissible. The court in this case, however, disagreed, holding that the enabling legislation was not “unconstitutionally vague,” citing the statute’s outlined purposes, and its factors for review of applications, which together “sufficiently alert the public of the statute’s scope and meaning.”⁴¹ Therefore, the enabling legislation did not violate due process.

Tourkow v. City of Fort Wayne, 563 N.E.2d 151 (Ind. App. 1990), echoed the ruling of the Bellevue Shopping Center court, upholding the decision of a local historic preservation commission as valid and not a violation of substantive due process. In this case, the owner of a home located within a historic district sought certificate of appropriateness for installation of vinyl siding for her home. The local historic preservation review board denied her application, and the homeowner appealed to the local trial court, which affirmed the review board’s decision.

The homeowner claimed that the denial of the certificate by

the review board “substantially prejudiced her,” and argued that the review board’s decision was “arbitrary and capricious because public opinion influenced it.”⁴² The court found that the board had a “long-standing practice of denying applications to install artificial siding” because of the material’s lack of historic authenticity and tendency to damage original materials, and so did not treat the applicant homeowner any differently than it had treated similarly situated applicants.⁴³ The court found therefore that the board’s denial was not “arbitrary and capricious.”

The homeowner also claimed that the standards in the local architectural review ordinance were “vague and unascertainable.”⁴⁴ The ordinance stipulated “before ‘a conspicuous change in the exterior appearance’ of an historical building takes place, the board must issue a certificate of appropriateness.”⁴⁵ The court found that the proposed installation of vinyl siding was “clearly a ‘conspicuous change’ in appearance,” and that the homeowner applicant failed to demonstrate the board’s denial to be “either contrary to constitutional right or arbitrary and capricious” and to meet her burden of proof on these issues.⁴⁶

The homeowner further objected to the “absence of

written findings of fact in the Review Board’s notice of denial.”⁴⁷ The state code required the board to “state its reasons for the denial...in writing and...advise the applicant.”⁴⁸ The court found that although the board did not state its rationale for its denial in its notice to the homeowner, the inclusion of the board’s findings of fact in the minutes of the meeting (during which the homeowner’s application was discussed) was sufficient to meet the statutory requirement of “written findings.”⁴⁹

Equal Protection

In *Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002), the owner of a locally designated landmark home informed the village planner that he intended to cover the exterior of his home to eliminate a lead paint hazard. Initially, the village planner advised against a stucco-like treatment and, according to the homeowner, suggested use of aluminum or vinyl siding, and directed the owner to obtain building permits for the planned work. The homeowner filed an application for the commission’s approval of the project, and meanwhile the building contractor applied for and obtained a building permit to install vinyl siding without being informed of the need to

obtain a certificate. Meanwhile, the homeowner received a letter advising him that his application for vinyl siding would probably be denied, and the village planning staff prepared a report to the same effect, citing the state preservation agency’s guidance against vinyl siding as not meeting the Secretary of the Interior’s Treatment Standards for facades visible to the public.

The homeowner in *Nevel* filed a federal suit, claiming denial of equal protection. The homeowner alleged that he had been “intentionally treated differently from others similarly situated” and that there was no “rational basis for the difference in treatment,” a two-part test established in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Under this test, the claimant must show that (1) “he was singled out for differential treatment,” and (2) “the differential treatment was irrational or arbitrary.”⁵⁰

Here, the homeowner’s evidence of differential treatment—the village’s approval of siding for a non-historic home and for a historic non-residential city building—was not persuasive, and failed to show that any differential treatment was either “irrational or arbitrary,” or promoted by ill-will. Because the homeowner could not establish that he was in fact singled out

for differential treatment, the circuit court affirmed the district court, ruling for the village.

Religious Freedom

In a joint statement issued at the time the Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed in 2000, the Senate sponsors specifically noted (as reported in the Congressional Record, 146 Cong. Rec. S7774-01) that:

- the act does not provide religious institutions with immunity from land use regulation, nor relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions;
- not every activity carried out by a religious organization constitutes “religious exercise” (such as situations where a church owns a commercial building and uses the revenues to support its religious activities);
- the act does not change the “substantial burden” standard articulated by the Supreme Court;
- the religious claimant challenging a regulation bears the burden of proof on the issue of substantial burden on religious exercise; and
- where the government demonstrates a specific

accommodation to relieve a substantial burden, the burden of persuasion that the accommodation is unreasonable or ineffective is on the religious claimant.

The last point may be particularly important for local governments that, for example, try to accommodate the needs of a religious institution through flexible application of design standards to its historic property while substantially accomplishing the purpose of the preservation ordinance.

In *Mintz v. Roman Catholic Bishop*, 424 F.Supp.2d 309 (D. Mass. 2006), the District Court of Massachusetts decided a RLUIPA claim by finding that the city’s regulations regarding building coverage, setbacks, parking, and permitting did not apply to a church that wanted to build a parish center because the activities to occur in the parish center encompassed those protected by the term religious exercise and the bylaws put a substantial burden on this religious exercise

Likewise, in *Living Water Church of God v. Charter Twp. Of Meridian*, 384 F.Supp.2d 1123 (W.D. Mich. 2005), the District Court for the Western District of Michigan held that denial of a church’s build-

ing permit was in violation of RLUIPA because it did not further a compelling government interest and was not the least restrictive means to achieve the government’s end. The proposed 25,000 square foot building was denied by the city because the footprint was deemed too large given the size of the property and the scale of the neighborhood.

However, in *The Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D. Mich. 2004), a city’s denial of a demolition permit did not violate RLUIPA because the city did not impose a substantial burden on the exercise of religion.

Obviously the differing approaches of the various lower courts could be resolved by the Supreme Court should it choose to take a RLUIPA case as it did with RFRA in the *Boerne* case.

Freedom of Speech

Freedom of speech issues can also become enmeshed with other aspects of cultural heritage preservation. In *Mellen v. City of New Orleans*, 1998 WL 614187 (E.D. La. 1998) the court struck down New Orleans’ noise ordinance as “overbroad.” The court found that music is a form of speech and it is appropriate to impose reasonable time, place, and manner

restrictions on speech. However, the ordinance in question was a blanket restriction placed across the city. The court decided that it had to look at the particular neighborhood to determine the validity of the ordinance. Here, music was found to be an important part of the culture of the French Quarter where the club that violated the ordinance was located.

Demolition by Neglect

In *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), the U.S. Court of Appeals upheld provisions in a local ordinance requiring reasonable maintenance and repair of buildings in New Orleans's French Quarter. Where the overall purpose of the preservation ordinance is a proper one, the court reasoned that required upkeep of buildings was reasonably necessary to accomplish the law's goals.

Rejecting the takings claim, the court stated: "The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not *per se* render that ordinance a taking."⁵¹ The court cited other examples of acceptable affirmative requirements placed on a property owner including provision of fire sprinklers, emergency facilities, exits, and lights.

In *Buttnick v. City of Seattle*, 719 P.2d 93 (Wash. 1986), the Washington State Supreme Court upheld the city's requirement that a property owner remove and replace a deteriorated and unsafe parapet. The court referenced a city council finding that "a reasonable effort was not made by the property owner to correct the public safety hazard presented by deteriorated parapet and pediment when the hazard was first cited" in spite of numerous contacts and hearings.⁵²

The opinion found sufficient evidence that the council applied the appropriate standard required by *Penn Central* and *Maher* when it concluded that the estimated cost of replacement of the parapet did not impose an unnecessary or undue hardship on the plaintiff, considering the property's market value and income producing potential.

In *District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. 1994), the Court of Appeals reversed an approval by the mayor's agent to demolish a dilapidated historic building because the demolition permit was unauthorized under District law. The court's opinion noted that the law authorized the city to require reconstruction where demolition was done in viola-

tion of the law. The court found that would be an appropriate option since the record indicated that the corporate owner was largely responsible for the building's rapid decline and for the destruction of its most important features, and that the building was not beyond repair.

Economic Hardship

The Pennsylvania Supreme Court was presented a combined takings and economic hardship claim in *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996) and held in favor of the preservation commission. The owners had known when purchasing the dilapidated house that it was a landmark needing substantial repairs. Nevertheless, they failed to hire an architect or contractor to give them an estimate of the feasibility and cost of renovation.

The court held that the owners did not meet their burden of proof because they failed to establish the house could not be resold "as is" for the amount they paid or that the combined purchase price and rehabilitation costs exceeded market value. Thus, no significant economic hardship had been established.

Similarly, in *Zaruba v. Village of Oak Park*, 695 N.E.2d 510 (Ill. App. Ct. 1998), the Illinois Supreme Court upheld the denial

of an economic hardship variance to demolish an historic house, rejecting the owner's claim that he was unaware of the specifics of the preservation ordinance. Factors cited by the court included the owner's overpayment for the property and his failure to either try selling it "as is" or exploring alternatives that might have received commission approval. Interestingly, the preservation alternative was more favorable financially to the owner than the proposed plans for the property.

Courts are generally unwilling to allow owners to use economic hardship claims to get themselves out of bad business decisions. In *Kalorama Heights Ltd. Partnership v. District of Columbia*, 655 A.2d. 865 (D.C. 1995), the D.C. Court of Appeals found that the applicant's purchase of the contributing property in a historic district with the hope of developing a twelve-story luxury condominium was "a 'speculative investment' tantamount to a 'gamble'."⁵³

This case also demonstrates how important it is for the preservation commission to build a solid record and place the burden of proving economic hardship on the applicant. The Kalorama court upheld the District's denial of a demolition permit citing substantial evi-

dence in the record, including the applicant's failure to prove it was not economically feasible to renovate or sell the property as a single-family dwelling.

Ex-parte Communication

In *Idaho Historic Preservation Council, Inc. v. City Council of Boise*, 8 P.3d 646 (Idaho 2000), a property owner sought a permit for demolition of a warehouse. The local historic preservation commission denied the application; the property owner appealed to the city council, which approved the certificate.

A local historic preservation organization filed petition for review of the council's decision in the local trial court, which ruled that the city council violated due process "because it received and considered information outside of the appellate record in granting the certificate of appropriateness [for demolition]."⁵⁴

The historic preservation organization had appealed the council decision, seeking review of among other issues the question of "[w]hether the City Council's receipt of phone calls from interested parties and the general public violated the due process standards of a quasi-judicial proceeding."⁵⁵

The city claimed no due process violation "because the subsequent hearing [on the

application] cured any improper influence from the ex parte communications."⁵⁶ The court established that "when a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law."⁵⁷

Deviation from this standard means in actual fact that "a second fact-gathering session [has occurred] without proper notice, a clear violation of due process."⁵⁸ Members of the city council who received calls prior to the public meeting failed to record or disclose the substance of the calls, and the commission therefore had no chance to rebut any evidence or arguments of the callers.

The court discussed the situations which would be exceptions to the general prohibition on ex parte communications:

- the ex parte contacts were not with the proponents of change or their agents, but, rather, with relatively disinterested persons;
- the contacts only amounted to an investigation of the merits or demerits of a proposed change; and, most importantly,
- the occurrence and nature of the contacts were made a matter of record during

a quasi-judicial hearing so that the parties to the hearing then had an opportunity to respond.⁵⁹

The court, however, declined to apply these exceptions in this situation, finding that the non-disclosure of the identities of the callers or the nature of the conversations between the callers and council members made it “impossible for the Commission to effectively respond to the arguments that the callers may have advanced.”⁶⁰ The court held here that “the receipt of phone calls in this case, without more specific disclosure, violated procedural due process.”⁶¹

The *Rutherford v. Fairfield Historic District*, No. 25 58 74, 1990 WL 271008 (Conn. Super. Ct. May 18, 1990) decision from Connecticut demonstrates the sort of situation in which a historic preservation commission can find itself—and prevail against an ex parte communications challenge.

In this case, the owner of a home in a historic district sought a certificate of appropriateness from the Fairfield Historic District Commission for window replacements for his home, located in a historic district. The commission denied the homeowner’s application, and the homeowner challenged the

commission’s decision, claiming, among other issues, that their decision was invalid and violated due process because of ex parte communications between commission members and an expert witness.

The *Rutherford* court held that the ex parte communications referred to by the homeowner did not violate the homeowner’s due process. The commission, composed of laypersons, has the right to “receive technical advice to carry out its responsibilities, as long as the [applicant] was provided with the opportunity to examine [the expert witness] and to rebut his testimony.”⁶² Furthermore, there is no evidence that the commission received evidence after the public hearing; the expert testimony took place in public, and the homeowner-applicant had the right to question and rebut the witness.

Standing

A state case involving this principle arose in Massachusetts in 2000—*Allen v. Old King’s Highway Regional Historic District*, 2000 Mass. App. Div. 330 (Mass. Dist. Ct.). Nearby owners to an affected property appealed the grant of a certificate of appropriateness by a regional historic preservation commission; the enabling statute for the commission

allowed such appeals by any *person aggrieved* by its decisions. Faced with the question of whether or not these property owners were persons aggrieved with standing to appeal, the court held the statutory definition of *person aggrieved* applied only to those who have demonstrated “special harm that would occur to him if the Certificate of Appropriateness awarded by the regional commission is allowed to stand.”⁶³

In addition, the court concluded, “[g]eneral civic interest in the enforcement of historic zoning is not sufficient to confer standing.”⁶⁴ For example, “[s]ubjective and unspecified fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.”⁶⁵

Finally, the court held that a party’s participation in the administrative appeal process or ownership of property close to the tract in question was not enough to confer standing.

Burke v. City of Charleston, 139 F.3d 401 (4th Cir. 1998) is another case relating to the issue of standing. In this case, after a local artist painted a bright,

colorful mural depicting a fanciful “creature world” on the side of a building located within the Charleston historic district and sold it to the building’s owner, the city board of architectural review ordered its removal. The artist sued the city, challenging the constitutionality of the ordinance on First Amendment grounds.

The artist appealed the adverse determination of the federal district court; the Fourth Circuit Federal Court of Appeals found that the artist lacked standing, because when the artist sold his mural to the owner of the building on which it was painted, the artist “relinquished his First Amendment rights.”⁶⁶ Therefore, the owner alone had the right to display the mural, and thereby the “legally cognizable interest in the display” of the work.⁶⁷ The artist did not prove “injury-in-fact”—the court found that the one who had the right to display the mural (the owner, if anyone, but not the artist) suffered a potential injury from the city’s order to remove it. Thus, the artist did not have legal standing to oppose the removal of the mural.

Laches

A state court case that addressed this issue was *City of Dalton v. Carroll*, 515 S.E.2d 144 (Ga.

1999). The prior owner of a home failed to obtain a building permit or certificate of appropriateness for construction of a metal carport located within the historic district.

The city received a complaint about the carport and notified the current owner within ten days. After the owner failed to remove the carport, the city sought a declaratory judgment and injunction. The trial court denied both claims, holding that laches barred the city’s claim.

The state supreme court reversed, and considered the factors for applying laches—length of the delay, the reasons for it, the resulting loss of evidence, and the prejudice suffered. In this case, the court found that the city did not delay enforcement of its architectural review ordinances, but notified the property owner within ten days of receiving the complaint, and that it was the predecessor owner’s failure to obtain the building permit that caused a six month delay between construction and discovery.

Furthermore, the property owner failed to comply with the city ordinances after notification. “Under these circumstances...it is not inequitable to permit the city to enforce its claim against [the property owner].”⁶⁸ While it is important to pursue out-of-court solutions

and avoid frivolous lawsuits, it is equally important to take legal action without delay when it is necessary.



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¹ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

² *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

³ *Merriam v. Moody's Ex'r*, 25 Iowa 163, 170 (1868) superceded by statute Iowa Code §§364.2(2) and 364.2(3) (1983), as recognized in *Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983).

⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (emphasis added).

⁵ *Id.* at 413.

⁶ *Penn Cent.*, 438 U.S. at 124.

⁷ *Id.* at 131.

⁸ *Id.* at 130.

⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Scalia does not use the exact term "categorical taking" in the opinion of the Court.

¹⁰ See also *Lingle v. Chevron*, 544 U.S. 528, 539 (2005) (reaffirming Penn Central test).

¹¹ *McNabb v. United States*, 318 U.S. 332, 347 (1943)

¹² *The People ex rel. Klaeren v. The Village of Lisle*, 316 Ill. App. 3d 770, 786 (2000)

¹³ *Id.*

¹⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁵ See Autumn L. Rierison, RLUIPA: Four Years Later, 20 Preservation L. R. 1169 (2003).

¹⁶ *City of Toledo v. Finn*, No. L-92-168, 1993 WL 18809 (Ohio Ct. App. Jan. 19, 1993).

¹⁷ O.C.G.A. § 50-14-6 (2005).

¹⁸ *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444, 451 (N.C. 1979).

¹⁹ *Id.*

²⁰ *City of Dallas v. Crownrich*, 506 S.W.2d 654, 659-60 (Tex. Civ. App. 1974).

²¹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002).

²² Civil Rights Act of 1871, 42 U.S.C. § 1983 (2007).

²³ A commissioner would be entitled to immunity unless his "act is so obviously wrong, in the light of preexisting law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994); abrogated by *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

²⁴ *Allen v. Old King's Highway Reg'l Historic Dist.*, 2000 Mass. App. Div. 330, 331 (Mass. Dist. Ct.).

²⁵ *District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp.2d 30 (D.D.C. 1998).

²⁶ *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App. 3d 203 (1981).

²⁷ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

²⁸ *Collins v. Fuller*, No. 912479B, 1993 WL 818633, at *1 (Mass. Dist. Ct. Aug. 6, 1993).

²⁹ *Id.*

30 *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612, 617 (Pa. 1993).

31 *City of Pittsburgh v. Weinberg*, 676 A.2d 207, 211 (Pa. 1996) (quoting *Maier v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976)).

32 *Weinberg*, 544 Pa. at 287.

33 *Historic Albany Found., Inc. v. Coyne*, 558 N.Y.S.2d 986, 988 (App. Div. 1990).

34 *Id.* at 989-90.

35 *Id.* at 990.

36 *Achtien v. City of Deadwood*, 814 F. Supp. 808, 813 (D.S.D. 1993).

37 *Id.*

38 *Donovan v. City of Deadwood*, 538 N.W.2d 790, 793 (S.D.1995) (quoting S.D. Codified Laws § 1-19B-23 (1995)).

39 *Id.*

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41 *Id.* at 765.

42 *Tourkow v. City of Fort Wayne*, 563 N.E.2d 151, 153 (Ind. app. 1990).

43 *Id.*

44 *Id.*

45 *Id.*

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47 *Id.*

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50 *Nevel v. Village of Schaumburg*, 297 F.3d 673, 681 (7th Cir. 2002) (quoting *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001)).

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53 *Kalorama Heights Ltd. Partnership v. District of Columbia*, 655 A.2d. 865, 872 (D.C. 1995).

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55 *Id.*

56 *Id.* at 649.

57 *Id.*

58 *Id.*

59 *Id.* at 650.

60 *Id.* at 651.

61 *Id.*

62 *Rutherford v. Fairfield Historic Dist.*, No. 25 58 74, 1990 WL 271008, at *3 (Conn. Super. Ct. May 18, 1990).

63 *Allen v. Old King's Highway Reg'l Historic Dist.*, 2000 Mass. App. Div. 330, 331 (Mass. Dist. Ct.).

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65 *Id.* (quoting *Barvenik v. Bd. of Aldermen of Newton*, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992)).

66 *Burke v. City of Charleston*, 139 F.3d 401, 403 (4th Cir. 1998).

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James K. Reap

Public Service Associate
University of Georgia College of
Environment and Design

Melvin B. Hill, Jr.

Senior Public Service Associate
University of Georgia Institute
of Higher Education

CULTURAL RESOURCES PARTNERSHIP NOTES

HERITAGE PRESERVATION SERVICES, NATIONAL PARK SERVICE

Series editor: Susan L. Renaud, Manager, Historic Preservation Planning Program
U.S. Department of the Interior, 1849 C Street, NW, Mail Stop 2255, Washington, DC 20240

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Cultural Resources

BUILDING A DEFENSIBLE RECORD*

by

Stephen Neal Dennis

March 9, 1991

Each September, the National Center for Preservation Law sends a short questionnaire to its mailing list of nearly 800 local historic preservation commissions across the country. Commissions are asked to indicate if they have been in court during the past year or eighteen months, and the brief responses help the Center pinpoint cases which should be monitored and to locate court decisions which need to be analyzed.

Every year since 1987, the Center's questionnaire has confirmed our growing conviction that there are a large number of court cases at the trial court level involving local historic preservation commissions. Unfortunately, indications are that far too many of these commissions have gotten to court without thinking through the implications of being there or constructing with adequate malice aforethought a useful (and defensible) record. And all too often, no one has a chance to help these commissions before it is too late and they have lost in court.

Let's explore together briefly this afternoon some of the factors which should go into the development of an adequate record of a local preservation commission's decision. I will not focus on Virginia law, because I believe the points I will be making are applicable to commissions regardless of the individual jurisdictions in which they find themselves.

— ONE —

A preservation commission's decision should be clear and comprehensible.

It can be tempting for the chairman or secretary of a commission, or for staff to a commission, to cut corners and "abbreviate" the description of the issue which the commission decided, and to omit the reasons for the commission's decision. Minutes of a commission meeting, as well as a decision letter to an applicant, should ideally both contain findings of fact and certain, quite specific, decision.

Leaving out crucial details may make a decision hopelessly opaque to an individual not intimately familiar with the situation that was before the commission. Assume that this will be the posture of any city council member or judge before whom the commission's decision may need to be defended in the future. Above all, do not leave your applicant and his attorney wondering what happened.

— TWO —

A preservation commission's decision should indicate the significance of the structure or district involved.

You may be a brilliant architectural historian and possess a detailed and comprehensive knowledge of the defining characteristics of the building involved in an application to your commission, but unless you can convince a reviewing authority of the importance of the building, it will be more difficult than it should be to argue the propriety of your commission's decision. Occasionally I have suspected that a preservation organization has lost a case that might have been won simply because it could not generate any sympathy for the building involved from the presiding judge, often not a local historian.

There is no need here for elaborate and obfuscating detail, but the building should be put into a context which can be easily and convincingly explained, and appropriate visual materials should be included in the file for the application and the record of the commission's action.

— THREE —

Know at least as much about your commission's existing precedents as the other side does.

I remember attending nearly ten years ago a meeting of the Alexandria City Council at which the future of the Alfred Street Baptist Church was to be argued. Several preliminary appeals to the Council from the Alexandria Board of Architectural Review (BAR) were heard first, and two of these involved the issue of artificial siding. It was quickly apparent that individual members of the Council and members of the public were more familiar with previous BAR decisions involving artificial siding than was the individual attempting to justify the BAR decisions to the City Council.

Assume that "the other side" will make every effort to use your commission's previous decisions against you if this style of attack can become a persuasive argument. There may be unique reasons why a change you have previously approved for another applicant is totally inappropriate in the situation now before you. Explain these factors, and use them to justify your decision.

— FOUR —

Hope to have one member of the commission with a good working knowledge of parliamentary procedures.

Your commission's meetings should not become cumbersome with elaborate strategic thrusts and counterarguments, but having one member who can propose a good resolution will save a lot of time over the years. If this member can in addition summarize the arguments presented prior to a resolution and then explain why he wishes to propose a resolution for formal adoption, this approach should clarify issues for other commission members as well as the applicant and any members of the general public present.

The passage of a resolution containing your commission's decision is always a splendid opportunity to refer tellingly to criteria, standards or guidelines contained in your

preservation ordinance. It is especially crucial to leave members of the press with the sense that the commission is operating so methodically that its public hearings do not constitute news, though the fate of individual applications may be of some interest to a newspapers' readers.

— FIVE —

If there is an interested neighborhood group or local preservation organization, hope that it will be able to supplement the commission's careful homework on individual applications.

In Kensington, Maryland, a well organized neighborhood effort has now beaten back twice a developer's attempt to insert overscaled new houses into small original lots which functioned for many years simply as side yards for a lot with an original Victorian residence. Without this encouraging support from the public, the Montgomery County Historic Preservation Commission might have been somewhat cowed by a determined developer and his highly compensated architects, attorneys and preservation consultants. Without such a watchdog group, the county attorney's office might not have been willing to make defending a challenged commission's actions a priority.

— SIX —

If you smell trouble, try to get your commission's attorney to review with you ahead of time issues that you anticipate needing to decide and arguments that you believe will be presented to the commission.

A good attorney can often suggest to a commission chairman questions that the commission should seek to have answered as an applicant is making his or her case before the commission. This is particularly important when an applicant may intend to glide smoothly over an issue which will not bear close examination by the commission, such as claimed economic hardship.

If you think the "hardship" issue will be argued, the commission's attorney should review carefully the court cases in your state dealing with "takings" in land use regulation contexts. Learn in advance what an applicant must prove to establish a legitimate hardship claim, and be prepared for the possibility that your applicant cannot meet the tests.

— SEVEN —

Don't decide all of the issues before your commission in one sentence.

If an applicant says, in effect, "This is what I want to do, and if you don't let me life won't be fair and besides I stand to lose a lot of money," realize that you could be dealing with three important and quite separate issues:

- A. A challenge to the commission's developed expertise to make an "aesthetic" decision;
- B. A challenge to the adequacy of the commission's procedures and the willingness of the commission to follow these established requirements;
- C. An economic hardship challenge to the commission's regulatory authority.

This is not the time for your commission to respond, “Gosh!” A careful commission chairman will try to see that these issues become separate for discussion and argument, and that an applicant is not allowed to confuse the issues as he presents his case. But this may mean that a chairman will need to “play through” an application in his mind before a meeting in order to decide how to ask that debate be structured.

— EIGHT —

Establish and maintain adequate working files for your commission.

This is the downfall of many commissions. Over a period of time, the commission is moved from one temporary location to another, and files have a way of becoming misplaced. In a recent case in New York City involving the designation of a group of Broadway theatres, the trial court judge became concerned that the commission could not produce a stenographic transcript of the hearings held by the commission on the package of designations. Eventually, the missing stenographic tapes were located and could be transcribed. But because the New York commission had moved briefly into one temporary location and then relocated into new permanent quarters, some materials which were infrequently used had gone into storage. If the commission had not finally located the missing stenographic tapes, arguments that the commission had not followed basic due process procedures would have been much more compelling.

I have known of commissions which cannot locate basic documents such as “official” maps of local historic districts and copies of publication notices or required letters to owners undermine their legitimacy. If an owner decides to challenge the city’s authority to regulate a building, you certainly don’t want to be responsible for helping the owner prove that the structure isn’t even properly designated. This is particularly likely to be a problem in a city with an older historic preservation program which has seen designations develop over several separate stages and which has had two or more different historic preservation ordinances.

— NINE —

Remember that an applicant’s experts have been hired to produce a desired result and analyze or challenge their assertions accordingly.

Too often, commission members listen politely to testimony from individuals appearing in support of an application the commission should probably deny. If the commission subsequently ignores this testimony, it could be difficult to explain on appeal why the testimony carried no weight with the commission. But if commission members question an “expert” vigorously and challenge assumptions or conclusions, the commission will set the stage for a decision which indicates that the commission did not find the testimony credible or found it outweighed by countervailing arguments presented by other witnesses. A “muscular” decision may be one achieved after some exercise by the commission.

— TEN —

Avoid any appearance of having been arbitrary or capricious.

A reviewing court will want to be convinced that the commission was not arbitrary or capricious, and that the commission's decision is supported by substantial evidence. This need not usually mean a preponderance of the evidence, rather that there is some evidence in the record supporting the outcome favored by the commission. If an application is too awful to be taken seriously, it should always be treated seriously. Don't let an applicant win on appeal because of your procedural errors.

Some commissions still lose in court, and some of these commissions probably deserve to lose. If an applicant comes before a commission with a strong economic hardship argument and the commission focuses entirely on the contribution of a building to a local historic district, this is a certain recipe for trouble. If a commission uses "guidelines" which are in no sense official, sooner or later someone may wake up to this fact and challenge the alleged guidelines.

Over time, most local historic preservation commissions develop a secure sense of their own powers. If the occasional commission betrays timidity and fears exercising the full range of its stated powers, one can hope that eventually this commission will gain new members with a surer understanding of the commission's potential as a regulatory agency. In Vermont, where municipalities are subject to the often criticized Dillon Rule which requires that local governments exercise only those powers expressly delegated to them, it is going to be necessary to amend the state enabling legislation for commissions to clarify the role that local historic preservation commissions can play. But this will take time, and meanwhile you need to be certain that your commissions have a fighting chance if they are challenged on appeal.

National Center for Preservation Law
1333 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036

**This talk was given at the 1991 Annual Preservation Workshop sponsored by the Arlington County Historical Affairs and Landmark Review Board, Arlington, Virginia.*

ALL THE WORLD'S A STAGE: HOW TO CONDUCT A PRESERVATION COMMISSION MEETING

Editor's Note: Since first appearing in The Alliance Review in 1994, "How to Conduct a Preservation Commission Meeting" by preservation attorney and CAMP Counselor, James Reap, has become one of the most frequently requested articles. We are pleased to present it again by popular demand.

*THE DRAMA'S LAWS THE DRAMA'S PATRONS GIVE.
FOR WE THAT LIVE TO PLEASE, MUST PLEASE TO LIVE.
- Samuel Johnson*

If all meetings are theater, as George David Kieffer insists in his book, *The Strategy of Meetings*, then preservation commission members and their staffs must learn to be effective producers, directors, script writers, and actors to ensure their production is successful and their objectives are met. It is largely through the conduct of public meetings and hearings that a community's perception of the preservation commission is formed, and their public image will help determine their ultimate success or failure. It is also at these meetings that commissions may be most vulnerable to procedural missteps that may render their decisions, regardless of their merits, null and void when challenged in court.

Communication is essential in meetings and the "theater" can either enhance or undermine the verbal message. Everything we do communicates something—where we meet, how the room is arranged, what we wear, our tone of voice, body language, punctuality, attitude, what we give most attention to, and how we treat others. Since we can't eliminate these messages, we should turn them to our advantage. Think about the image you want to project and the impressions, such as disorganization and arbitrariness, you want to avoid. With proper preparation, active participation and attention to detail we can be effective communicators and accomplish our purposes within the requirements of the law.

Preparation

- Be familiar with your:
 - Laws, rules and procedures
 - State Constitution
 - Statutes
 - Local Ordinance
 - Commission's Bylaws
 - Rules of Procedure
 - Design Guidelines
- Take advantage of training opportunities
- Observe and critique meetings of other boards
- Evaluate your own performance in past meetings

In preparing for your role you need to be familiar with the laws, rules and procedures under which you operate. Know the relevant provisions of the state constitution and its statutes, the local ordinance, and the commission's bylaws, rules of procedure and design guidelines. Commissioners can learn from others by taking advantage of conferences and workshops on historic preservation law and commission operation. Observe and critique meetings of other boards such as planning and zoning commissions as well as other preservation commissions in other towns and cities. Commissioners can even evaluate performance by viewing a videotape of meetings and by surveying the audiences.



Communication is essential
to hold things together.
Photo: Public Domain

The Script: The Agenda

- Common items:
 - name of the group
 - title of the meeting
 - date, place, starting and ending times

- name of the chair
- items to be considered and persons responsible
- references to background materials
- Identify action items and list them first
- Identify items for discussion only
- Distribute the agenda ahead of time
- Go "on location" to view included properties

Every production needs a script, and yours is the agenda. A good agenda helps members come to the meeting prepared and stay focused. Some common elements include: the name of the group, title of the meeting, date, place, starting and ending times, the chair, items to be considered and those responsible, and references to background materials. It's helpful to identify those items that require action and those which are for discussion only. Action items are generally listed first, followed by other issues in order of their urgency. Distributing the agenda and background materials ahead of time helps participants learn their parts. Whenever possible, members should prepare by going "on location" to get a firsthand view of the properties which will be discussed in the meeting.

It's crucial to develop rules of procedure and supplement them with standardized parliamentary procedures such as *Robert's Rules of Order*. Like the agenda, the rules help the group remain in control of its own processes and eliminate confusion. Operating a meeting without them would be like playing baseball without rules. There is a danger, however, that misused parliamentary procedure can block creative thought and the interchange of ideas. The chair must make the right decision on the degree of formality required at any given time.



Setting the Stage: Meeting Room

- Size—neither too big nor too small
- Proper lighting and sound
- Tape recording equipment
- Seating arrangement that enhances interaction

Set the stage properly. The room you choose can enhance communication or become a barrier. The space should be neither too big nor too small for the group, and everyone should be able to see and hear what's going on. Pay attention to proper lighting and sound. If possible, arrange for equipment to tape record the proceedings to ensure an adequate permanent record. Among other appropriate configurations, a semicircular arrangement for commission members facing others in attendance is conventional and promotes interaction.

The room you choose can enhance communication or become a barrier.

Photo: Public Domain

The Leading Role: The Chair

- Know the rules
- Remain impartial
- Seek contributions from everyone
- Make certain minority views are expressed
- Clarify and summarize issues
- Separate facts from opinions
- Look for and diffuse emotional build-ups
- Never permit personal attacks or derogatory comments

The lead role in meetings belongs to the chair. As the production's moderator, his/her main job is to facilitate communication. To do this, the chair must know the rules and remain impartial. He/she should seek contributions from all participants, make certain

minority views are expressed, clarify and summarize issues, help separate facts from opinions and keep on the lookout for and diffuse emotional buildups. He/She should never permit personal attacks or derogatory comments.

The Curtain Rises: A Strong Opening

- Begin on time
- Start with the right attitude
- Project a sense of confidence
- Make sure you can be heard and understood
- Avoid jargon and acronyms
- Introduce key participants
- Summarize the process
- Invite audience participation
- Cover your legal requirements

When the curtain goes up, make sure you have a strong opening. Begin on time. This is the commission's first test of control and sends a message the meeting will be conducted in a businesslike manner. Start with the right attitude and project a sense of confidence. Your audience will be quick to pick up on nervousness or uncertainty. Make sure you can be heard and understood. Speak clearly and avoid using jargon and acronyms that require translation.



Set the stage by introducing the cast of characters.

Photo: Public Domain

Set the stage by introducing the cast of characters. Summarize how the plot will unfold and invite audience participation. Be sure to cover your legal requirements for the record: note the presence of a quorum, determine if notice and advertisement requirements have been met, state the rules on conflict of interest, and approve the minutes of previous meetings. Now you're ready for the first act.

The Feature Presentation:

Considering Applications

- Allow applicants to:
 - present their case
 - rebut opposing case
- Allow others to express their views
- Hear staff presentations
- Listen carefully and ask questions
- Verify required documentation

Whether you're considering applications for designation or certificates of appropriateness, at a minimum, you must allow applicants to be heard, present their case, and rebut the opposing case. **Some states require witnesses to be sworn in and an opportunity to cross examine.** If so, these formalities must be observed. Allow others present to express their views and hear any staff presentations. Ask "experts" to describe their qualifications and take their testimony for what it is—just professional advice. Listen carefully and ask questions to make certain you understand the issues involved. Verify that all required documentation is in order.

- Discuss the application thoroughly
- Examine the facts and alternatives in terms of:
 - practicality
 - cost
 - effectiveness
 - enforceability
- Develop a consensus, then call for a vote
- Always try to achieve some consent

Cont'd on page 16

- Reserve formality for times when:
 - there would be confusion without it
 - when action is needed for the record

After all views are heard, members should discuss the application thoroughly, examining the facts and alternatives in terms of practicality, cost, effectiveness and enforceability. It's here that strictly following *Robert's Rules of Order*—where the motion comes first and the discussion follows—can discourage consensus and allow a motion to pass before all issues have been considered. A more informal approach encourages collaboration and is less threatening than debate. The negotiated solution acceptable to all members may not be the first choice of any, but it should be something everyone can live with. Conflicts can often be resolved by finding common ground. Develop a consensus first, if possible, and then call for a vote. Always try to achieve some consent even if there is not unanimity. Reserve formality for times when there would be confusion without it and when action is needed for the record.

The Drama Builds

- Give reasons for your decision
- Summarize the evidence
- Recite the standards applied
- Stay clearly within your area of responsibility
- When review of applications is completed, move through the rest of your agenda

It is important for the commission to give reasons for each of its decisions, even if state law doesn't require it. Courts find it difficult to evaluate actions where no reasons are given, and they will not tolerate findings and conclusions good for any occasion. Members framing motions for approval or denial of an application (for a designation or a certificate of appropriateness) should summarize the evidence, recite the standards applied—using the language of the ordinance—and state why the commission is taking the action. In reaching decisions, always stay clearly within the area of responsibility described by your ordinance.

When you have completed your action items, move through the remaining matters on the agenda.

The Final Curtain: Concluding the Meeting

- Summarize actions taken
- Inform participants what happens next in the process
- Thank all who have participated
- End on a positive note

As the final curtain approaches, members will have begun to turn off substantive discussion. Use the last few moments of a meeting to summarize actions taken and inform participants what happens next in the process and who must be involved. Thank all those who have participated. End like you began, on a positive note, leaving your audience with a favorable impression of the commission.

In the end, don't confuse theatre with showboating. If you watch the real meeting masters, they are smooth and subtle. It takes hard work and practice to run a good meeting, but the results in decisions sustained, good working relationships and a positive image in the community, are worth the effort.

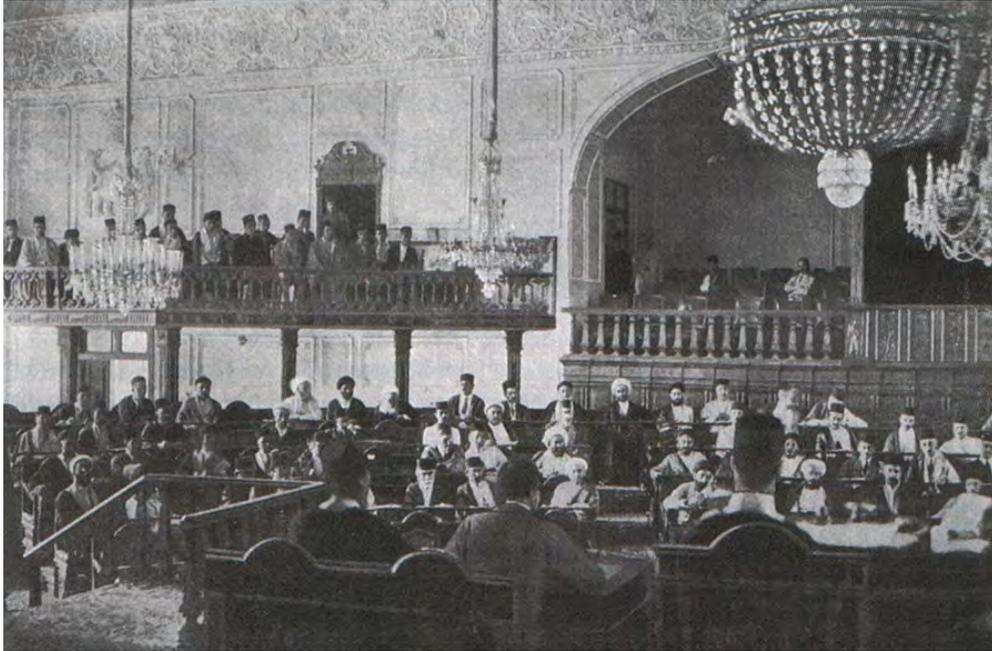
Break a Leg!



Avoid emotional escalation
as the drama builds.
Photo: Public Domain



For the Record: The NAPC Short Guide to Parliamentary Procedure



NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS
P.O. Box 1605 • ATHENS, GA 30603
(706) 542-4731 (PHONE) • (706) 369-5864 (FAX)
[HTTP://WWW.UGA.EDU/NAPC](http://www.uga.edu/napc)

***“Helping local preservation commissions succeed through
education, advocacy, and training”***

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INTRODUCTION AND ACKNOWLEDGEMENTS

Introduction

Whether or not a commission follows correct parliamentary procedure can make the difference between whether or not a decision stands if challenged: in short, whether or not historic resources are lost or architectural integrity is compromised. Unfortunately, many commissions unwittingly fail to follow correct procedures because, at first blush, they may seem intimidating, complex, and onerous. Upon closer examination, however, parliamentary procedures are really straight-forward and easy to comprehend. Following them not only helps ensure that decisions are defensible, it also helps ensure that meetings run smoothly and efficiently, and that accurate minutes can be produced in a timely manner. Remember, if an appeal goes to court, the judge won't care what the decision was; the judge will care *how it was made*.

How a commission fares in a court of law isn't the only reason to follow the rules. If a commission is fastidious in following correct parliamentary procedure and transparent in its actions, it is far more likely to win in the court of public opinion. For some reason people just seem reassured when they can see that a deliberative, quasi-judicial body established for the purpose of telling them what they can and can't do to their property isn't just making it up as it goes along.

Even though a commission's chair usually fills the role of parliamentarian, all commission members and staff should have a working knowledge of parliamentary procedure. When new commissioners are appointed, part of their orientation should be a review of parliamentary procedure and an explanation as to why the commission follows it. Periodically assessing how well you are following the rules can help prevent or correct deviating from them before problems occur. New commissioner orientation is an excellent opportunity to make the assessment.

The National Alliance of Preservation Commissions (NAPC) has compiled and written *For the Record: The NAPC Short Guide to Parliamentary Procedure* to help commission members and staff understand parliamentary procedure and to serve as a handy reference when questions arise. Like any tool, however, this guide won't help if it isn't used. So, read it, study it, make notes in the margins, and keep it within easy reach.

Acknowledgements

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INTRODUCTION TO PARLIAMENTARY PROCEDURE

What is Parliamentary Procedure?

It is a set of rules for conduct at meetings that permits everyone to be heard and to make decisions without confusion.

Why is Parliamentary Procedure Important?

Because it is an established method of conducting business at meetings and public gatherings. It can be adapted to fit the needs of any organization.

What Guide Should Be Used for Parliamentary Procedure?

Today, *Robert's Rules of Order* newly revised is the most common handbook of operation for most preservation commissions, but there are other sources of parliamentary procedure that may be adopted by commissions. For those using *Robert's Rules*, the following is a simplified guide to what they include.

What are Motions?

A motion is a proposal that members take action, or a stand, on an issue. Individual members can:

1. Make a motion.
2. Second motions.
3. Debate motions.
4. Vote on motions.

There are Four Basic Types of Motions:

1. Main Motions: The purpose of a main motion is to introduce items to the membership for their consideration. They cannot be made when any other motion is on the floor, and yield to privileged, subsidiary, and incidental motions.
2. Subsidiary Motions: Their purpose is to change or affect how a main motion is handled, and is voted on before a main motion.
3. Privileged Motions: Their purpose is to introduce items that are urgent about special or important matters unrelated to pending business.
4. Incidental Motions: Their purpose is to provide a means of questioning procedure concerning other motions and must be considered before the other motion.

How are Motions Presented?

1. Obtaining the floor:
 - a. Wait until the previous speaker has finished.
 - b. Raise your hand and/or address the Chair by saying, "Mr. Chair or Madam Chair."
 - c. Wait until the Chair recognizes you.
2. Make your motion:
 - a. Speak in a clear and concise manner.
 - b. Always state a motion affirmatively. Say, "I move that we..." rather than, "I move that we do not..."
 - c. Avoid personalities and stay on your subject.
3. Wait for someone to second your motion or the Chair to call for a second.
4. If there is no second to your motion, it is lost and may not move forward.
5. If there is a second, the Chair states your motion.
 - a. The Chair will say, "it has been moved and seconded that we..." thus placing your motion before the membership for consideration and action.
 - b. The members then either debate your motion, or may move directly to a vote.
 - c. Once your motion is presented to the members by the Chair it becomes "commission property", and cannot be changed by you without the consent of the members.
6. Expanding on your motion:

- a. The time for you to speak in favor of your motion is at this point in time, rather than at the time you present it.
 - b. The mover is always permitted to speak first.
 - c. All comments and debate must be directed to the Chair.
 - d. Keep to the time limit for speaking if one has been established.
 - e. The mover may speak again only after other speakers are finished, unless called upon by the Chair.
7. Putting the question to the members:
- a. The Chair asks, "Are you ready to vote on the question?".
 - b. If there is no more discussion, a vote is taken.

Voting on a Motion

The method of vote on any motion depends on the situation and the by-laws of policy of your commission. There are five methods used to vote by most organizations, and they are:

1. By voice — The Chair asks those in favor to say, "aye", those opposed to say "no". Any member may move for an exact count.
2. By roll call — Each member answers "yes" or "no" as his name is called. This method is used when a record of each person's vote is required.
3. By general consent — When a motion is not likely to be opposed, the Chair says, "if there is no objection..." The membership shows agreement by their silence, however if one member says, "I object," the item must be put to a vote.
4. By division — This is a slight verification of a voice vote. It does not require a count unless the Chair so desires. Members raise their hands.
5. By ballot — Members write their vote on a slip of paper, this method is used when secrecy is desired.

There are two other motions that are commonly used that relate to voting.

1. Motion to table — This motion is often used in the attempt to "kill" a motion. The option is always present, however, to "take from the table", for reconsideration by the members.
2. Motion to postpone indefinitely — This is often used as a means of parliamentary strategy and allows opponents of motion to test their strength without an actual vote being taken. Also, debate is once again open on the main motion. This method is rarely used by historic preservation commissions.

Making Parliamentary Procedure Work

Parliamentary Procedure is the best way to get things done at your meetings. But, it will only work if you use it properly.

1. Allow motions that are in order.
2. Have members obtain the floor properly.
3. Speak clearly and concisely.
4. Obey the rules of debate.

Most importantly, *BE COURTEOUS.*

PARLIAMENTARY PROCEDURE AT A GLANCE

To Do This: (See Note 1)	You Say This:	May You Interrupt the Speaker?	Must You Be Seconded?	Is the Motion Debatable?	Is The Motion Amendable?	What Vote is Required?
Adjourn the meeting (before all business is complete)	"I move that we adjourn."	May not interrupt speaker	Must be seconded	Not debatable	Not amendable	Majority vote
Recess the meeting	"I move that we recess until..."	May interrupt speaker	Must be seconded	Not debatable	Amendable	Majority vote
Complain about noise, room temperature, etc.	"Point of privilege."	May interrupt speaker	No second needed	Not debatable (See Note 2)	Not amendable	None (See Note 3)
Suspend further consideration of something	"I move we table it."	May not interrupt speaker	Must be seconded	Not debatable	Not amendable	Majority vote
End debate	"I move the previous question."	May not interrupt speaker	Must be seconded	Not debatable	Not amendable	Two-thirds vote
Postpone consideration of something	"I move we postpone this matter until..."	May not interrupt speaker	Must be seconded	Debatable	Amendable	Majority vote
Have something studied further	"I move we refer this matter to a committee."	May not interrupt speaker	Must be seconded	Debatable	Amendable	Majority vote
Amend a motion	"I move that this motion be amended by..."	May not interrupt speaker	Must be seconded	Debatable	Amendable	Majority vote
Introduce business (a primary motion)	"I move that..."	May not interrupt speaker	Must be seconded	Debatable	Amendable	Majority vote

Object to procedure or to a personal affront (See Note 4)	"Point of order."	May interrupt speaker	No second needed	Not debatable	Not amendable	None (See Note 3)
Request information	"Point of information."	If urgent, may interrupt speaker	No second needed	Not debatable	Not amendable	None
Ask for a vote by actual count to verify a voice count	"I call for a division of the house."	May not interrupt speaker (Note 5)	No second needed	Not debatable	Not amendable	None unless someone objects (See Note 6)
Object to considering some undiplomatic or improper matter	"I object to consideration of this question."	May interrupt speaker	No second needed	Not debatable	Not amendable	Two-thirds vote required
Take up a matter previously tabled	"I move we take from the table..."	May not interrupt speaker	Must be seconded	Not debatable	Not amendable	Majority required
Reconsider something already disposed of	"I move we now (or later) reconsider our action relative to..."	May interrupt speaker	Must be seconded	Debatable if original motion is debatable	Not amendable	Majority required
Consider something out of its scheduled order	"I move we suspend the rules and consider..."	May not interrupt speaker	Must be seconded	Not debatable	Not amendable	Two-thirds vote required
Vote on a ruling by the Chair	"I appeal the Chair's decision."	May interrupt speaker	Must be seconded	Debatable	Not amendable	Majority in the negative required to reverse chair's decision

Notes:

1. These motions or points are listed in established order of precedence. When anyone of them is pending, you may not introduce another that's listed below it. But you may introduce another that's listed above it.
2. In this case, any resulting motion is debatable.
3. Chair decides.
4. The remaining list of motions, points and proposals have no established order of precedence. Any of them may be introduced at any time except when the meeting is considering one of the top three matters listed in the chart (motion to adjourn, motion to recess, point of privilege).
5. But division must be called for before another motion is started.
6. Then majority vote is required.

HOW TO FRAME A MOTION

First things first, a few definitions:

Certificate of Appropriateness — A document evidencing approval by the Historic Preservation Commission of an application to make a material change in the appearance of a designated historic property or of a property located within a designated historic district.

Deliberative Assembly — An organization comprised of members who use parliamentary procedure for making decisions. A local historic preservation commission is a deliberative assembly.

Finding of Fact — In parliamentary procedure, the findings of a deliberative assembly on issues of fact submitted to it for decision, usually used in formulating a judgment. "I find that the materials submitted are sufficient for the commission to render a judgment."

Motion — In parliamentary procedure, a formal proposal by a member of a deliberative assembly that the assembly take certain action

Parliamentary Procedure — Set of rules for conduct at meetings that allow everyone to be heard and to make decisions without confusion.

Parliamentary procedure, and specifically the use of motions, is essential in commission meetings to help them run smoothly. Additionally, through the use of motions commission members can ensure their actions and decisions are articulated and defensible.

By presenting a clear and concise motion based on your community's design guidelines, you are better able to inform the public as to why you are approving, approving with conditions or denying a Certificate of Appropriateness and avoid misunderstandings and ill-feelings towards the commission and your community's preservation agenda.



A well-framed motion is clear and easy for all to understand.

Example Motion

Mr. Chair, I have studied the application and all other relevant documents and presentations related to this case and I am familiar with the property in question

and I find that if constructed in accordance with the plans submitted, the project will be compatible with the character of the historic district.

I move to approve the application No. 2009-01 for 123 John Doe Street as submitted because the application does meet the following criteria:

1. The proposed change does meet section 4.6 Fences and Walls of our design guidelines
2. as the materials, height, scale and design of the new rear fence specifically meet guidelines 4.6.5 and 4.6.7 and are in harmony with our design guidelines and the character of the overall district and adjoining properties.

Motion stating he/she is proceeding from a position of knowledge

Finding of Fact

Concise description of features that contribute to the decision and reference to the design guidelines and architectural character as a basis for decision.

Sample Motion Worksheet

I have studied the application and all other relevant documents and presentations related to this case and I am familiar with the property in question.

Finding of Fact:

I find that _____

Motion to Grant/Deny COA:

I move to **Approve** [or] **Approve with the following conditions** [or] **Deny** the application **Case Number** for **Street Address/Property Name** as **submitted** [or] **as amended in plans/correspondence dated** _____ because the applications **does** [or] **does not** meet the following criteria:

1. The proposed change(s) **does** [or] **does not** meet section (s) _____

of our design guidelines.

2. The proposed changes **are** [or] **are not** compatible with the character of the district for the reasons that the _____ (i.e. height, setback, materials, architectural detailing, roof, windows, general form and scale) **are** [or] **are not** in harmony with our design guidelines and the character of the overall district and adjoining properties.
3. List any other reasons why the application should be **approved** [or] **disapproved**.

ADDITIONAL RESOURCES

Non-profit Organizations

American Institute of Parliamentarians

<http://www.aipparl.org>

*On-line bookstore with additional resources

National Association of Parliamentarians

<http://parliamentarians.org/>

Internet Sources

The Official Robert's Rules of Order

<http://www.robertsrules.com/>

Parliamentarian Jim Slaughter, Parliamentary Procedure Consultant

<http://www.jimslaughter.com/>

Rules On-line

<http://www.rulesonline.com/>

Robert's Rules of Order

<http://www.robertsrules.org>

Articles

"Point of Order", *The Alliance Review*, November-December 2008, National Alliance of Preservation Commissions

*various articles

"Nuts and Bolts of Commission Operation," *The Alliance Review*, September-October 2005, National Alliance of Preservation Commissions

*various articles

Books

Meeting Procedures: Parliamentary Law and Rules of Order for the 21st Century, by James Lochrie, New York, New York: Rowman and Littlefield Publishers, Inc, 2003.

Parliamentary Procedure at a Glance: New Edition, by O. Garfield Jones, New York, New York: Penguin Group, 1990.

Robert's Rules of Order, Newly Revised in Brief, by Henry M. Robert, III, Williams J. Evans, Daniel H. Honemann and Thomas J. Balch, 2004.

The Standard Code of Parliamentary Procedure, 4th Edition by Alice Sturgis, New York, New York: McGraw-Hill, 2001.

ABOUT THE NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS

Our Mission: "To build strong local preservation programs through education, training, and advocacy."

NAPC is the only organization devoted solely to representing the nation's local preservation commissions. Since 1983, NAPC has supported local preservation commissions through its three part mission of providing education training, and advocacy. Service to our membership is the core of NAPC's operation. Working together we can, through strength of numbers in a true alliance, "build strong local preservation programs."

Education:

Resource Library: The NAPC office responds daily to requests for information and has a national network of experts that can be consulted.

NAPC-L: NAPC-L is a members-only Listserv connecting commission members, staff, and others across the United States in an online forum to facilitate the exchange of ideas and expertise.

National Commission Forum – The Forum is a NAPC's biennial conference. Forum is the *only* national conference dedicated to local preservation commissions and provides a unique interactive format where participants not only discuss the issues, but develop the solutions as well.

National Preservation Conference – NAPC assists the National Trust for Historic Preservation in the development of the Local Preservation Commission educational track and organizes such conference sessions as the Preservation Short Course, Advocacy 101 and others.

The Alliance Review – NAPC's newsletter, published six times per year, includes numerous articles and resources on current topics of interest to local commissions.

Training:

NAPC has provided training for thousands of commission members, staff, and elected officials. Our trainers are selected from NAPC's extensive network of experts throughout the country.

Commission Assistance and Mentoring Program – "CAMP" is NAPC's signature training program and is based upon a core curriculum of four elements: legal framework of preservation; identification and protection of historic resources; the local commission's role and responsibilities; and public support and outreach. CAMPs are tailored to meet local needs. In a fun yet effective "summer camp" format, training program help "campers" improve their preservation skills.

Speaker services – Drawing on our national network of experts and resources, NAPC frequently provides keynote speakers and trainers for conferences and workshops. We work closely with clients find the best person to address their particular topic or issue.

Advocacy:

Since 1983, NAPC has provided a voice for local preservation commissions.

At the national level – NAPC works with our national partners to provide information to decision-makers on current legislative issues involving local preservation programs.

Locally – NAPC provides community leaders with letters of support that cite solutions, successes, and precedents to aid them in presenting a stronger case on local preservation issues.

To learn more about NAPC and how you can join, visit www.uga.edu/napc or call 706-542-4731

NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS
P.O. Box 1605 • ATHENS, GA 30603
(706) 542-4731 (PHONE) • (706) 369-5864 (FAX)
[HTTP://WWW.UGA.EDU/NAPC](http://www.uga.edu/napc)

***“Helping local preservation commissions succeed through
education, advocacy, and training”***

LOCAL PRESERVATION ORDINANCES

MAKING THEM WORK FOR YOUR COMMUNITY

Lucinda M. Woodward, Supervisor, California Office of Historic Preservation

Introduction

Early-day historic preservation programs were often informal, limited to honorific designations, and administered by community historical organizations. However, the passage of the National Historic Preservation Act in 1966 nudged preservation programs into local land use planning programs, making it essential that local governments provide consideration and protection of historic properties in a manner that is legally defensible. Specifically, it states

The Congress finds and declares that the historical and cultural foundations of the nation should be preserved as a **living part of our community and development** [bold added] in order to give a sense of orientation to the American people. (Section 1(b) (16 U. S. C. 470))

The message is clear: preservation should relate to the here and now. The historic preservation ordinance provides the regulatory and legal framework for protecting historic properties and integrating preservation with other decision making at the local level of government.

One of the questions frequently fielded by the California Office of Historic Preservation (OHP) is, Do you have a model historic preservation ordinance? Our response is a resounding No! California has nearly 500 incorporated cities and 58 counties, each with its own culture and personality. In addition, in California state law grants cities and counties very broad authority to regulate historic properties without requiring them to adhere to any specific provisions. To presume that a one-size-fits-all ordinance exists would be a disservice to local governments. The ordinance should be prepared to meet the needs of the community; the community should not be force-fit into a model that doesn't work for it. So finding an ordinance that fits the community is a bit like Goldilocks searching for the perfect bowl of porridge.

Keep in mind that adopting new ordinances and amending existing ones occur within a political arena; the final decision is made by the City Council or the County Board of Supervisors. Hot button issues continue to exist which at times are the subject for public debate. Whether owner consent is required to designate a property remains a topic of heated discussion in California. Other issues include demolition and whether the local government can deny such a request or merely delay it; staff level review versus review by the full commission; review of interiors; review of infill projects in historic areas; and how to approach archeological properties.

Several years ago the City of Pasadena, California used a Certified Local Government Grant to contract with Clarion Associates of Denver, Colorado to update their ordinance. Because the grant wasn't large enough for a complete revision, city staff came up with the idea that Clarion would diagnose their current ordinance and follow up with alternatives for the city to consider. The city planning staff drafted the final version of the ordinance with limited legal support using the alternatives approach provided by Clarion. Pasadena's creative solution to a limited budget was serendipitous. We were so impressed with the approach Pasadena had taken that OHP contracted with Clarion to prepare similar guidance that would be relevant to all of California's local governments. The result was one of OHP's most ambitious publications, *Drafting*

“To presume that a one-size-fits-all ordinance exists would be a disservice to local governments.”

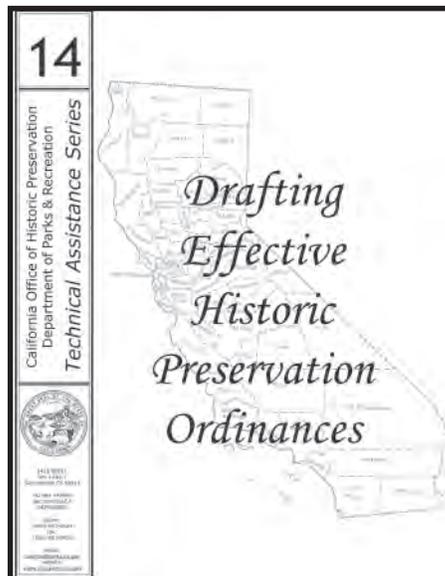
Effective Historic Preservation Ordinances: a Manual for California's Local Governments. The manual identifies significant issues that all communities need to address when preparing or revising an ordinance. The publication's table of contents effectively serves as an outline for the various sections that should appear in an ordinance. Each chapter is set up like a restaurant menu where the diner has choices: ham or pastrami; rice or potatoes? By working through a menu of choices presented in each chapter, the local government has the opportunity to craft an ordinance that is tailored-made to fit. One size does not fit all.

Obviously, this guidance is of great use to communities who are already in the process of revising or amending their existing ordinance as well as those who are just at the beginning stages of setting up a local preservation program. However, it is a very good idea for all local governments to periodically run a diagnostic check-up to determine if their ordinance still meets the needs of the community or whether a tune-up is called for.

Things to Consider in Creating, Amending, or Reviewing an Ordinance

The following are the key elements that every local government should consider including in an ordinance and the questions that each community must ask of itself:

- **Purpose:** What are the local preservation goals? Are there particular issues that potentially affect historic properties, such as infill in historic areas? What resources should be protected? How should they be protected? How should the ordinance be administered and enforced?
- **Enabling Authority:** What is the local government authority available to adopt a preservation ordinance? In California, for example, local governments have broad authority to adopt preservation ordinances as part of their police power established in the state constitution and specific state statutes.
- **Establishment of the Preservation Commission:** What entity will administer and enforce the ordinance? What is its composition? What is its scope of powers? Is it advisory to another body or does it have final review authority? Are professional qualifications required?
- **Procedures and Criteria for Designation of Historical Resources:** Does the ordinance outline specific procedures for designating historic properties? Who can nominate? Is owner consent required? What are the noticing requirements? Does the commission have authority to designate properties or is the decision made by an elected body? Is there an appeals process? Is there a provision for establishing historic contexts and carrying out surveys? What are the criteria for designating historical resources? Criteria that are modeled on those of the National Register have the advantage of being time-tested and being familiar. What types of resources will be protected, and how? Will districts be considered as well as individual properties? Are archeological resources included in the ordinance or should a separate archeological ordinance be considered? What about cultural landscapes?
- **Procedures and Criteria for Actions Subject to Review:** What activities will be regulated that could affect historic resources and what is the appropriate level and amount of review? Typically, rehabilitation, demolition, and relocation are included. What about new construction and infill in historic areas? Can the local government say "no" to the demolition of a historic property, or just delay



The manual above identifies significant issues that all communities need to address when preparing or revising an ordinance
 Photo courtesy of www.parks.ca.gov

the action? What review standards will be used to evaluate the appropriateness of a proposed change (not to be confused with design guidelines)? Does the commission have final authority or is it advisory to another body?

- **Consideration of Economic Effect of Designation or Review of Action:** To provide a “safety-valve” it is important to include a procedure that allows a property owner to demonstrate that in some cases enforcement of the ordinance would constitute an extreme economic hardship. Does the community offer economic incentives for preservation, such as property tax reduction, elimination or reduction of certain fees, or variances in zoning requirements?
- **Appeals:** How are decisions appealed and to whom? An appeals process provides an administrative resolution to claims that might otherwise end up in court. Some communities rely on a general citywide appeals board; others have an appeals process specific to the historic preservation ordinance.
- **Enforcement:** What enforcement provisions are actually feasible? It makes little sense to include provisions that the community is unable or unwilling to enforce. Remedies for nonconformance typically include fines, injunctive relief and compliance orders, receivership and entry on to land to correct violation, forced reconstruction, and loss of further entitlement. Sometimes it is tempting to want to disallow a property owner any further use of the property for some period of time after an egregious offence, such as an illegal demolition, has occurred. But, does anyone want to look at an empty lot for five years?
- **Definitions:** This is probably the most important part of the ordinance and this section should never be underestimated. We have reviewed ordinances where terms are not defined at all. For example, What exactly constitutes a demolition? Or, What is a major alteration? We also see ordinances where several terms seem to be used interchangeable such as historic property, cultural resource, and heritage landmark. Sound definitions are needed to sustain judicial challenge. It is a good idea to use terms shared by the National Register, the Secretary of the Interior, your state’s historic register, and your state’s own environmental laws. These have been time-tested.
- **Severability:** It is important that if for any reason a section of the ordinance is found to be invalid, that such a decision does not affect the validity of the remaining sections.

Some Other Things to Consider

Historic Preservation Overlay Zones

Because of the desire to strengthen the relationship between historic preservation and land use planning, some communities have adopted historic preservation overlay zones (HPOZs) as an alternative to the more traditional approach of designating individual properties or historic districts. HPOZs are established through the zoning ordinance, rather than the independent historic preservation ordinance. An HPOZ adds a layer of regulations over the underlying zoning regulations in a specific area. Another benefit that the zoning overlay has the potential to regulate use in addition to changes in design or fabric. In some jurisdictions HPOZs avoid the issue of a certain percentage of property owner approval. Other communities establish a historic district first through a historic preservation ordinance procedure, and then apply the historic overlay zoning.

Staff review

In an era of reduced budgets and in a political and economic climate where permit streamlining is often desired, some communities are delegating more responsibilities

under the ordinance to staff rather than consideration by the commission. If this is the approach the community wants to take, it is important that it is codified in the ordinance and not simply a staff or commission decision or common practice. Thresholds need to be established and defined; what can be reviewed by staff and what must be placed on the commission agenda.

Conservation Districts or Conservation Overlay Zones

More communities are becoming concerned with the preservation of neighborhood or community character in addition to the preservation of historic fabric and design. Conservation districts often address broad issues such as set back, height, traditional scale and character, and serve as an alternative to the more stringent historic district regulations.

Some Pitfalls

In California there is a healthy property rights sentiment and also high property values, neither of which is particularly conducive to a robust historic preservation. As a result, in an effort to not let anything slip through the cracks, we have seen proposed ordinances are so detailed that they are ineffective, so ambitious that they cannot be supported by local staff, and so rigid that any change is difficult. Keep in mind that the goal is to produce an ordinance that is workable and enforceable in your community and that has community and political support.

Since 1984, she has been with the California Office of Historic Preservation where she supervises the Local Government Unit. She works closely with both local governments and community organizations to integrate historic preservation with land use planning and to coordinate historic preservation planning efforts with environmental review processes.

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Access to NAPC-L is limited to NAPC members

Lisa Craig is the Chief of Historic Preservation for the City of Annapolis, MD. The following article is based on her presentation of the same title at Forum 2012 in Norfolk, VA.

SECRETS BY LISA

TOP SECRET

Secrets of a Successful Application

By Lisa Craig

In actuality, the best thing about a successful application is that there are NO Secrets. This article reveals how a good application creates a transparent procedural process, supports the purpose of your historic district ordinance and leads to the ultimate goal for the historic property owner: project approval.

The key questions to address in reviewing both your historic district commission's application and the application process are:

1. How does a good **Certificate of Approval or Appropriateness** application process benefit the applicant, staff, commission, and public?
2. How can an applicant ensure their project is presented in a **concise, clear and consistent** manner?
3. How can the applicant/staff use the application to demonstrate the **project is compatible** with the historic district ordinance and design guidelines?
4. How does the applicant/staff respond to **public comments** that may or may not be relevant to the application?
5. How does the commission use the application to ensure a **clear and defensible decision**?
6. What is the process for **making changes** to your application and/or application process?

In addressing these key questions, the application process can be analyzed using what I refer to as the “Successful C’s:”

- **Certificate of Approval/Appropriateness** ☒ In many historic districts it’s called an application for a *Certificate of APPROVAL*.
- **Concise, clear & consistent** ☒ Work with the applicant to ensure that information presented to the commission meets these basic criteria:
 - Concise* means that when the application calls for product specification sheets, the essentials are provided, not 20 pages of irrelevant technical information.
 - Clear* means that if the intent is to replace siding, advise the owner to not use terms like “refurbish” or “renovate.”
 - Consistent* means that if the scope of work describes window repair, but the submitted plans show window replacement, the applicant must clarify the proposed treatment.
- **Compatible** relates to the applicable guidelines or standards for review. It means that when replacement-in-kind, a new addition, or restoration is proposed, the product specs and drawings reflect that fact per the applicable guidelines (e.g., “The new units shall duplicate the historic sashes, glass, lintels, sills, frames and surrounds in design, dimensions, and materials.”)
- **Comments** refer to the fact that any comments received from staff or the general public are shared with the applicant prior to the hearing to allow adequate time for applicant response.
- **Clear & defensible decision-making** is based on information provided in the application, which serves as the basis for the commission’s decision. Staff should instruct the applicant to use terminology and illustrate designs that respond to the commission’s design guidelines, the Secretary or the Interior’s Standards and the ordinance.
- **Changes to the application process** are highly encouraged to ensure consistency with the ordinance.

So, how easy is it for your customer to find the forms, procedures and review criteria for submission of their project? Frankly, doing some research yourself may give you a greater appreciation for the need to improve your own community’s commission web page. If it’s a challenge for you to navigate yours or any municipality’s website to locate an application, how do you think the applicant feels when searching for it? In Annapolis, there are at least three ways of locating the form on the City’s website. But none of those are less than six clicks from the City’s home page. So, who serves as a good model?

Searching a dozen municipal preservation programs in the country, I didn’t come up with an easily navigable example, but then I switched to some of the non-profit preservation organizations. My first try was with the Preservation Society of Charleston’s website. Within two clicks I had a direct link to the City of Charleston’s web page for the Department of Design, Development and Preservation, and with two more clicks, I had a Design Review Board application. This exemplifies the importance of the relationship between the city’s preservation regulatory body and the non-profit preservation advocacy organization. If your community is “challenged” by the limitations, policies or priorities established for your municipal government’s website, you may be able to ensure that the historic property owner has quick access to your historic preservation commission’s home page by partnering with your local preservation organization.

CONTACTING THE COMMISSION

Some communities have established a 311 webpage to allow applicants to post a question, receive an answer online, or request a follow-up phone call. A good example of that exists in Montgomery County, Maryland. But no matter the means of contact ☒ a phone call, an email or, yes, even a snail-mail letter ☒ communicating directly with HPC staff is often the next step. [Note: What cannot be encouraged is direct communication between a property owner and a member of the Commission. This can be termed *ex-parte* contact and while Commission member names

should be included on the government website, their contact information should not.]

I find that email can work just fine for simple requests (I need to paint my house, do I need the HPC's approval?). Many times, though, when someone says they want to do some basic repair work on their home, it can mean anything from replacing a damaged corner board to replacing all the windows on the front façade. A conversation with the property owner is often necessary to clarify both the process and the forms that are needed, including required permits and the feasibility of staff approval based on the project specifications.

Completing the

CERTIFICATE OF APPROVAL

Page 1

 **City of Annapolis**
Department of Planning & Zoning
Historic Preservation Division
145 Gorman Street, 3rd Floor
Annapolis, MD 21401-2535
HicPres@annapolis.gov • 410-263-7961 • Fax 410-263-1129 7961 • MD Relay or 711 • www.annapolis.gov

**HPC Public Hearing Application
for Certificate of Approval**

Building site address _____

Provide complete information below. Mailing addresses and telephone numbers are required.

Property Owner Information		Contractor's Information	
Name _____	Name _____	Address _____	Address _____
City _____ State _____ Zip _____			
Day phone _____ Cell _____			
E-mail _____	E-mail _____	E-mail _____	E-mail _____

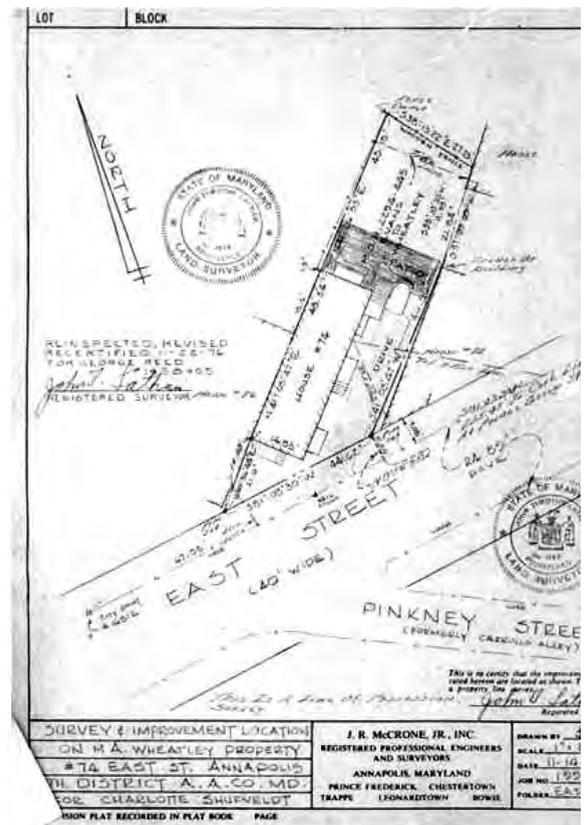
Applicant Information		Architect/Engineer Information	
Name _____	Name _____	Address _____	Address _____
City _____ State _____ Zip _____			
Day phone _____ Cell _____			
E-mail _____	E-mail _____	E-mail _____	E-mail _____

- Applicant/Agent to receive comments.
- Will you be applying for the Historic Preservation Tax Credit? Yes No
(The tax credit is limited to those expenses having to do with the exterior features of a structure and the total estimate of expenses per application must exceed \$6,000. Applications must be submitted prior to start of work. Please refer to the Annapolis City Code - Section - 6.04.230 - Historic Preservation Tax Credit which is attached to this application.)
- Are there any easements or deed restrictions for the exterior of this building or the site? Yes No
If yes, submit a letter from the easement holder stating their approval of the proposed work.
- A site plan to scale indicating property lines and lot dimensions, adjacent street and curb cuts, existing structures and locations for all existing and proposed exterior signs.
If signs are proposed please provide drawings indicating material, method of attachment, position on building, size and front lines feet of building, size and position of all other signs on building, and a layout of the sign.
- Scaled drawings (1/4" to 1") for new construction, additions, and major alterations must be submitted. Drawings must include: plans, sections, elevations and details.
1 full size to scale set of 11" x 17" or larger plans & 14 reduced sets on 8" x 11" or 8" x 14" to scale.
- Printed color photographs or digital photos of existing conditions must be submitted in original packet. Photocopies of the photographs may be used in the remaining fourteen packets. Once your project is completed, photos of the completed work must be submitted to the Historic Preservation Staff within 60 days.

*The Annapolis COA application form.
(all photos credit: Lisa Craig)*

What information do you require from the applicant for your project review process? In Annapolis, the COA application requires the following basic information:

- Building site address
- Name and contact information (including email) for property owner and the applicant
- Intent to apply for the local historic property tax credit
- Disclosure of any preservation easement
- Description of the proposed scope of work
- Estimated cost of the project
- Signature of property owner or agent of property owner
- Applicant certification acknowledging accuracy of information presented and understanding that other permit requirements may apply
- Supplemental information including:
 - Site plan / boundary survey
 - Scaled drawings
 - Color digital photos
 - Cut sheets/product specifications
 - Other required permits



Supplemental information, such as a site plan or boundary survey, is critical to a complete application.

Having reviewed and/or completed the Certificate of Approval application, the applicant will contact the Historic Preservation office to review the procedure for submission. It is at that point where the staff has the first opportunity to work with the applicant to ensure a complete application submission. It's also the point at which the complexity of the project may require a meeting with Historic Preservation staff and/or other agency staff involved in the project review. This point of collaboration is often referred to as a "pre-application" process, which may also include building code officials, Planning & Zoning staff, the Fire Marshall, Public Works and Transportation Department Staff.

While the details of the application are important to the COA process, for the application process to be truly successful, the building permit must be issued. In some cities, that may mean the staff needs to go a step beyond and help property owners or applicants navigate beyond pre-development into the development process — connecting them to (but not endorsing) professionals experienced in working in the historic district with an emphasis on checking references, directing them to other agencies or non-profit organizations that can help with financing or business development programs, and finally engaging the community in the final outcome — for example, a new business opening in the Main Street Historic District.

WORKING TOWARD APPROVAL

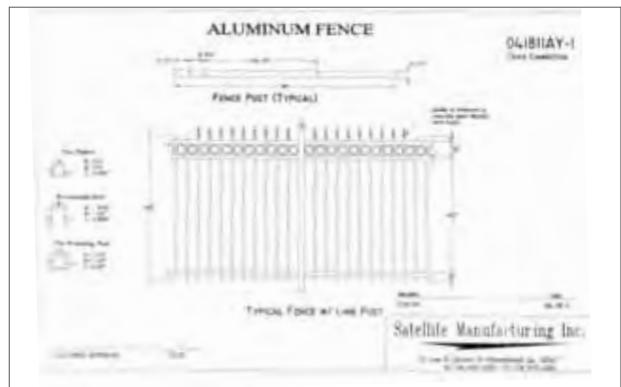
So, back to what the commission and the staff should consider to be the end goal: getting the applicant's project to approval. If staff has done an effective job of customer service — guiding the applicant to the appropriate forms, following up with a discussion on the particulars of the project, providing clarity on completing the application, connecting the applicant to other reviewing agencies, and issuing a supportive staff report based on compliance with the design review criteria — then the result should be a complete application.

How to Ensure Quality in the APPLICANT'S SUBMISSION

For the applicant's project to be presented in a clear, concise and consistent manner, drawings must be understandable. If the application clearly states scaled drawings are required for a public hearing, make sure the applicant understands what a scaled drawing is. For example, most fence companies can provide such a drawing, but if the applicant is working with a contractor who can't provide a drawing, it may put the applicant at a disadvantage either because staff feels the application is not complete or because the HPC is not clear as to the true dimensions and method of installation. It's critical that staff ensure there is consistency between one application and another as it relates to drawings, product specifications, site plans, etc., prior to submission to the HPC .



Staff availability for customer service will ensure a smoother application process!



Consistency in drawings and product specifications is key to a complete application.

PROJECT COMPATIBILITY

How does the application demonstrate the **project is compatible** with the historic district ordinance and design guidelines? Staff is in the best position to understand the process, past precedent for approvals, and the commission's approach to interpretation of the ordinance and guidelines. Therefore, staff should encourage the applicant to communicate with them through whatever means is convenient ☒ email, phone, in-person meeting ☒ well before the application deadline. It may also mean communicating not just with the applicant, who may be the architect, contractor or an owner's tenant, but the property owner. When communication with the property owner's agent becomes more frustrating than fruitful, contact the owner directly.

SIX STEPS

to a Better Application Process:

- 1) If the applicant is unclear as to the necessary information for the submission, then provide examples of other project applications similar that have met the standards.
- 2) Provide information about professionals experienced in working in the historic district.
- 3) Discuss the specific guidelines the commission will consider.
- 4) Provide examples of acceptable product specs/drawings or photographs.
- 5) Coordinate project approval with local zoning requirements.
- 6) Encourage early submittal of the application for your review and identification of items necessary to complete the application ☒ .g., product specifications that show material, method of installation, and dimensions.

Encouraging and Responding to

PUBLIC COMMENT

In Annapolis, the general public may submit comments on an application to the Commission both prior to and during the hearing. Additionally, all relevant City review staff provide comments which are available to the public 11 days prior to the hearing. The applicant is provided with those comments and may submit additional information or revisions up to five days prior to the hearing in response to the comments. Staff also discusses with the applicant which comments are relevant to the application and the design review criteria. In this way, the applicant and the Commission are equally aware of what the criteria are for consideration of the application, notwithstanding any comments received that are not substantive to the Design Guidelines being addressed or are not addressed in the Historic District Zoning ordinance.

CHANGE IS INEVITABLE

Making changes to your application and clarifying procedures for review are sometimes necessary. In some cases the changes may be significant (creating a new form) while other times it may mean adding one question (e.g., easements on the property). Consider changing your application and/or review process when there are inconsistencies with the historic district zoning ordinance, changes to city permitting procedures and applications, or a need for legal wording or new preservation tools such as easements and historic tax credits.

Remember, a successful application is no secret. A good application process benefits the applicant, staff, commission, and public if it is presented in a concise, clear and consistent manner; demonstrates how the project is compatible with the Historic District Ordinance and Design Guidelines; ensures timely staff and public comments relevant to the application; provides the commission with the basis for clear and defensible decision-making; and can always be made better with changes initiated by staff or the commission that support consistency with the ordinance, procedures and other permit processes.■

Assessing Economic Hardship Claims under historic preservation ordinances

By Julia Miller

Historic preservation ordinances in effect around the country often include a process for administrative relief from preservation restriction in situations of "economic hardship." Under typical economic hardship procedures, an applicant may apply for a "certificate of economic hardship" after a preservation commission has denied his or her request to alter or demolish a historic property protected under a preservation ordinance. In support of an application for relief on economic hardship grounds, the applicant must submit evidence sufficient to enable the decision making body to render a decision. The type of evidence required is generally spelled out in preservation ordinances or interpreting regulations. The burden of proof is on the applicant.

The exact meaning of the term "economic hardship" depends on how the standard is defined in the ordinance. Under many preservation ordinances economic hardship is defined as consistent with the legal standard for an unconstitutional regulatory taking, which requires a property owner to establish that he or she has been denied all reasonable beneficial use or return on the property as a result of the commission's denial of a permit for alteration or demolition.

Requests for relief on economic hardship grounds are usually decided by historic preservation commissions, although some preservation ordinances allow the commission's decision to be appealed to the city council. In some jurisdictions, the commission may be assisted by a hearing officer. A few localities have established a special economic review panel, comprised of members representing both the development and preservation community.

Economic Impact

In acting upon an application for a certificate of economic hardship, a commission is required to determine whether the economic impact of a historic preservation law, as applied to the property owner, has risen to the level of economic hardship. Thus, the first and most critical step in understanding economic hardship is to understand how to evaluate economic impact.

Commissions should look at a variety of factors in evaluating the economic impact of a proposed action on a particular property. Consideration of expenditures alone will not provide a complete or accurate picture of economic impact, whether income-producing property or owner-occupied residential property. Revenue, vacancy rates, operating expenses, financing, tax incentives, and other issues are all relevant considerations. With respect to income-producing property, economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return. This approach allows a commission to focus on the 'bottom line' of the transaction rather than on individual expenditures.

In addition to economic impact, the Supreme Court has said that "reasonable" or "beneficial use" of the property is also an important factor. Thus, in evaluating an economic hardship claim based on the constitutional standard for a regulatory taking, commissions will need to consider an owner's ability to continue to carry out the traditional use of the property, or whether another viable use for the property remains. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the landmark decision upholding the use of preservation ordinances to regulate historic property, the Supreme Court found that a taking did not arise because the owner could continue to use its property as a railroad station.

The Supreme Court has also said that the applicant's "reasonable investment-backed expectations" should be taken into consideration. Although the meaning of this phrase has not been delineated with precision, it is clear that "reasonable" expectations do not include those that are contrary to law. Thus, an applicant's expectation of demolishing a historic property subject to a preservation ordinance at the time of purchase (or subject to the likelihood of designation and regulation) may not be considered "reasonable." Also pertinent is whether the owner's objectives were realistic given the condition of the property at the time of purchase, or whether the owner simply overpaid for the property. Under takings law, government is not required to compensate property owners for bad business decisions. Nor is the government required to guarantee a return on a speculative investment.

Commissions may also be able to take into account whether the alleged hardship is "self created." Clearly relevant is whether the value of the property declined or rehabilitation expenses increased because the owner allowed the building to deteriorate.

Application of the takings standard in the context of investment or income-producing property is usually fairly straightforward. The issue can be more complex, however, in situations involving hardship claims raised by homeowners. In the context of homeownership, it is extremely difficult for an applicant to meet the standard for a regulatory taking, that is, to establish that he or she has been denied all reasonable use of the property. When a commission insists that houses be painted rather than covered with vinyl siding, and windows be repaired rather than replaced, the applicant can still live in the house. The fact that these repairs may be more costly is not enough. Even if extensive rehabilitation is required, the applicant must show that the house cannot be sold "as is," or that the fair market value of the property in its current condition plus rehabilitation expenditures will exceed the fair market value of the house upon rehabilitation. See *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa.1996). It is also important to note that "investment-backed expectations" are different in the context of homeownership, owners often invest in home improvements or renovations without the expectation of recouping the full cost of the improvement in the form of increased property value.

In addressing hardship claims involving historic homes, commissions must be careful to be objective and consistent in their approach. Otherwise, a commission may undermine the integrity of its preservation program and raise due process concerns as well. Ideally, grant money, tax relief, and other programs should be made available to historic homeowners who need financial assistance.

Special standards for economic hardship may apply to nonprofit organizations. Because these entities serve charitable rather than commercial purposes, it is appropriate to focus on the beneficial use of their property, rather than rate of return, taking into account the particular circumstances of the owner (i.e., the obligation to serve a charitable purpose). In such situations, hardship analysis generally entails looking at a distinct set of questions, such as: the organization's charitable purpose, whether the regulation interferes with the organization's ability to carry out its charitable purpose, the condition of the building and the need and cost for repairs, and whether the organization can afford to pay for the repairs, if required. (Note, however, that while consid-

eration of financial impact may be appropriate, a nonprofit organization is not entitled to relief simply on the basis that it could raise or retain more money without the restriction.)

The Proceeding

Under a typical hardship process, the applicant will be required to submit specific evidence in support of his or her claim. Once a completed application has been filed, a hearing will be scheduled, at which time the applicant generally presents expert testimony in support of the economic hardship claim on issues such as the structural integrity of the historic building, estimated costs of rehabilitation, and the projected market value of the property after rehabilitation. Once the applicant has presented its case, parties in opposition or others may then present their own evidence. The commission may also bring in its own expert witnesses to testify. As noted above, the burden of proof rests on the property owner.

In hearing economic hardship matters, commissions must be prepared to make a legally defensible decision based on all the evidence presented. In the event of conflicting expert testimony, which is often the case in economic hardship proceedings, the commission will need to weigh the evidence, making specific findings on the relative credibility or competency of expert witnesses.

In evaluating the evidence, the commission should ask itself five distinct questions:

- 1. Is the evidence sufficient?* Does the commission have all the information it needs to understand the entire picture, or is something missing. The application is not complete unless all the required information has been submitted. If additional information is needed, ask for it.
- 2. Is the evidence relevant?* Weed out any information that is not relevant to the issue of economic hardship in the case before you. Commissions may be given more information than they need or information that is not germane to the issues, such as how much money the project could make if the historic property were demolished. The property owner is not entitled to the highest and best use of the property.
- 3. Is the evidence competent?* Make an assessment as to whether the evidence establishes what it purports to show.
- 4. Is the evidence credible?* Consider whether the evidence is believable. For example, ask whether the figures make sense. A commission will need to take into consideration the source of the evidence and its reliability. (If the evidence is based on expert testimony, the commission should determine whether the expert is biased or qualified on the issue being addressed. For example, it may matter whether

a contractor testifying on rehabilitation expenditures actually has experience in doing historic rehabilitations.)

5. *Is the evidence consistent?* Look for inconsistencies in the testimony or the evidence submitted. Request that inconsistencies be explained. If there is contradictory evidence, the commission needs to determine which evidence is credible and why.

In many instances the applicant's own evidence will fail to establish economic hardship. However, in some situations, the question may be less clear. The participation of preservation organizations in economic hardship proceedings can be helpful in developing the record. Commissions should also be prepared to hire or obtain experts of their own. For example, if a property owner submits evidence from a structural engineer that the property is structurally unsound, the commission may need to make an independent determination, through the use of a governmental engineer or other qualified expert, as to the accuracy of that information. It may be impossible to evaluate the credibility or competency of information submitted without expert advice.

The record as a whole becomes exceedingly important if the case goes to court. Under most standards of judicial review, a decision will be upheld if it is supported by substantial evidence. Thus, in conducting administrative proceedings, it is important that evidence provides a true and accurate story of the facts and circumstances and that the commission's decision is based directly on that evidence.

EVIDENTIARY CHECKLIST

The following checklist may serve as a useful tool for local commissions and other regulatory agencies considering economic hardship claims:

1. Current level of economic return:

- Amount paid for the property, date of purchase, party from whom purchased, and relationship between the owner of record, the applicant, and person from whom property was purchased,
- Annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years, and depreciation deduction and annual cash flow before and after debt service, if any, during the same period,
- Remaining balance on the mortgage or other financing secured by the property and annual debt-service, if any, during the prior three years,
- Real estate taxes for the previous four years and assessed value of the property according to the two most recent

assessed valuations,

- All appraisals obtained within the last two years by the owner or applicant in connection with the purchase, financing, or ownership of the property,
 - Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other,
 - Any state or federal income tax returns relating to the property for the last two years.
2. Any listing of property for sale or rent, price asked, and offers received, if any within the previous two years, including testimony and relevant documents regarding:
 - Any real estate broker or firm engaged to sell or lease the property,
 - Reasonableness of price or rent sought by the applicant,
 - Any advertisements placed for the sale or rent of the property.
 3. Feasibility of alternative uses for the property that could earn a reasonable economic return:
 - Report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any buildings on the property and their suitability for rehabilitation.
 - Cost estimates for the proposed construction, alteration, demolition, or removal, and an estimate of any additional cost that would be incurred to comply with the requirements for a certificate of appropriateness,
 - Estimated market value of the property: (a) in its current condition, (b) after completion of the proposed alteration or demolition, and (c) after renovation of the existing property for continued use,
 4. Any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property.
 5. Knowledge of landmark designation or potential designation at time of acquisition.
 6. Economic incentives and/or funding available to the applicant through federal, state, city, or private programs. ■

Julia Miller works in the Law and Public Policy office at the National Trust for Historic Preservation.



PRESERVATION LAW REPORTER EDUCATIONAL MATERIALS

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DEMOLITION BY NEGLIGENCE

“Demolition by Neglect” is the term used to describe a situation in which a property owner intentionally allows a historic property to suffer severe deterioration, potentially beyond the point of repair. Property owners may use this kind of long-term neglect to circumvent historic preservation regulations.

Contexts in Which Demolition by Neglect Arises

Sometimes demolition by neglect occurs when an owner essentially abandons a historic property. More often, neglect is an affirmative strategy used by an owner who wants to develop the property. The context in which the issue is raised depends on what action the city decides to take, if any.

At one end of the spectrum, some local governments have taken affirmative enforcement actions against the owners of such properties, ultimately going to court if necessary. At the other end of the spectrum, occasionally the owner of a neglected or deteriorating property will file a lawsuit against the local government, challenging the historic designation or some other feature of the preservation ordinance. The problem with both of these extremes is that courts are very unpredictable.

More commonly, demolition by neglect controversies end up somewhere in the middle of this spectrum, with the local government issuing citations to repair the building, and the owner ignoring the citations. The skirmishes involved in this process often result in a statement that leaves all sides frustrated.

Relationship Between Demolition by Neglect and Economic Hardship

Property owners using demolition by neglect as a tactic to work around preservation laws will often argue that the prohibitive cost of repairs and deferred maintenance creates an economic hardship.

Ideally historic preservation ordinances need a safeguard provision to protect against this kind of argument, creating a loophole. Generally, the owner’s own neglect should not be allowed to create an economic hardship. However, it is often difficult to sort out the extent to which an economic hardship is attributable to an owner’s actions, or to things beyond the owner’s control (i.e., circumstances that would have existed in any event). In looking at economic hardship and demolition by neglect, it is important for commissions to look beyond simply the relationship between the cost of repairs and the purchase price or the “as is” value.

Tools for Controlling Demolition by Neglect

The most important tool for controlling demolition by neglect is a carefully drafted provision in the local preservation ordinance requiring affirmative maintenance and ensuring that the local commission is equipped with adequate remedies and enforcement authority. Even if a community already has some type of affirmative maintenance provision, it may want to review your ordinance and amend it in order to increase its effectiveness.

The first step is to look at the state's enabling legislation to determine the specific legal authority for affirmative maintenance provisions. Affirmative maintenance provisions have repeatedly been upheld and enforced by the courts. The leading case is *Maber v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), in which a federal appeals court upheld an affirmative maintenance provision for the French Quarter in New Orleans, ruling that the provision was constitutional as long as it did not have an unduly burdensome effect on the individual property owner. In *Harris v. Parker*, Chancery No. 3070 (Cir. Ct. Isle of Wight County, Va. Apr. 15, 1985), a case from Smithfield, Virginia, the court actually ordered repairs to be carried out in compliance with the affirmative maintenance requirements in the ordinance. And in *Buttnick v. City of Seattle*, 719 P.2d 93, 95 (Wash. 1986), the court ruled that requiring an owner to replace a defective parapet on a historic building did not result in unreasonable economic hardship. Finally, the D.C. Court of Appeals in *District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. App. 1994), reversed approval of the demolition of a historic landmark in dilapidated condition caused by the owner's own actions, because the demolition permit was unauthorized under the District's preservation act.

When drafting an affirmative maintenance provision, it is important to mandate coordination between the preservation commission and the building code enforcement office, to ensure that the commission is consulted before code citations and enforcement orders are issued. Be specific in defining what repairs will be required, and what remedies will be available under what circumstances.

One important remedy to include in the ordinance is the authority for the local government to make the repairs directly and then charge back the owner by placing a lien on the property. Also make sure that the economic hardship provision is drafted so that it prevents owners from arguing that their own neglect has caused an economic hardship.

Incentive Programs and Other Forms of Assistance

Another important tool for controlling demolition by neglect and increasing the effectiveness of affirmative maintenance programs is the use of incentives. Tax incentives, low cost loans, and grants are always encouraged as a way to help owners fund necessary maintenance. Maintenance expenses can also be defrayed through the use of volunteer maintenance crews.

Enforcement

One reason why demolition by neglect is such a frustrating issue for preservationists and historic preservation commissions is that it often involves a branch of local government over which we have little influence or control—the code inspection and enforcement office. Most preservation groups have good relationships with their preservation commissions, but probably no relationship at all with the building inspection office.

There is often a conflict between these two governmental functions. Even under the best of circumstances, these two offices rarely coordinate their actions. At worst, an outright turf battle may erupt, in which the code enforcement office orders a building demolished as a safety hazard without consulting the preservation commission.

It is therefore very important for local preservation groups to get to know code enforcement officials. A good working relationship with these officials can be critical to helping to ensure that deferred maintenance problems are identified and corrected before they reach the point of demolition by neglect.

Selected Examples of Demolition by Neglect Provisions

Cited below are:

- examples of provisions in state historic preservation enabling laws authorizing localities to prevent the destruction of historic buildings by “demolition by neglect;”

- sample local ordinance provisions dealing with demolition by neglect through maintenance requirements; and
- examples of the use of eminent domain to prevent demolition by neglect.

1. State Enabling Legislation

A number of states permit local governments to prevent the “demolition by neglect” of historic properties. Below are some examples of provisions in state enabling laws for historic preservation intended to address this problem:

North Carolina: “The governing board of any municipality may enact an ordinance to prevent the demolition by neglect of any designated landmark or any building or structure within an established historic district. Such ordinance shall provide appropriate safeguards to protect property owners from undue economic hardship.”

Rhode Island: “Avoiding demolition through owner neglect. a city or town may by ordinance empower city councils or town councils in consultation with the historic district commission to identify structures of historical or architectural value whose deteriorated physical condition endangers the preservation of such structure or its appurtenances. The council shall publish standards for maintenance, of properties within historic districts. Upon the petition of the historic district commission that a historic structure is so deteriorated that its preservation is endangered, the council may establish a reasonable time not less than 30 days within which the owner must begin repairs. If the owner has not begun repairs within the allowed time, the council shall hold a hearing at which the owner may appear and state his or her reasons for not commencing repairs. If the owner does not appear at the hearing or does not comply with the council's orders, the council may cause the required repairs to be made at the expense of the city or town and cause a lien to be placed against the property for repayment.”

Alabama: “Demolition by neglect and the failure to maintain an historic property or a structure in an historic district shall constitute a change for which a certificate of appropriateness is necessary.”

Wisconsin: “[A] political subdivision may acquire by gift, purchase, or condemnation any property right in historic property, whether the property is real or personal.”

2. Local Ordinance Provisions Concerning Demolition by Neglect

Many local ordinances include provisions for dealing with the problem of demolition by neglect. Some noteworthy examples are described below:

San Francisco: Language in the San Francisco ordinance is quite explicit and detailed with respect to the problem of demolition by neglect:

“Maintenance: The owner, lessee, or other person in actual charge of a Significant or Contributory building shall comply with all applicable codes, laws and regulations governing the maintenance of property. It is the *intent of this section to preserve from deliberate or inadvertent neglect* the exterior features of buildings designated Significant or Contributory, and the interior portions thereof when such maintenance is necessary to prevent deterioration and decay of the exterior. All such buildings shall be preserved against such decay and deterioration and shall be free from structural defects through prompt corrections of any of the following defects:

1. Facades which may fall and injure members of the public or property.
2. Deteriorated or inadequate foundation, defective or deteriorated flooring or floor supports, deteriorated walls or other vertical structural supports.
3. Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split or buckle due to defective material or deterioration.
4. Deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors.
5. Defective or insufficient weather protection for exterior wall covering, including lack of paint or weathering due to lack of paint or other protective covering.
6. Any fault or defect in the building which renders it not properly watertight or structurally unsafe.”

Culpeper, Virginia: A somewhat different approach has been taken by the town of Culpeper, which states in its ordinance:

“*Sec. 28-27.2. Demolition By Neglect.* No officially designated historic landmark or contributing structure within the historic district shall be allowed to deteriorate due to neglect by the owner which would result in violation of the intent of this Section. “Demolition by neglect” shall include any one or more of the following courses of inaction or action:

1. Deterioration of the exterior of the building to the extent that it creates or permits a hazardous or unsafe condition.
2. Deterioration of exterior walls or other vertical supports, horizontal members, roofs, chimneys, exterior wall elements such as siding, wooden walls, brick, plaster, or mortar to the extent that it adversely affects the character of the historic district or could reasonably lead to irreversible damage to the structure.

In the event the Culpeper County Building Official, or the agent officially recognized by the Town of Culpeper as serving that capacity, determines a structure in a historic district is being ‘demolished by neglect’, he shall so notify the Chairperson of the Historic and Cultural Conservation Board, stating the reasons therefor, and shall give the owner 30 days from the date of the notice to commence work rectifying the specifics provided in the notice; or to initiate proceedings as provided for in Section 28-27. If appropriate action is taken in this time, the Town may initiate appropriate legal action as provided therein.”

Charlottesville, Virginia: The Charlottesville ordinance not only requires the maintenance of a landmark property but also requires the maintenance of the land on which the landmark sits. Note the following:

“*Section 31-141. Maintenance and repair required.*

Neither the owner of nor the person in charge of a structure or site in any of the categories set forth in section 31-127.2 of this Code shall permit such structure, landmark or property to fall into a state of disrepair which may result in the deterioration of any exterior appurtenance or architectural feature so as to produce or tend to produce, in the judgment of the appropriate board, a detrimental effect upon the character of the district as a whole or the life and character of the landmark, structure or property in question, including but not limited to:

1. The deterioration of exterior walls or other vertical supports;
2. The deterioration of roofs or other horizontal members;
3. The deterioration of exterior chimneys;
4. The deterioration of crumbling of exterior plasters or mortar;
5. The ineffective waterproofing of exterior walls, roofs and foundations, including broken windows or doors;
6. The peeling of paint, rotting, holes and other forms of decay;
7. *The lack of maintenance of surrounding environment, e.g., fences, gates, sidewalks, street signs, accessory structures and landscaping* (emphasis added);
8. The deterioration of any feature so as to create or permit the creation of *any* hazardous or unsafe condition or conditions.

The enforcing officer shall give notice by certified or registered mail of specific instances of failure to maintain or repair. The owner or person in charge of such structure shall have sixty days to remedy such violation; provided, that the appropriate board, upon request, may allow an extension of up to sixty days to remedy such violations. Thereafter, each day during which there exists any violation of this section shall constitute a separate violation and shall be punishable as provided in articles XXVIII of this chapter.”

Montgomery County, Maryland: Montgomery County requires a public hearing when charges of demolition by neglect are raised. If a property owner has been requested to maintain his property but refuses to do so, the ordinance allows the director of the county's Department of Environmental Protection may arrange for necessary repairs and charge the expenses to the owner.

“Sec. 24A-9. *Demolition by Neglect.*

... In the event the corrective action specified in the final notice is not instituted within the time allotted, the Director may institute, perform and complete the necessary remedial work to prevent deterioration by neglect and *the expenses incurred by the Director for such work. Labor and materials shall be a lien against the property, and draw interest at the highest legal rate, the amount to be amortized over a period of 10 years subject to a public sale if there is a default in payment.*” (Emphasis added.)

Portland, Maine: Portland permits its Department of Planning and Urban Development to order property owners to make necessary repairs to deteriorating buildings within specified time periods. The city also spells out in its ordinance procedures for appealing such orders.

“Section 14-690. *Preservation of Protected Structures.*

(a) Minimum Maintenance Requirement.

All landmarks, and all contributing structures located in an historic district, shall be preserved against decay and deterioration by being kept free from the following structural defects by the owner and any other person or persons who may have legal custody and control thereof.

- (1) Deteriorated or inadequate foundation which jeopardizes its structural integrity;
- (2) Defective or deteriorated floor supports or any structural members of insufficient size to carry imposed loads with safety which jeopardize its structural integrity;

- (3) Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration which jeopardize its structural integrity;
 - (4) Structural members of ceilings and roofs, or other horizontal structural members which sag, split or buckle due to defective materials or deterioration or are of insufficient size to carry imposed loads with safety which Jeopardize its structural integrity;
 - (5) Fireplaces or chimneys which list, bulge or settle due to defective material or deterioration or are of insufficient size or strength to carry imposed loads with safety which jeopardize its structural integrity;
 - (6) Lack of weather protection which jeopardizes the structural integrity of the walls, roofs, or foundation;
- (b) The owner or such other person shall repair such building, object, or structure within a specified period of receipt of a written order to correct defects or repairs to any structure as provided by subsection (a) above, so that such structure shall be preserved and protected in accordance with the purposes of this article.
 - (c) Any such order shall be in writing, shall state the actions to be taken with reasonable particularity, and shall specify dates for compliance which may be extended by the Department (of Urban Planning and Development) for reasonable periods to allow the owner to secure financing, labor or materials. Any such order may be appealed to the Board of Appeals within 30 days. The Board shall reverse such an order only if it finds that the Department had no substantial justification for requiring action to be taken, that the measures required for time periods specified were not reasonable under all of the circumstances. The taking of an appeal to the Board or to Court shall not operate to stay any order requiring structures to be secured or requiring temporary support unless the Board or Court expressly stay such order. The City shall seek preliminary and permanent relief in any court of competent jurisdiction to enforce any order."

The Portland ordinance also deals firmly with people who violate these and other provisions. In addition to having to pay fines for "each day on which there is failure to perform a required act," the ordinance applies a sort of "scorched earth" policy: If a person violates the ordinance either willfully or through gross negligence, he may not obtain a building permit for any alteration or construction on the historic landmark site for five years. Moreover, for a period of 25 years, any alteration or construction on the property is subject to special design standards imposed in the ordinance, whether or not the property involved is historic.

3. Eminent Domain

Several cities authorize the use of eminent domain as a means of protecting historic buildings from deterioration or neglect. Specific examples include:

San Antonio, Texas: San Antonio permits the city to "condemn the [historic] property and take it by the power of eminent domain for rehabilitation or reuse by the city or other disposition with appropriate preservation restrictions in order to promote the historic preservation purposes of [the ordinance] to maintain the structure and protect it from demolition."

Richmond, Virginia: Chapter 10, Section 21, of the Code of Virginia states that the Department of Conservation shall have the power to acquire, by purchase, gift or *eminent domain*, properties of scenic and historical interest which in the judgement of the Director of the Department should be

acquired, preserved and maintained for the use and pleasure of the people of Virginia. (Emphasis added)

Richmond, Va., recently obtained a charter change that allows the city to condemn and acquire properties in historic districts suffering from demolition by neglect. The city is currently using this authority to save a Greek Revival house in the Church Hill Historic District.

Baltimore, Maryland: Though not a recent example, the City of Baltimore exercised its eminent domain authority to acquire the historic Betsy Ross House in order to preserve it. In *Flaccommio v. Mayor and Council of Baltimore* (71 A. 2d 12 1950), the Supreme Court of Maryland upheld the city's use of this power.

Louisville, Kentucky: In the late 1970s, the City of Louisville condemned two Victorian townhouses that Louisville the Louisville Women's Club planned to demolish for a parking lot. The city then resold the properties, with preservation covenants attached, to a developer. The Club took the city to court, but the court upheld the city's action.

A National Trust preservation law publication . . .

Protecting Potential Landmarks Through Demolition Review

by Julia H. Miller



NATIONAL TRUST
for HISTORIC PRESERVATION®

1785 Massachusetts Avenue, NW
Washington, D.C. 20036
202.588.6035

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Cover Photo: Redwood Street Historic District, Baltimore, MD (Historic American Buildings Survey, NPS)

Protecting Potential Landmarks through Demolition Review

By Julia H. Miller*

Last year, the wrecking ball fell twice in downtown Baton Rouge—almost. Two historic buildings, the 1910 S.H. Kress Building, the site of a 1960 civil rights protest at the then all-white, lunch counter of the five and dime, and the adjacent Welsh & Levy Building, built in 1885, were spared only after the owner backed off his plans to demolish the buildings for a surface parking lot in response to public outcry. The fate of a third building, the Old Baton Rouge Ice Plant, proved less fortunate. This 1880s one-story brick building was demolished for a riverfront condominium project. Once used for ice production, the building had been located on the Mississippi River on one of the city's few remaining intact blocks dating from the Nineteenth Century.

Baton Rouge has since taken steps to protect its unprotected resources and other communities can too. Through the adoption of a “demolition review ordinance,” older buildings (generally those over 50 years) cannot be demolished without review by a preservation commission or special committee to determine whether a building is historically significant. If the building qualifies as significant, then a commission may delay the issuance of a demolition permit to explore preservation alternatives, such as designating the building as a historic landmark or finding a purchaser who may be interested in rehabilitating the building.

What is a Demolition Review?

Demolition review is a legal tool that provides communities with the means to ensure that potentially significant buildings and structures are not demolished without notice and some level of review by a preservation commission. This process creates a safety net for historic resources to ensure that buildings and structures worthy of preservation are not inadvertently demolished.

Demolition review does not always prevent the demolition of historically significant buildings or structures. Rather, as the name suggests, it allows for review of applications for demolition permits for a specific period of time to assess a building's historical significance. If the building is deemed significant, then issuance of the permit may be delayed for a specific period of time to pursue landmark designation, or alternatively, to explore preservation solutions such as selling the property to a purchaser interested in rehabilitating the structure or finding alternative sites for the proposed post-demolition project.

What is the Difference between “Demolition Review Laws” and “Demolition Delay” or “Interim Protection” Provisions used in Preservation Ordinances?

Demolition review laws are typically, but not exclusively, separate and distinct from historic preservation ordinances. They preclude the demolition of *any* building or structure over a certain age, or any building or structure identified for protection—regardless of significance—for a specific period of time, to allow for a determination of historical or architectural merit. Historic properties may or may not be designated as a landmark at the culmination of this process, depending upon a law's specific terms, and such laws may or may not include a

*Special Counsel and Legal Education Coordinator, National Trust for Historic Preservation

“demolition delay” or “waiting period” component.

The nomenclature can be confusing. Demolition review laws are sometimes called “demolition delay ordinances” or simply, “demolition ordinances.”

Demolition delay provisions in historic preservation ordinances are used to prevent the demolition of buildings or structures that have already been designated as historic landmarks or as contributing structures in a historic district for a specific amount of time, usually ranging from 6 to 24 months. During that time, the preservation commission, preservation organizations, concerned citizens, and others may explore alternatives to demolition, such as finding a purchaser for the structure or raising money for its rehabilitation.

These provisions are typically used by communities that lack the authority to deny demolition permits. For example, in North Carolina, local jurisdictions generally only have the authority to delay a demolition permit up to 365 days unless the structure at issue has been determined by the State Historic Preservation Officer to have “statewide significance.” *See* N.C. Gen. Stat. § 160A.400.14.

Interim protection provisions are also found in preservation ordinances. They preclude the demolition or alteration of buildings or structures during the period in which the building is under consideration for historic designation. The objective is to preserve the status quo pending designation and to prevent anticipatory demolitions. For further information, see Edith M. Shine, “The Use of Development Moratoria in the Protection of Historic Resources,” 18 PLR 3002 (1999).

Why Do Communities Adopt Demolition Review Procedures?

Demolition review procedures help to prevent the demolition of historically significant buildings. Given the vast numbers of older buildings in cities and towns across the United States, it is virtually impossible for a community to identify all buildings that should be protected under a historic preservation ordinance in advance. By establishing a referral mechanism, communities can be assured that buildings meriting preservation will not fall through the cracks. The delay period provides an opportunity for the municipality or other interested parties to negotiate a preservation solution with the property owner, or to find persons who might be willing to purchase, preserve, rehabilitate, or restore such buildings rather than demolish them.

Demolition review procedures have also been adopted to protect buildings that may not meet the standards for designation but nonetheless embody distinguishing features that help to make a community an attractive place to live or work. For example, demolition review provisions are being used to address the proliferation of “teardowns” in many of our older neighborhoods. By delaying demolition for a period of time, concerned residents may be able to negotiate the preservation of character-defining houses on a case-by-case basis. *See, e.g.* Santa Monica, California, and Highland Park, Illinois.

Which Properties are Subject to Demolition Review Procedures?

Demolition review ordinances typically set forth objective criteria for determining which properties are subject to review. For example, a demolition review ordinance may require some level of review for all buildings built before a specific date or all buildings that have attained a certain age on the date the permit application is filed. Many communities use “50 years” as the critical benchmark. *See, e.g.* Boston, Massachusetts, Boulder, Colorado, and New Castle, Delaware. A few jurisdictions have opted for a shorter time period, largely in recognition of their younger building stock, *see, e.g.* Santa Monica, California (which uses a 40-year benchmark), and Gainesville, Florida (all structures listed in the state’s “master site

file" and/or 45 years of age). Still others utilize a specific date. See, e.g. Alameda, California, and Weston, Massachusetts, which protect all buildings constructed prior to 1945.

Alternatively, the demolition ordinance may only apply to properties identified on a historic survey or listed on a state historic register or the National Register of Historic Places. Chicago, for example, requires review for the roughly 6,200 buildings designated as "red" or "orange" on its 1996 Historic Resources Survey. Montgomery County, Maryland, stays the issuance of a demolition permit for properties included on its Locational Atlas and Index of Historic Sites.

Finally, some communities limit the scope of protection afforded to buildings located within a specific geographic area. Baton Rouge's newly-enacted demolition ordinance, for example, applies only to its downtown buildings. Boston's law governs any buildings located in its downtown area, Harborpark, and neighborhood design overlay districts, in addition to all those that are at least 50-years old.

Keep in mind that the viability of this system may depend upon an applicant's representation or a permit official's ability to verify or accurately determine a building's age. Boston addresses this issue by insisting that all demolition permit applications be referred to the city's landmark commission. Staff to the commission makes the determination as to whether the building is subject to review.

In Wilton, Connecticut, the burden of establishing the age of the building rests on the demolition permit applicant. Applications must include a statement regarding the size and age of the building or structure to be demolished with verification through independent records such as tax assessment records or the city's cultural resource survey. Santa Monica bases its age determination on the date the original permit for the building or structure was issued. Alameda, California's law provides that the age is to be determined by review of city records. Weston, Massachusetts, protects against the potential problem that the date of a building or structure cannot be determined by record by also requiring the review of all properties of "unknown age."

What Actions Generally Trigger Demolition Review?

All demolition review procedures are triggered by the filing of an application for a demolition permit. The scope of demolition work requiring review, however, varies from jurisdiction to jurisdiction. In addition, requests for permits to move or substantially alter buildings may also require review.

In Boulder, demolition review is required for the demolition or removal of any building over fifty years old. Demolition includes the act of either demolishing or removing—

- Fifty percent or more of the roof area as measured in plan view (defined as the view of a building from directly above which reveals the outer perimeter of the building roof areas to be measured across a horizontal plane); or
- Fifty percent or more of the exterior walls of a building as measured contiguously around the "building coverage"; or
- Any exterior wall facing a public street, but not an act or process which removes an exterior wall facing an alley.

[Illustrations omitted.] To meet the exterior wall retention standard,

- The wall shall retain studs or other structural elements, the exterior wall finish, and the fully framed and sheathed roof above that portion of the remaining building to which such wall is attached;

- The wall shall not be covered or otherwise concealed by a wall that is proposed to be placed in front of the retained wall; and
- Each part of the retained exterior walls shall be connected contiguously and without interruption to every other part of the retained exterior walls.

In Davis, California, the city’s demolition review procedures apply to “the destruction, removal, or relocation of a structure not classified as an ‘incidental structure,’ or the permanent or temporary removal of more than twenty-five percent (25%) of the perimeter walls of a structure.” Incidental structures are accessory buildings such as sheds, fences, play structures, and so forth.

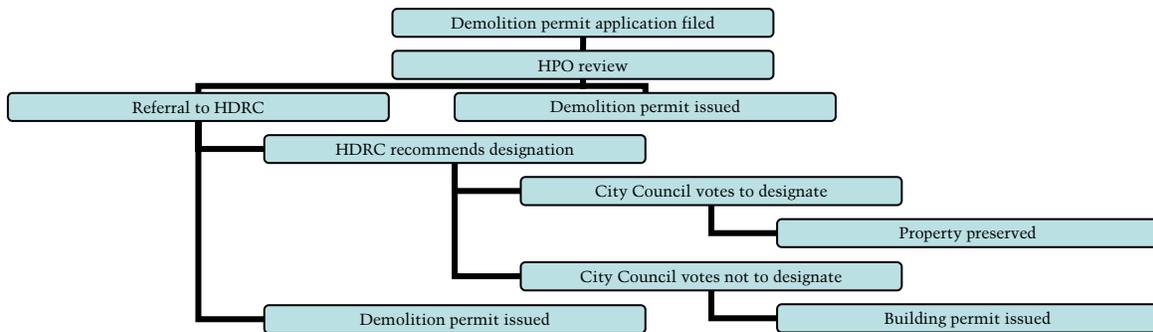
In Newton, Massachusetts, the demolition review requirement applies to any permit, without regard to whether it is called a demolition permit, alteration permit, or building permit, if it involves total and partial demolitions. A “total demolition” is “[t]he pulling down, razing or destruction of the entire portion or a building or structure which is above ground regardless of whether another building or structure is constructed within the footprint of the destroyed building or structure.” A “partial demolition” is “[t]he pulling down, destruction or removal of a substantial portion of the building or structure or the removal of architectural elements which define or contribute to the character of the structure.”

A few jurisdictions have narrowed the number of applications requiring review by limiting referrals to projects entailing the demolition of at least 500 square feet of gross floor area. *See, e.g.,* Concord, New Hampshire, and Monroe, Connecticut.

How is Demolition Review Accomplished?

Under typical demolition review procedures, the permitting official is directed to refer a demolition permit application to a review body for an initial or preliminary determination of significance. In San Antonio, for example, all demolition permits are referred to the city’s Historic Preservation Officer (HPO) to determine within 30 days whether or not a building or structure is historically significant. If the HPO finds the building significant, the HPO is required to forward the application to the Historic and Design Review Commission (HDRC) for review and recommendation as to significance. If the HDRC concurs in the HPO’s finding of significance, then the Commission must recommend designation to the City Council. Buildings and structures not deemed significant at any time during these proceedings may be demolished.

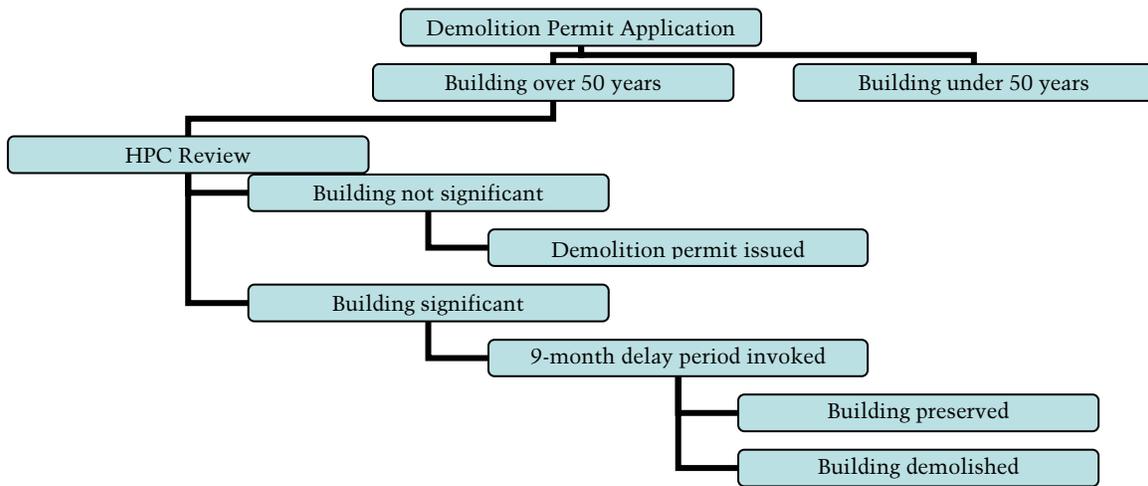
San Antonio Demolition Review Process



Santa Monica and Chicago also delay issuance of a demolition permit to allow for the landmark designation of the building, if warranted. In Santa Monica, the demolition permit may be issued if no application to designate is filed within 60 days. Chicago’s demolition ordinance delays issuance of permit up to 90 days “in order to enable the department of planning and development to explore options to preserve the building or structure, including, but not limited to, possible designation of the building or structure as a Chicago Landmark in accordance with Article XVII of Chapter 2-120 of this code.”

Some demolition review laws simply provide for a delay in the issuance of a permit to explore preservation-based solutions. New Castle County, Delaware utilizes this approach. The county may delay issuance of a demolition permit for any building “thought to be over 50 years old” for a period up to 10 days, during which time the Historic Review Board must make a determination whether the building is historically significant. If the building is deemed significant, then the board may order further delay up to 9 months from the date the application was initially filed to seek demolition alternatives.

New Castle County Demolition Review Process



In Boston, the Inspectional Services Department must transmit a copy of an application for a permit to demolish a building to the Boston Landmarks Commission within three days. The commission staff, in return, must make a determination within 10 days as to whether the building is (1) subject to review and (2) significant under specific criteria. If the property is determined not to be significant, then no further review is required. If the property is significant, the commission must hold a public hearing to determine whether the building should be subject to demolition delay. A decision on whether to delay the permit must be made within 40 days from the date the demolition permit application was initially filed.

To invoke the delay period, the commission must find that, in considering the public interest, it is preferable that the building be preserved or rehabilitated rather than demolished. Factors for consideration include: (a) the building’s historic, architectural, and urban design significance; (b) whether the building is one of the last remaining examples of its kind in the neighborhood, the city, or the region; and (c) the building’s condition. If the commission finds that the building is subject to demolition delay, issuance of the demolition permit may be delayed for up to 90 days from the close of the public hearing. A “Determination of No Feasible Alternative” may be issued during the public hearing or prior to the expiration of the 90-day period if the commission finds that there are no feasible alternatives to demolition.

Who Makes the Determination of Significance?

In most cases, the historic preservation commission makes the determination of significance, with initial review by the staff to the commission. *See, e.g.*, Boston, Massachusetts, Davis, California, and San Antonio, Texas. Variations, however, do exist from community to community. In Santa Monica, for example, demolition permit applications are forwarded directly to each of the members of the landmarks commission. In Boulder, initial review is performed by the city manager and two designated members of the landmarks board. If the property is significant, then the matter is referred to the city's landmarks board. In the cities of Keene and Concord, New Hampshire, the demolition review committee, comprised of three members of each city's heritage commission, is responsible for conducting the initial review, making an official determination of significance, and holding a meeting to explore preservation alternatives.

What Evidence Must be Submitted for Review?

Most jurisdictions require the submission of sufficient information to enable the decision maker to make an informed decision on a building's age and significance. In Santa Monica, for example, a completed application form must be submitted to the landmarks commission, along with a site plan, eight copies of a photograph of the building, and photo verification that the property has been posted with a notice of intent to demolish.

Boston requires the submission of photographs of both the subject property and any surrounding properties with a demolition permit application. In addition, the applicant must provide a map identifying the location of the property, a plot plan showing the building footprint and those in the immediate vicinity; plans for site improvements, including elevations if a new structure is planned, and the notarized signatures of all owner's-of-record along with proof of ownership. Additional materials may be required if a public hearing on the issue of whether the property is "preferably preserved" is held. Items such as a structural analysis report, adaptive reuse feasibility studies, the availability of alternative sites for the proposed project, effects of post-demolition plans on the community, and other materials the commission may need to make a feasibility determination may be requested.

Newton, Massachusetts has comparable requirements. In the case of partial demolitions involving alterations or additions, the town also requires the submission of proposed plans and elevation drawings for the affected portion of the building.

What Standards are Used to Determine Historical Significance?

In Gainesville, Florida, the preservation planner is essentially charged with determining whether the structure would qualify as a landmark under the city's historic preservation ordinance. A demolition permit may be issued if the planner finds that the structure "is not designed in an architectural 'high style' or a recognized vernacular building pattern, and it does not have historic events or persons associated with it."

In New Castle County, Delaware, the Historic Review Board makes a determination as to whether the building or structure is historically significant, based on the criteria for listing in the New Castle County Register of Historic and Architectural Heritage.

In Baton Rouge, Louisiana, the city's planning commission is charged with determining whether "[t]he structure is individually listed on the National Register of Historic Places or included in a National Register Historic District, or the structure is classified as National Register Eligible or Major Contributing in the historic building survey of the Central Business District."

In Westfield, Connecticut, individual findings of significance are not made. Rather, to invoke the 90-day, demolition delay period, the structure must be listed in or located within a historic district listed in the National Register of Historic Places, the State Register of Historic Places, the Westfield Historical Commission Register of Historic Places, or a local historic district created under the city's historic preservation ordinance. To be included on the city's historic register, the property must "contain or reflect distinctive and demonstrably important features of architectural, cultural, political, economic or social significance to the City of Westfield."

In Boulder, a preliminary finding on whether there is "probable cause" for designation as an individual landmark is made. If there is "probable cause," then the matter is required to be referred to the landmark commission for a public hearing on the eligibility of the building for designation as a landmark. In addition to determining whether the building meets the objectives and standards for landmark designation under its preservation ordinance, the Boulder commission must also take into account: (1) "[t]he relationship of the building to the character of the neighborhood as an established and definable area;" (2) "the reasonable condition of the building;" and (3) "the reasonable projected cost of restoration or repair." If the building is found to merit designation, then a delay period not to exceed 180 days from the date the demolition permit application was initially filed may be invoked.

Cities and towns enacting demolition review procedures in Massachusetts may not invoke a delay period until the building or structure at issue is found to be both "significant" and "preferably preserved." The term "preferably preserved" essentially means that it is in the public's interest to preserve the building. In some cases, a determination may be made to seek landmark status. Newton's "demolition delay ordinance" is illustrative. Under the city's law, a significant building is "any building or structure which is in whole or in part fifty years or more old" and which:

(1) is in any federal or state historic district, or if in any local historic district, is not open to view from a public street, public park or public body of water; or

(2) is listed on or is within an area listed on the National Register of Historic Places or eligible for such listing, or listed on or is within an area listed on the State Register of Historic Places, or eligible for such listing; or

(3) has been determined by the commission or its designee to be a historically significant building after a finding that it is:

a) importantly associated with one or more historic persons or events, or with the architectural, cultural, political, economic or social history of the City of Newton, the Commonwealth of Massachusetts or the United States of America: or

b) historically or architecturally important by reason of period, style, method of building construction or association with a particular architect or builder, either by itself or in the context of a group of buildings or structures; or

c) located within one hundred fifty (150) feet of the boundary line of any federal or local historic district and contextually similar to the buildings or structures located in the adjacent federal or local historic district.

A building or structure is "preferably preserved" if issuance of the requested demolition permit "would result in the demolition of a historically significant building or structure whose loss would be detrimental to the historical or architectural heritage or resources of the City of Newton."

What Procedures are Used to Evaluate Significance?

The notice and hearing requirements set forth in demolition review ordinances normally address two concerns. One is meeting the constitutional rights of the applicant to due process. The other is ensuring that the community knows about the pending demolition and has a meaningful opportunity to participate in the proceedings. Determinations of significance are generally held upon review by a city's historic preservation commission at a public hearing.

Notice. Individual notice is often required when specific findings are made affecting the applicant's request for a demolition permit. For example, in Boulder, notice must be provided to the applicant upon a finding by an initial review committee that probable cause exists that the building or structure may be eligible for designation as an individual landmark. The applicant is also entitled to notice of the public hearing before the full commission regarding the property's eligibility for landmark status and notice of the commission's final decision to stay the demolition permit for a period of 180-days to explore preservation alternatives.

Public notice requirements under demolition review ordinances can also be extensive. In situations where delay periods may be invoked for the purpose of exploring preservation alternatives, public awareness can be critical. In Monroe, Connecticut, for example, concerted efforts are made to inform the public. The city's ordinance requires publication of notice in newspaper of general circulation and individually-mailed notice to the city's historic district commission, the town historian, the Monroe Historical Society, and all abutting property owners. In addition, the city is required to post for at least 30 days a 36 by 48" sign visible from nearest public street with the words "DEMOLITION" printed on the sign with the letters being at least 3 inches in height. Among other requirements, Gainesville, Florida, requires that the historic preservation planner post a sign on the property "notifying the public of the owner's intent to demolish the structure in order to allow interested parties to come forward and move the structure upon consent of the owner."

Hearings. Public hearings are typically required under demolition delay provisions to determine whether the building or structure posed for demolition is historically significant. See, e.g. Baton Rouge, Louisiana, Boston, Massachusetts, Boulder, Colorado, Westfield, Connecticut, Gainesville, Florida, and Concord, New Hampshire. Some demolition delay laws also use the public hearing format to consider alternatives for demolition delay. The Westfield, Connecticut, ordinance, for example, specifically states that "[t]he purpose of said Hearing shall be to discuss, investigate and evaluate alternatives that will allow for the preservation of such buildings, structures, features/components or portions thereof." It provides, however, that [t]he applicant's intended use/reuse of the property is not a topic of the hearing."

How Long Do Delay Periods Typically Run?

The delay periods invoked under demolition review ordinances run from 30 days to two-years, with most falling within the 90-day to six-month range. In some jurisdictions, the length of the delay period may be prescribed by state law. For example, in Connecticut, § 29-406(b) of the Connecticut General Statutes authorizes any town, city, or borough to impose a waiting period of not more than ninety days. Also note that the effective length of equivalent waiting periods can vary significantly, depending upon the date upon which the delay is measured. Boston, for examples, measures its 90-day delay period from the close of the public hearing. Chicago, in comparison, measures its 90-day delay period from the application filing date.

Communities with longer delay periods sometimes include specific provisions that enable the issuance of a demolition permit prior to the expiration of the waiting period if spe-

cific conditions are met. For example, in Lake Forest, Illinois, the city's 2-year waiting period for all demolition permits may be waived or shortened, upon a finding by the Building Review Board, after holding a public hearing, that—

a. The structure itself, or in relation to its environs, has no significant historical, architectural, aesthetic or cultural value in its present restored condition; or

b. Realistic alternatives (including adaptive uses) are not likely because of the nature or cost of work necessary to preserve such structure or realize any appreciable part of such value; or

c. The structure in its present or restored condition is unsuitable for residential, or a residentially compatible use; or

d. The demolition is consistent with, or materially furthers, the criteria and purpose of this section and Section 46-27 of the Zoning Code.

In Newton, Massachusetts a demolition permit may be issued before the expiration of the city's 12-month delay period if the Newton Historical Commission is satisfied that the permit applicant:

- has made a "bona fide, reasonable and unsuccessful effort to locate a purchaser for the building or structure who is willing to preserve, rehabilitate or restore the building or structure; or
- has agreed to accept a demolition permit on specified conditions approved by the commission.

See, also, Boston's Demolition Delay Ordinance, which provides for the issuance of a finding of "no feasible alternative to demolition" at the public hearing or any time prior to the expiration of the delay period.

Also note that some jurisdictions insist that the property be secured during the demolition delay period. In Boston, for example, the applicant is required to secure the building during the review period. If the building is lost during this period due to fire or other causes, then the action is treated as an unlawful demolition.

How are Demolition Alternatives Explored?

The historic preservation commission usually sits at the center of the preservation effort. The commission will work with the owner and other interested organizations, public agencies, developers, and individuals who may be instrumental in developing a workable solution. Boston's demolition review ordinance specifically identifies who must be asked to participate in the city's investigation of alternatives. In addition to the owner, the Landmarks Commission must invite the Commissioner of Inspectional Services, the Director of the Boston Redevelopment Authority, and the Chairperson of the Boston Civic Design Commission, and any other individual or entity approved by the applicant. In Boulder, the Landmarks Board may "take any action that it deems necessary and consistent with this chapter to preserve the structure, including, without limitation, consulting with civic groups, public agencies, and interested citizens."

The range of alternatives that may be pursued may be specifically identified in the ordinance or left to the preservation commission's discretion. In addition to considering the possibility of landmark designation, the moving of a building to an alternative location, and the salvaging of building materials, the Boulder Landmarks Board is empowered to "take any action that it deems necessary . . . to preserve the structure." In Wilton, Connecticut, the Wilton Historic District Commission or the Connecticut Historical Commission is charged

with “attempting to find a purchaser who will retain or remove such building or who will present some other reasonable alternative to demolition” during the 90-day delay period.

Alternatives that are often considered include the possibility of rehabilitating the building with the assistance of tax incentives or other financial assistance; adapting the building to a new use; removing the building to another site; finding a new owner who is willing and able to preserve the building; incorporating the building into the owner/applicant’s redevelopment plans; and using an alternative site for the owner/applicant’s project.

The submission of specific information pertaining to the property is generally required. An applicant, for example, may be required to submit a structural engineer’s report and information on the cost of stabilizing, repairing, rehabilitating, or re-using the building, plans for the property upon demolition, and the availability of other sites that would meet the applicant’s objectives.

What Exceptions May Apply to the Strict Application of Demolition Review Laws?

Many demolition review laws recognize exceptions upon a showing of economic hardship or where the public safety is at stake. In Gainesville, Florida, for example, the demolition delay period may be waived by the historic preservation board if the applicant can demonstrate “economic hardship.” As is generally the case with the consideration of economic hardship claims under historic preservation ordinances, the burden of proof rests on the applicant to show that retention of the property is not economically viable and the applicant must set forth specific relevant information to make his or her case.

Virtually every demolition review law recognizes an exception on public safety grounds. Gainesville also provides that “any structure that has been substantially burned or damaged by an event not within the landowner’s control with more than 50 percent of the structure affected” may also be demolished, regardless of the building’s significance.

Weston, Massachusetts provides the following exception:

Emergency Demolitions

Notwithstanding the following provisions, the Building Inspector may issue a demolition permit at any time in the event of imminent and substantial danger to the health or safety of the public due to deteriorating conditions. Prior to doing so, the Building Inspector shall inspect the building and document, in writing, the findings and reasons requiring an emergency demolition, a copy of which shall be forwarded immediately to the Commission. Before allowing emergency demolition, the Building Inspector shall make every effort to inform the Chairperson of the Commission of his intention to allow demolition before he issues a permit for emergency demolition.

No provision of this by-law is intended to conflict with or abridge any obligations or rights conferred by G.L.c.143 regarding removal or demolition of dangerous or abandoned structures. In the event of a conflict, the applicable provisions of Chapter 143 shall control.

Once the Delay Period Expires, What Other Restrictions May Apply?

Some jurisdictions also require the submission of documentation of the property and/or the salvage of significant architectural features prior to the issuance of the demolition permit. Boulder, Colorado, expressly authorizes the city manager to require the submission of documentation about the building prior to the issuance of a demolition permit, such as a de-

scription of significant events, information on its occupants, photographs, plans, and maps. In Keene, New Hampshire, the demolition review committee is required to “photographically document the building” prior to demolition. In addition, the salvage of significant architectural features is encouraged.

How are Demolition Review Ordinances Enforced?

Experience has shown that historic buildings will be demolished, without regard to protections against demolition, if the ramifications for non-compliance are minor or insignificant. Accordingly, communities generally seek to establish penalties that will, in fact, discourage violations from occurring. Commonly used penalties, for example, include the imposition of significant fines for each day of the offense, and the preclusion of a permit to develop or occupy the property for specific period of time.

In New Castle County, Delaware, the county attorney is authorized by ordinance “to take immediate action prosecute those responsible” for the demolition of structures determined to have historic significance prior to the issuance of a demolition permit. In addition, building permits for the parcel affected may be withheld for a period of one to three years. Violators of the demolition ordinance in Monroe, Connecticut, may be subject to a fine amounting to the greater of one thousand dollars or the assessed value of the property for each violation. In Highland Park, Illinois, a person who violates the demolition review ordinance may be assessed a fine equal to “90 percent of the fair market value of the cost of the replacement of such regulated structure.”

Newton, Massachusetts, authorizes the imposition of a \$300 fine and two year ban on the issuance of a building permit against anyone who demolishes a historically significant building or structure without first obtaining and fully complying with the provisions of a demolition permit issued in accordance with its demolition review ordinance. However, a waiver on the building permit ban may be obtained in instances where reuse of the property would “substantially benefit the neighborhood and provide compensation for the loss of the historic elements of the property” either through reconstruction of the lost elements or significant enhancement of the remaining elements. As a condition to obtaining the waiver, however, the owner must execute a binding agreement to ensure that the terms agreed to are met.

Do Demolition Delay Ordinances Work?

On December 15, 2003, a Chicago Tribune article written by architectural critics, Blair Kamin and Patrick T. Reardon, made headline news. Kamin and Reardon reported that, in a year’s time, only one of 17 buildings slated for demolition had been preserved under the city’s much acclaimed “demolition delay ordinance.” The critics asserted that the city’s much-touted effort to preserve the buildings coded red or orange on Chicago’s 1996 Historic Resources Survey through the imposition of a 90-day waiting period on demolition permits, wasn’t working. They attributed the loss of the buildings to the city’s failure to make preservation a priority and by not providing sufficient legal protections and financial incentives to get the job done.

In the same article, Kamin and Reardon also reported that the Chicago Landmarks Division had made a contrary assessment. Sixteen out of the 17 orange-rated buildings posed for demolition were not recommended for designation because they had failed to meet the criteria for landmark status and the one building that was saved would have been demolished but for the demolition delay ordinance.

It cannot be denied, as Kamin and Reardon noted, that demolition review laws seem to support an “ad hoc” approach to landmark designation. The buildings being designated are

those threatened by demolition rather than those most deserving. Also, the question of what is preserved often depends upon who cares about the matter, rather than the historical or architectural merit of the building at issue.

Keep in mind, however, that the need for such laws really stems from the fact that it is impossible to designate every building worthy of protection in advance, especially in cities like Chicago, where over 17,000 buildings have been listed on the city's historic survey. Historic preservation commissions are often understaffed, and often cities simply lack the resources or political will to protect all of their historic properties in advance.

Indeed, in Massachusetts, where over 100 demolition review laws have been adopted, demolition review laws are considered overwhelmingly successful. According to the Massachusetts Historical Society, demolition delay enabled the preservation of the Coolidge Corner Theater and a Lustron house in Brookline. Negotiations under Eastham's delay provision enabled a historic house to be moved rather than demolished. Demolition review requirements have also helped to stem the tide of teardowns in residential areas in Newton, and resulted in the rehabilitation of the circa-1710 Foster Emerson House in Reading. For more information, see Christopher Skelly, "Preservation through ByLaws and Ordinances" (Massachusetts Historical Commission 2003).

What Else do I Need to Know About Demolition Review Laws?

By now you should be aware that demolition review laws can vary significantly. In developing your own program, it is important to understand not only how such laws work generally, but also to think about how such a law would work in your own community. Basic considerations include the types and number of buildings likely to require review, who should conduct that review, and how the law would relate to your city or town's historic preservation program. Communities should also seek to —

- **Establish an efficient process.** Provide a quick and efficient means for ensuring that permits on non-significant buildings are not held up unnecessarily. The number of demolition permit applications filed in a given year can sometimes be staggering. The San Antonio Historic Preservation Office, for example, reports that it reviews approximately 900 applications per year.
- **Have resources in place which help applicants and/or permitting officials determine the age and significance of their buildings.** In other words, take the guesswork out of the process.
- **Avoid making the safety net too small.** It is important to ensure that potential landmarks are, indeed, subject to the law's protections. In communities with resources from the recent past, for example, it may be necessary to establish a threshold date that is commensurate with those resources. Communities relying on specific dates rather than the age of the building may find the need to amend the ordinance over time. If demolition review is limited to a category of buildings or list of structures, comprehensive survey work must be done prior to the law's enactment to ensure that all buildings meriting protection are included.
- **Keep the community informed.** Effective notice provisions, such as the posting of a large sign, are critical. Members of the public cannot respond to a demolition threat unless they know about it.
- **Don't make the delay period too short.** Without a meaningful delay period, leverage is lacking. It takes time to find a new buyer or a new site, or to even make an assessment as to whether an adaptive reuse project would work.

- **Give the preservation commission the necessary tools to negotiate a solution.** Preservation solutions are more likely to be forthcoming with some level of financial assistance or tax savings. Enable the commission to draw on the expertise of other city officials when necessary and invite critical players to the table. Demolition review provides an invaluable opportunity to improve communication between a preservation commission and its staff, and other governmental officials and the development community.
- **Enable the property to be designated, if designation is warranted.** Negotiated preservation is no substitute for a strong preservation ordinance.
- **Enforce your ordinance.** Ensure that the penalties effectively deter non-compliance and be prepared to enforce your ordinance if violations occur.

Where Can I Find Examples of Demolition Delay Ordinances?

Listed below are examples of demolition delay ordinances that have been adopted around the country.

California

Alameda City Code § 13-21-7.
http://www.ci.alameda.ca.us/code/Chapter_13/21/7.html

Davis Building Ordinance § 8.18.020
http://www.city.davis.ca.us/pb/pdfs/planning/forms/Demolition_Permit_Requirements.pdf

Santa Monica Municipal Code § 9.04.10.16.010 (as amended by Ordinance No. 2131 (July 27, 2004)).
<http://www.codemanage.com/santamonica/>

Colorado

Boulder Revised Code § 10-13-23.
<http://www3.ci.boulder.co.us/cao/brc/10-13.html#Demolition>

Connecticut

Monroe Demolition Delay Ordinance
<http://www.cttrust.org/index.cgi/1049>

Wilton Demolition Ordinance
<http://www.cttrust.org/index.cgi/1049>

Delaware

New Castle County Code § 6.3.020(B).
http://www.municode.com/resources/online_codes.asp

Florida

Gainesville Code of Ordinances § 6-19.
http://www.municode.com/resources/online_codes.asp

Illinois

Chicago, Illinois. Municipal Code of Chicago § 13-320-230(a)-(c) and § 2-76-215.
http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/DemolitionPermits.txt

Highland Park Ordinances, Ch. 17 §§ 170.040.
<http://www.cityhpil.com/govern/ordinances.html>

Lake Forest, Illinois, Building Scale and Environmental Ordinance § 9-87.
<http://www.cityoflakeforest.com/pdf/cd/bsord.pdf>

Louisiana

Baton Rouge and East Baton Rouge Parish Demolition and Relocation Ordinance
http://municode.com/resources/on-line_codes.asp

Massachusetts

Boston Zoning Code, Art. 85, §§ 1-8.
<http://www.cityofboston.gov/bra/pdf/ZoningCode/Article85.pdf>

Cambridge Municipal Code Ch. 2.78, Art. II
<http://bpc.iserver.net/codes/cbridge/index.htm>

Newton Revised Ordinances, Ch. 22, Art. III, § 22-44.
http://www.ci.newton.ma.us/legal/ordinance/chapter_22.htm#art1

Town of Weston Bylaws, Art. XXX.
<http://www.lmstrategies.com/whc/by-law1.htm>

Maryland

Montgomery County Code, Part II § 24A-10
http://www.amlegal.com/montgomery_county_md/

New Hampshire

Concord Code of Ordinances, Art. 26-9 §§16-9-1 through 16-9-5.
http://municode.com/resources/on-line_codes.asp

Keene Code of Ordinances, Art. IV, §§ 18-331 through 18-335.
http://municode.com/resources/on-line_codes.asp

Texas

San Antonio Unified Development Code. Art. 4, § 35-455(b)(2).
http://www.sanantonio.gov/dsd/pdf/udc_article4_04.pdf



Establishing a Demolition by Neglect Ordinance

by Dan Becker

Many historic resources are demolished each year due to a lack of maintenance that leads to deterioration. When deterioration reaches the extent that it creates health and safety violations, building officials are obligated to act in the public interest to abate the hazard; the frequent result is demolition that circumvents local historic preservation ordinances. Whether such lack of maintenance is intentional in order to avoid preservation ordinance controls on demolition, or unintentional due to a lack of awareness or financial resources, the result is the same: loss of a community asset.

While demolition by neglect is a serious problem for many communities, it is a challenge that can be met. Meeting the challenge requires understanding the fundamental legal principles required for a defensible demolition by neglect ordinance, including the key components required for a useful demolition by neglect ordinance, and selecting effective strategies for the adoption (or improvement) and implementation of a successful demolition by neglect program in your community.

Fundamental Legal Principles

The first step toward a demolition by neglect program is determining your community's authority to adopt an ordinance. In most cases, such authority is dependent upon state enabling legislation; however, some local governments have "home rule" powers that permit them to adopt ordinances without specific enabling legislation. This is a critical determination...home rule governments can directly adopt their own demolition by neglect ordinance. If your community does not have home rule, then you must establish whether

your enabling legislation has provisions that authorize minimum maintenance provisions.

A number of states (including Alabama, North Carolina, Rhode Island, Virginia, and Wisconsin) have specific language in their enabling legislation regarding demolition by neglect of historic structures. This is the best case scenario. Lacking such specific language, in some cases authority can be inferred from statutes that allow governments to create preservation programs to protect historic resources, or from general enabling legislation that gives local authorities power to protect or promote the public health, safety, and welfare. In these cases, consult your local government's attorney for guidance, perhaps even seek an opinion from your state's attorney general.

Your ordinance must ensure due process. It must be clearly related to the governmental goal of preserving historic resources, and it must be designed to be reasonable, fair, and of general applicability to the community. The issue of regulatory taking also has great bearing upon demolition by neglect ordinances, especially as it relates to economic hardship. Further information on these principles can be found in the reading list at the end of this article.

Key Components of an Ordinance

An effective ordinance will contain specific elements: standards, petition and action procedures, economic hardship provisions, appeals, and enforcement. You must be able to define deterioration in order to abate it. Standards are required to provide a benchmark for evaluation. A general

statement requiring that a building be kept in good repair will prove to be difficult to enforce because judgments of "good repair" can be challenged as arbitrary. Precise language in your ordinance should clearly define what is considered to be deterioration. Petitions that allege demolition by neglect should list specific defects that reference these standards, so that a reasonable person viewing the deterioration can see what part of the ordinance is being violated.

Clear procedures are necessary to ensure that each case is handled in the same way and that property owners are assured of due process. Provisions should be included in the ordinance for the submittal of petitions alleging demolition by neglect, the process for notification of the property owner, procedures for conducting hearings, and time frames for actions. Also necessary are criteria for evaluating and making findings regarding economic hardship, the manner for filing of appeals, and modes of enforcement by remedy, abatement, and/or penalty. Again, state law provisions may dictate what kind of enforcement tools you have at your disposal.

Particular attention should be paid to criteria for evaluating economic hardship. This is a necessary safeguard that protects the local government and property owners from claims of regulatory takings. Your ordinance should spell out in detail the kind of financial information that the property owner must provide in order to demonstrate a claim of economic hardship, and ensure that findings are made with regard to the claim. In the event that the evidence proves that such a claim is valid, then the ordinance should also provide guidance in the preparation of a plan to relieve the hardship.

Strategies for Adopting an Ordinance

Each community has its own personality when it comes to the kinds of ordinances that are appropriate for its citizens, and no one strategy will fit all. It will not advance your preservation cause if such an ordinance becomes controversial, so it will pay dividends to carefully consider whether such an ordinance is right for your community, and how to establish support for its adoption.

Several lessons can be learned from our experience in Raleigh. Enabling legislation authorizing local demolition by neglect ordinances was adopted by the North Carolina legislature in 1989 as part of a general re-write of the statutes governing preservation in the state. In 1992, the city completely reorganized its preservation program as part of a successful preservation community effort to establish a county preservation program. The justification for the city's ordinance revisions was to ensure that the two programs were well coordinated, as well as to incorporate the state legislation changes. Demolition by neglect became part of a routine updating of the ordinance, rather than the sole focus of a "sales effort"

that might attract undue attention and controversy.

Because the city's ordinance was the first in the state to take advantage of the new enabling authority, we modeled many of its procedures after state prescriptions for enforcement of minimum housing standards. Our plan, if challenged, was to avoid the view that it something entirely new to be defended. We would treat demolition by neglect as an extension of powers the state had already granted: we were taking advantage of a familiar process that had been on the books a long time, was a matter of general course, and was recognized as a process for affirmative enforcement of deficiencies. A case can be made for equal treatment under the law...property with deficiencies (minimum housing standards, demolition by neglect standards) are handled the same way. Happily, we were not required to make these arguments, and the ordinance was adopted after routine review.

Using the Ordinance

A demolition by neglect ordinance is not for the faint of heart. It is aggressive, pro-active preservation. Recognize that such a program is staff-resource intensive, and requires great precision in the application of due process. It is important to build cooperative partnerships both with neighborhoods and with local government agencies charged with enforcement. Initially, we have undertaken only one case at a time. We have requested that neighborhood groups prioritize properties they wish to have considered under the ordinance's provisions, and to keep the list short. Commission staff assist inspections department staff with monitoring and evaluating property compliance. Knowing when to use the ordinance is important. Be sure that deterioration is substantial enough to warrant the application of such governmental power, but not so severe that the expense of repair exceeds the market value of the property which could lead to a finding of economic hardship.

The City of Raleigh's demolition by neglect ordinance can be accessed on-line by going to:
<http://www.municode.com/database.html>. Navigate to Raleigh, North Carolina, search for '10-6180' and you will call up the section of the code for demolition by neglect.

For further guidance regarding demolition by neglect and related legal issues, the following resources are recommended:

Duerksen, Christopher J. and Richard J. Roddewig. *Takings Law in Plain English*, 3rd ed. (Chicago and Denver: Clarion Associates, Inc., 1998)

Pollard, Oliver A, III. "Counteracting Demolition by Neglect: Effective Regulations for Historic District Ordinances," *The Alliance Review*, Winter 1990. National Alliance of Preservation Commissions, Athens, GA.

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Pollard, Oliver A, III. "Minimum Maintenance Provisions: Preventing Demolition by Neglect," Preservation Law Reporter, Volume 8, 1989 Annual. National Trust for Historic Preservation, Washington, DC.

Roddewig, Richard J. and Christopher J. Duerksen. "Responding to the Takings Challenge: A Guide for Officials and Planners," Planning Advisory Service Report #416, May 1989. American Planning Association, Chicago, IL.

White, Bradford J. and Paul W. Edmondson. Procedural Due Process in Plain English: A Guide for Preservation Commissions. (Washington DC: National Trust for Historic Preservation, 1994)

Dan Becker serves as Executive Director of the Raleigh Historic Districts Commission, Raleigh, NC and is a NAPC Board Member.

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What is the structural condition of the building? Don't just take the word of the owner if you have doubts. At a minimum, a report from the building commissioner is needed to establish the structural soundness. However, the Commission may want to consult with a structural engineer for an opinion on the structural soundness of a building. Just

because a building is in poor condition doesn't mean it should be torn down.

Can the building be mothballed? Mothballing a building is less expensive than demolition and it preserves the building until economic conditions, a new owner or funds are available to restore the building. If the building is to be demolished because it is vacant, it need not be a blight on the neighborhood. The building and boarded up windows can be painted. The grounds can be maintained. The windows and doors can be properly secured from unwanted access.

A Commission should not be afraid to deny a request for demolition. Once the building has been demolished, it will never return. Furthermore, new construction can never replace the historic character and fabric of a building.

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Communities' rights to appeal Postal Service decisions to the Postal Rate Commission would be expanded to include relocations and new construction along with closings.

H.R. 670 is currently in the Subcommittee on the Postal Service and enjoys the support of 69 co-sponsors. At least 100 co-sponsors are needed by late spring.

For further information contact Preservation Action at (202) 659-0915 or preservationaction@worldnet.att.net.

Join the National Alliance of Preservation Commissions

Become part of the network of over two thousand landmark, historic district commission and boards of architectural review in the United States. The National Alliance of Preservation Commissions (NAPC) is organized to facilitate local commissions in providing information and education to each other. It is a forum for the exchange of ideas, a source of support, and a unifying body giving local commissions a national voice. As a member of the NAPC you can benefit from the ideas and experiences of local communities throughout the United States working to protect historic districts and landmarks through local legislation.

Membership Benefits

- *The Alliance Review*, a newsletter filled with practical information for staff and members of preservation commissions.
- A resource center of information, including educational materials, forms, guidelines and ordinances developed and used by commissions across the country.
- Technical seminars and conferences, special regional events, and an annual meeting and workshops for commissions held in conjunction with the National Trust's Annual Conference.
- A voice for your commission in Washington with the National Park Service, the National Trust, the Advisory Council, Preservation Action, and the National Conference of State Historic Preservation Officers.

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or local nonprofit organizations
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Communities with a population of 5,000-50,000
or regional or statewide nonprofit organizations
 - \$100 Commissions with a budget over \$5,000
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DEMOLITION DELAY: A TOOL, NOT A SOLUTION

BY KURI GILL,
CERTIFIED LOCAL
GOVERNMENT
COORDINATOR
STATE OF OREGON

Oregon has a statute that requires that historic properties significant to the state must be protected. Every local jurisdiction does this a little differently. The most common protection we see is demolition delay. In most cases the protection stops there. For some communities, including our Certified Local Governments (CLGs), delay is only one part of a broader local preservation effort.

A brief, non-scientific survey of CLGs in Oregon revealed a bit about the effectiveness of demolition delay in saving historic properties in those CLG communities:

- ▶ Nearly all have demolition review.
- ▶ The majority have demolition delay.
- ▶ The delay ranges from 60-210 days. The typical delay is 90 days. In some cases a delay can be extended if action is happening to save the property.
- ▶ Most require time for documentation of the property, some require salvage and/or preservation of building elements, but even this is often not effectively gathered.
- ▶ A few require evidence that the owner attempted to sell or remove the building.
- ▶ Numbers indicate that demolition delay doesn't save buildings. In reporting CLGs, only one of 19 buildings submitted for demolition was saved in the last four years.
- ▶ Opinions are mixed about the effectiveness of demolition delay. This may be partly because many demolition requests are ultimately not submitted once the proponent learns about the review and delay processes and about the opportunities for preservation.

Even when demolition delay is enacted, the results vary. In some cases, the documentation and salvage occur; in very rare cases, the building is moved.



Credit: City of Portland, OR.

This house in Portland was saved through demolition delay. A massive and expensive effort in moving it to another location.

Most codes do not specify who completes the documentation, to what standards the documentation will comply, or where the information will go. A few communities are prepared, with a historic preservation commission or local preservation nonprofit that completes the work and collects the information. They have the systems in place and are ready to act when needed. In most cases, it seems the documentation doesn't happen. The same is true for salvage. In most cases there is no way to ensure the salvage actually occurs. Moving the building is also not ideal, as the original setting is often part of its significance. In addition, moving the building can be expensive and challenging. Where does the building go? Who is in charge? Who notifies the public about the building's availability?

A few communities in Oregon that have recently suffered losses of significant historic properties have moved beyond demolition delay and added demolition denial as an action. In all cases, since the demolition denial has been in effect, the properties denied demolition are still standing - some in improved condition. Also, the denial tends to limit the number of applications requesting demolition.

Code that addresses demolition by neglect is another tool that has helped save local resources. The code



This barn, on the Historic Preservation League of Oregon's Most Endangered Places list, was demolished after a long demolition delay. The action motivated the community of Cottage Grove to change the code to include demolition denial.

allows for citations for actions that affect the structural integrity of the building (leaky roofs, broken windows, sagging porches, etc.) and fees if the conditions are not addressed. Arresting demolition by neglect and instituting demolition denial have proved to be a combined force for preservation.

The jury is still out on the effectiveness of demolition delay in saving historic properties, especially if documentation and salvage are not completed. It can be a great tool to support a broader preservation program. Here are four ways communities can deal with demolition and get the most out of demolition delay.

1. Think big picture: It always comes down public education. Even if the community has had districts in place since the 1970s, this part of the work can never stop. Don't let the community accept demolition as a first option. Also, public education about the process of demolition applications may stop folks going down that road before they reach the planning desk. Make sure that tools, resources, and options are made available.
2. Be proactive: This is a great way for commissioners to do something other than design review. Drive around and check out the condition of the designated historic properties. If they are looking the worse for wear, then send a packet to the property owner that includes historic information about the property, explains how important it is to the community, and describes resources to take care of the property.
3. Be prepared: Is your commission or community prepared for a demolition and the work that should take place during a delay?

a. Have a plan for documentation.

- i. Who will do it? Commissioners, city staff, local museum, preservation organization, property owner?
- ii. How will it be completed? Are there standards in place? Interior photos, exterior photos, floor plan, structural information, history?

- iii. Where will it go? Is there a place to store the information so it is preserved and accessible? City hall, museum, preservation organization?

b. Have a plan for salvage.

- i. Who will do it?
- ii. For what purpose will it be saved? Reuse, documentation, preservation, education?
- iii. What will be saved? Everything that is reusable, character-defining details, unique building techniques?
- iv. Where will it go? Is there a place to store the information so it is preserved and accessible? City hall, museum, preservation organization?

c. Have a plan for moving.

- i. Develop a network for notification of available buildings and decide who completes the notification.
- ii. Work with organizations that need buildings (low income housing organizations, schools, etc.) to have people waiting for building donations.
- iii. Work with the city to make moving of historic properties as easy and low-cost as possible (permitting, etc.)
- iv. Create lists of contractors that move and set buildings.
- v. Grow a fund to help pay the costs of the move.

d. Have all of these tools at hand to give the property owner.

4. Get tougher on neglect: Documentation, salvage, and moving the building are good options. Preserving the building in place is a better one. Once you have some public education and support, consider adding some teeth to the code to prevent demolition by neglect. This is often the real cause of, or at least excuse for, demolition. Some developers even purchase property with the intent of demolition. Demolition by neglect even outsmarts demolition denial when the structure becomes so dilapidated that it is dangerous and devalues the entire property.

Imagine a screwdriver, a pretty cool invention. Alone it does nothing. Demolition delay is very much like the screwdriver. It is handy, but only if someone uses it the right way.■