DRAFTING EFFECTIVE HISTORIC PRESERVATION ORDINANCES: A MANUAL FOR CALIFORNIA'S LOCAL GOVERNMENTS

TECHNICAL ASSISTANCE BULLETIN #14

Prepared by

CLARION ASSOCIATES, LLC
1700 Broadway, Suite 400
Denver, Colorado 80290
(303) 830-2890

for the
OFFICE OF HISTORIC PRESERVATION
STATE OF CALIFORNIA
DEPARTMENT OF PARKS AND RECREATION

WITH A GENEROUS GRANT FROM THE CALIFORNIA STATE PARKS FOUNDATION

Technical Assistance Bulletin #14 is intended to assist California's local governments in creating or revising a historic preservation ordinance. It identifies key issues that all communities must deal with when drafting or revising an ordinance, and discusses various approaches to each of these key issues, thus allowing each community to craft an ordinance that best fits their own local conditions.

This publication has been financed in part with Federal funds from the National Park Service, Department of the Interior, under the National Historic Preservation Act of 1966, as amended, and administered by the California Office of Historic Preservation. The contents and opinions do not necessarily reflect the views or policies of the Department of the Interior, nor does the mention of trade names or commercial products constitute endorsement or recommendation by the Department of the Interior. Under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, the U.S. Department of the Interior strictly prohibits unlawful discrimination on the basis of race, color, national origin, age, or handicap in its federally- assisted programs. If you believe you have been discriminated against in any program, activity, or facility as described above, or if you desire further information, please write to Office for Equal Opportunity, U.S. Department of the Interior, National Park Service, Box 37127, Washington DC 20013-7127.

December 2004

INTRODUCTION

Recent estimates suggest that at least 250 to 300 governments in California have enacted an historic preservation ordinance. Many of these ordinances, such as the ones from San Francisco and Los Gatos, have been in place for several decades or more, and community leaders frequently reevaluate and fine-tune key provisions to better achieve their preservation objectives. Other California communities are just beginning to develop ordinances for the first time, using laws from other cities and towns as models.

PURPOSE OF THIS MANUAL

This manual is intended to assist California's local governments in creating or revising a historic preservation ordinance. The goal of this manual is not to present a model ordinance, nor to suggest a one-size-fits-all approach to the drafting process. All communities have different goals for their preservation programs, based on widely varying factors such as the types of historical resources they want to protect, the degree of protection they want to offer through an ordinance, and local development pressures.

Instead, the manual identifies key issues that all communities must deal with when drafting or revising an ordinance. For instance, how should the preservation commission be appointed? What standards of review should apply to certificates of appropriateness? Should property owners be given the opportunity to veto historic designation? How do you prevent demolition of historical resources by neglect? The intent of this manual is to discuss various approaches to each of these key issues, thus allowing each community to craft an ordinance that best fits their own local conditions.

KEY ELEMENTS OF A LOCAL PRESERVATION ORDINANCE

While each preservation ordinance should be unique and tailored to the needs of the individual community, there nevertheless are certain basic components found in most effective preservation ordinances throughout California (and the country). A capsule summary of each of these common elements is listed below. The sections listed below correspond to each of the subsequent sections of this manual.

SECTION 1: PURPOSE

Understanding local preservation goals is a crucial first step in the drafting process, and every preservation ordinance should begin with a clear and succinct purpose statement. Why preserve historic buildings? What does the community hope to accomplish by regulating the appearance of new construction in historic areas? This manual presents a set of questions that are designed to assist communities in defining their preservation goals.

SECTION 2: ENABLING AUTHORITY

The ordinance should identify the legal authority by which it is able to regulate historic buildings and historic areas. This manual discusses the state and federal legal framework for preservation in California.

SECTION 3: ESTABLISHMENT OF PRESERVATION COMMISSION

The ordinance must identify the local entity charged with administering and enforcing the ordinance and list their specific responsibilities. In many cases the preservation commission is a separate decision-making body within the local government. In other cases the city council or its equivalent may act in the capacity of a preservation commission. This manual reviews key issues to consider when drafting this crucial section. For example, should the community require professional qualifications of preservation commission members? What types of activities should fall under the preservation commission's jurisdiction? Should the commission have decision-making authority, or merely be advisory to some other body, such as a planning commission?

SECTION 4: PROCEDURES AND CRITERIA FOR DESIGNATION OF HISTORICAL RESOURCES

What types of historical resources should be protected, and how? Should the ordinance consider both individual buildings and structures and also historic districts? What about archaeological resources? Clear criteria for the designation of historical resources are an essential feature of a preservation ordinance. This manual discusses the basic issues regarding designation procedures and criteria in detail. Other related topics that are covered include owner consent; designation of interiors; and alternatives to designation such as conservation districts.

SECTION 5: PROCEDURES AND CRITERIA FOR REVIEWABLE ACTIONS

Once a resource is designated, what types of activities that affect it should be regulated by the community? Local preservation commissions typically are granted some authority over demolition or major alteration of designated properties, and also new construction in historic areas. Within these general categories, there are many questions to consider. For example, should the community be able to say "no" to demolitions of historic properties, rather than just delay them?

SECTION 6: CONSIDERATION OF ECONOMIC EFFECT OF DESIGNATION OR REVIEW OF ACTION

To ensure compliance with federal and state constitutional requirements, the ordinance should include a procedure allowing a property owner to make the case that, in some situations, enforcement of the ordinance will cause unusual and extreme economic hardship. This is analogous to the variance provisions of a standard zoning ordinance, which provide a "release-valve" in unusual cases where regulation of development and use

of a property may potentially rise to the level of an unconstitutional "taking." From a policy perspective, it may also be desirable to allow for some degree of flexibility within a preservation ordinance in order to encourage rehabilitation and economic use of the property, to avoid making "mothballing" of regulated properties the result of historic preservation efforts.

SECTION 7: APPEALS
How are decisions made under the ordinance appealed, and to whom? A defined appeal process provides a local administrative resolution to numerous claims that might otherwise spur litigation in the immediate aftermath of a decision by the preservation commission.

SECTION 8: ENFORCEMENT
The most well-crafted preservation ordinance may be rendered ineffectual with weak enforcement provisions. How can the community ensure compliance with the ordinance? The manual outlines enforcement issues that communities should keep in mind when drafting or revising their ordinance.

SECTION 9: DEFINITIONS
A concise set of definitions helps to clearly establish the scope of regulation, particularly the type of structures and other features subject to designation and review and the specific actions that trigger review.

The following sections in this manual discuss each of the key ordinance components listed above. For all subjects, this manual first defines and explains the relevant issue, and then where applicable, presents sample excerpts from adopted ordinances to show how other California communities are addressing the issue. While these examples do not always represent the entire universe of possible approaches, nor do they necessarily represent the best approach for a particular community, they nevertheless have been selected to represent the range of approaches currently in use in California. In addition, a summary matrix at the back of this manual illustrates the variety of approaches to these issues currently in place throughout the state.

SECTION 1: PURPOSE

Understanding local preservation goals is a crucial first step in the drafting process, and every preservation ordinance should begin with a clear and succinct purpose statement. Why preserve historic buildings? What does the community hope to accomplish by regulating the appearance of new construction in historic areas?

Every preservation ordinance should be unique, and there are many reasons – cultural, economic, aesthetic, educational, and social – why a community might choose to adopt regulations to protect its historical resources. Regardless of the particular reasons chosen, the clear articulation of community goals is an important first step in the ordinance drafting process. Just as important, the community's ability to adopt and enforce preservation regulations should be considered early in the drafting process. The following are suggestions of several key issues to be addressed:

What is the purpose behind an ordinance? Asking the question "Why preserve?" is a crucial first step in determining the form and scope of any preservation ordinance.

- What are the reasons for preservation in the community? Is it important from an economic standpoint, or are the reasons mainly architectural or historical? Most communities rely on multiple reasons to justify their preservation programs.
- Are there currently any threats to a particular historical resource or district calling for immediate action? Are there future development pressures?
- Is there a general understanding of and sympathy toward preservation in the community? How is this reflected in neighborhoods, by business, or within the local government? Do citizens see a need for action to preserve historical resources?
- Has there been a failure to recognize historic preservation values in past development or planning efforts?

What resources should be protected? Next, the community must identify the specific types of historical resources that should be protected by asking the following types of questions.

- Does the community have only a few scattered buildings worth saving, or should the focus be broader – on districts and neighborhoods?
- Has a survey of historical resources already been conducted, or must this information still be developed?
- What features of historic buildings are important and worth preserving? Should the focus be on exterior facades only, or also on interior features?
- Should open space associated with historical resources be protected?
- Should the ordinance focus on new construction in historic areas?
- Can the preservation ordinance be linked with neighborhood conservation?

- What is the primary use of existing historical resources? Residential, commercial, industrial, or a mix? Who owns the resources – homeowners, businesses, developers, charitable organizations, or the government?
- What aspects of the community's history do the existing historical resources reflect?

How should historical resources be protected? The community should consider the best way to protect historical resources.

- Are the important historic or architectural features of buildings in the community of one style or type? Are they easily identifiable? Can clear and understandable standards and criteria for designation and permit review be devised?
- Should the ordinance merely require delays prior to the demolition of historical resources, or should the community be allowed to deny demolitions?
- What is the current state of repair of historical resources in the community? Are they in need of renovation, and if so, is it realistic to expect rehabilitation to occur? Is maintenance of existing structures a concern?

How should the ordinance be administered and enforced? The ordinance should be drafted to meet the goals of legal defensibility, effectiveness, administrative efficiency, and fairness to parties involved in the process.

- Who should be the primary body charged with administering and enforcing the ordinance? The city council or board of supervisors? A separate preservation commission? Can the local government supply staff to support a new commission?
- What are the existing tools for regulating zoning and land use in the community? Do preservationists have confidence in these existing mechanisms? Can preservation be integrated into the existing regulatory system? Will the local zoning board and planning commission be knowledgeable and sensitive to preservation goals? Should one of those bodies make final decisions?
- What level of authority should staff have in making decisions under the ordinance?
- How will the ordinance be enforced? Does the local government have the capability to monitor developments in the community, or will that task fall to preservationists?
- Is a strong preservation ordinance liable to be attacked? If so, would the local government be willing and able to defend it, or would that task fall to local preservationists?
- What kind of preservation-oriented talent is available in the community to assist in achieving local preservation goals? Are there enough knowledgeable people to run yet another volunteer commission or advisory group?

Only after these questions have been considered should the drafting of a new ordinance (or the redrafting of an existing one) begin. Perhaps the most important thing to keep in

mind is that each community is unique, and those drafting the ordinance should not feel constrained by what other cities and towns have done.

After considering the community's goals and capabilities, the ordinance drafters must generate a purpose statement for the ordinance. Such a statement is essential to set forth the local government's reasons for enacting the preservation law, and to tie historic preservation efforts to available governmental authority. In exploring the role that preservation regulations will play in the community, local governments should strive to develop a comprehensive preservation program that goes further than simply approving an ordinance to control the demolition of historical resources. The City of San Jose, for example, articulates in its purpose section a broad intent to both preserve historic structures and review further development that will impact the positive qualities of that City's historical resources (See excerpt below.).

From a legal perspective, if a local government can demonstrate that it has made preservation part of its overall effort to foster and promote the general welfare and well being of the community as a whole, the local preservation ordinance stands a better chance of surviving judicial scrutiny. For example, the City of Davis enumerates the protection of visual character, the protection of property values, and the enhancement of economic benefits within its "Purpose" section to justify the exercise of regulatory power in its historic preservation ordinance (See excerpt below.).

The practical benefits of a broadly conceived and well-defended preservation program are even more important. An effective preservation program will not only give local government access to federal and state funding and greater leverage over federal projects that affect historic properties and areas. It also can inject an element of certainty into the local development regulatory process, thereby fostering needed and compatible economic development. For more discussion of these issues, see the final section in this manual, "Developing a Comprehensive Preservation Program."

CALIFORNIA CODE EXCERPTS:
DEFINING LOCAL GOALS AND CAPABILITIES

CITY OF DAVIS
Section 40.23.010 Purpose.
The purpose of this article is to promote the general welfare by providing for the identification, protection, enhancement, perpetuation, and use of improvements, buildings, structures, signs, features, sites, places, and areas within the city that reflect special elements of the city's historical, architectural, archaeological, cultural, or aesthetic heritage for the following reasons:

A. To encourage public knowledge, understanding, appreciation, and use of the city's past;
B. To foster civic pride in the beauty and character of the city and in the accomplishments of its past;
C. To enhance the visual character of the city by encouraging new design and construction that complements the city's historical buildings;

D. To increase the economic benefits of historic preservation to the city and its inhabitants;
E. To protect property values within the city;
F. To identify as early as possible and resolve conflicts between the preservation of historical resources/districts and alternative land uses; and
G. To conserve valuable material and energy resources by ongoing use and maintenance of the existing built environment.

CITY OF SAN JOSE
Section 13.48.010 (Purpose [–Historic Preservation]).
A. The council of the city of San Jose hereby finds that in order to promote the economic and general welfare of the people of the city of San Jose, and to ensure the harmonious, orderly and efficient growth and development of the municipality, it is deemed essential by the council of the city of San Jose that the qualities relating to the history of the city of San Jose and a harmonious outward appearance of structures which preserve property values and attract tourists and residents alike be preserved; some of these qualities are the continued existence and preservation of historic districts and landmarks; continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between buildings of historic design and those of more modern design; that such purpose is advanced through the preservation and protection of the old historic or architecturally worthy structures and neighborhoods which impart a distinct aspect to the city of San Jose and which serve as visible reminders of the historical and cultural heritage of the city of San Jose, the state, and the nation.

B. The purpose of this chapter is to promote the public peace, health, safety and welfare through the preservation of landmarks and districts and thereby stabilize neighborhoods and areas of the city; enhance, preserve and increase property values; carry out the goals and policies of the city's general plan, increase cultural, economic and aesthetic benefits to the city and its residents; preserve, continue and encourage the development of the city to reflect its historical, architectural, cultural, and aesthetic value or tradition; protect and enhance the city's cultural and aesthetic heritage; and promote and encourage continued private ownership and utilization of such structures.

SECTION 2: ENABLING AUTHORITY

Whether a community is revising an existing ordinance or starting from scratch, a prerequisite to any drafting effort should be a thorough understanding of the degree of local government authority available to adopt a preservation ordinance. In California, local governments enjoy broad authority to adopt preservation ordinances as part of their police power established in the state constitution, and also from specific state statutes.

Within the constitutional scheme of government in the United States, states are the primary holder of regulatory power over land within their borders. As is typical of many states, the California constitution grants every city and county the "police power," which enables local governments to act to protect the health, safety, and welfare of their citizens.[1] In California (and elsewhere throughout the country), courts have made clear that land-use regulations, including zoning and historic preservation ordinances, are authorized under the public welfare component of the police power. Importantly, courts also have agreed that historic preservation is a valid public purpose, which is an important prerequisite for all governmental actions.[2]

In addition to the general police power, state statutes specifically authorize local governments in California to acquire and protect historical resources. Under California Government Code Section 25373(b), a county board of supervisors may, "by ordinance, provide special conditions or regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, structures, works of art and other objects having a special character or special historical or aesthetic interest or value. These special conditions and regulations may include appropriate and reasonable control of the appearance of neighboring private property within public view." Similar authority for municipalities is found in California Government Code Section 37361(b).

Further, both federal and California courts have emphasized that governments may regulate to protect community aesthetics, which are at the heart of many preservation ordinances, to further the public welfare. This principle has been firmly established since at least 1954, when the U.S. Supreme Court noted that: "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."[3] The 1978 U.S. Supreme Court case of *Penn Central Transportation v. New York City*,[4] generally examined the constitutionality of New York City's preservation ordinance and found such an ordinance to be a valid public purpose and a legitimate function of local government.

---

[1] California Constitution, Article XI, Section 7.
[2] On historic preservation law in general, *see* Antonio Rossman, *Historic Preservation*, *in* California Environmental Law (K. Manaster and D. Selmi eds. 1998); Christopher J. Duerksen, *Historic Preservation Law*, *in* Rathkopf's The Law of Planning and Zoning (Ziegler ed. 1975).
[3] *Berman v. Parker*, 348 U.S. 26, 33 (1954).
[4] 438 U.S. 104.

Yet, while California communities have broad preservation authority under the state constitution and statutes, their ability to regulate historical resources is still subject to certain constraints under the federal and state constitutions,[5] including prohibitions against the taking of private property for public use without just compensation, and the guarantee of due process. These two important issues are covered later in this manual.

[5] U.S. Constitution, Amendment V; California Constitution, Article XI, Section 7.

SECTION 3: ESTABLISHMENT OF THE PRESERVATION COMMISSION

The ordinance must identify the local entity charged with administering and enforcing the ordinance and list their specific responsibilities. In many cases the preservation commission is a separate decision-making body within the local government. In other cases the City Council or its equivalent may act in the capacity of a preservation commission. This manual reviews key issues to consider when drafting this crucial section. For example, should the community require professional qualifications of preservation commission members? What types of activities should fall under the preservation commission's jurisdiction? Should the commission have decision-making authority, or merely be advisory to some other body, such as a planning commission?

The possible strategies for organizing a preservation commission by ordinance are endless, limited mainly in California by practical political and staffing considerations, which vary widely by community. This section addresses four basic issues: composition of the review body, the scope of its powers, the location of final review authority, and disclosure of pecuniary and personal interests of review board members.

COMPOSITION

Because local preservation ordinances in California are grounded in very broad enabling authority, communities have wide leeway in the composition of preservation commissions. Members of a local preservation commission typically are appointed by the local governing body or chief executive. Preservation commissions typically have five to nine members—an odd number helps prevent tie votes. Terms vary widely, with three years being a typical length. Terms usually are staggered to ensure that experienced members always will be serving. Some communities may want to consider setting a maximum limit on the number of consecutive terms that any person can serve, to prevent the commission from becoming too closely associated with any one individual.

Each jurisdiction should consider whether to require professional qualifications for some, or all, members of the review body. Qualifications are important from both a legal and a practical standpoint. There currently are different approaches in use throughout the state. Some communities require that a few (e.g., Napa) or all (e.g., Fresno) members be trained in history, architecture, archaeology, or a related field, in order to ensure that preservation decisions benefit from professional expertise. Other communities require no such qualifications and simply ask that members express an interest in preservation in order to serve.

There are merits to both approaches. A broadly based membership can protect the ordinance and its administration from a claim of arbitrariness and can help distinguish preservation restrictions from other aesthetic controls that are sometimes invalidated by courts. Some observers argue that the overall quality of preservation and design review in the community suffers if commission members do not have solid credentials and the experience necessary to carry out their responsibilities. There is value in having a mix of backgrounds on a preservation commission.

Requiring professional qualifications ensures that members have the necessary technical expertise to review adequately matters before the preservation commission. Requiring professional qualifications for at least some members also is consistent with the national requirements for cities participating in the Certified Local Government (CLG) program, which provides a source of grant money for preservation programs in participating communities. The California CLG procedures encourage local governments to have at least two professionally qualified persons. A local government in California may be certified without the minimum number or types of disciplines established if it can be demonstrated to the satisfaction of that state that it has made a reasonable effort to fill those positions, or that some alternative composition of the commission best meets the needs of the protection of historic properties in the local community. The CLG guidelines outline professional qualifications in a handful of areas, including history, architectural history, archaeology, and architecture. For each discipline, the guidelines require a minimum level of education and professional experience, which are codified in the Code of Federal Regulations (36 C.F.R. 61). In addition to the disciplines identified in the CLG guidelines, it also is useful to have planners and landscape architects on a local preservation commission.

Some communities believe that requiring qualifications may deprive the review body of valuable common-sense perspectives from citizens not professionally involved in preservation-related fields, and also might prevent service by individuals who are well-qualified though not professionally trained. To some, "qualifications" equal bias, and thus decisions made by commissioners with qualifications may carry less weight with the legislative body, because they are perceived to be less representative of the whole community.

In an attempt to reach a middle ground between these two philosophies, many communities have adopted a balanced system made up of both professionally qualified members and also citizens-at-large who bring a broader perspective of community affairs. In such jurisdictions, only some (e.g., four out of seven) commission members are required to meet professional qualifications standards, in order to bring expertise in urban design and preservation to the commission. The Alameda, California, approach is typical:

> The Commission shall consist of five members, all of whom shall be residents of the City during incumbency, nominated by the Mayor and appointed by the City Council:
> A. One registered architect
> B. One registered landscape architect, architect, or building designer
> C. One state licensed general building contractor
> D. Two members shall be citizens of the City at large, with an interest in community design.
> E. In the event that the Council determines that any of the positions described in subsections (a), (b), or (c) cannot be filled by persons qualified thereunder, the Council may fill any such position by appointing persons qualified under subsections (a), (b), (c), or (d).[6]

[6] Alameda, California, Municipal Code, Title II, Article 3, Sec. 332.

Around the country, numerous courts have examined the composition of the preservation review body in the context of challenges to local ordinances. While none have held that the particular composition of a review body is fatal to the validity of a historic preservation ordinance, these courts nevertheless have noted that representation by a range of disciplines and interests helps refute any claim that the actions of the review body are arbitrary.[7] For example, in a famous case involving a challenge to the New Orleans preservation ordinance, the court noted that the ordinance "curbed the possibility for abuse by the Commission…by specifying the composition of that body and its manner of selection."[8] Similarly, the Colorado Supreme Court, in a case from Georgetown, Colorado, acknowledged the importance of a commission's expertise in helping to prevent arbitrary action.[9] These cases indicate that careful wording can strengthen the legal case for an ordinance by specifying a knowledgeable, representative membership for a local preservation commission.

Settling on the composition of a local commission is sometimes a difficult undertaking in small communities that simply do not have a large cadre of professionals with relevant experience. There may be only one or two architects in the area, and they may be hesitant to serve if volunteering means foregoing preservation or restoration projects that might come before the commission. The solution is not an easy one. State historic preservation offices can be of great assistance by making available an architect to "ride circuit," rendering expert advice to key members of small preservation commissions (though of course staffing such a position requires a high commitment of resources by the state.)

In summary, across California, historical review boards and preservation commissions represent a wide diversity of sizes, generally five to fifteen members, and skills, such as varying degrees of experience in preservation-related fields. In addition to the Alameda language included above, several excerpts from adopted California preservation ordinances are included below to illustrate the range of approaches used in the state today. They range from the Berkeley ordinance, which simply specifies a number of commission members and contains no detail on professional qualifications; to the Colton ordinance, which identifies a general range of disciplines from which all commission members should be drawn; to Santa Monica, which sets strict qualifications for some but not all seats on the local commission. The Los Gatos ordinance requires a mixture of lay members and planning commission members on its preservation commission; this common approach ensures a linkage between preservation and other planning and land-use activities in the community.

[7] *See*, *Citizens for Responsible Development v. City of West Hollywood*, 39 Cal.App.4th 490, 494 n. 1, 45 Cal.Rptr.2d 917 (Cal. App. 1995) (noting the availability of experts within the commission as the court upheld the preservation commission's determination that certain structures were not of historic significance).
[8] *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975).
[9] *South of Second Assoc. v. Georgetown*, 580 P.2d 807, 808-09 n.1 (Colo. 1978).

CALIFORNIA CODE EXCERPTS: ESTABLISHING THE REVIEW BODY

CITY OF BERKELEY

Section 3.24.030. Membership – Appointments – Organization and Officers.

The commission shall consist of nine members. Appointments to the commission shall be made by council members and vacancies on the commission shall be filled by council members in accordance with [general provisions regarding appointment vacancies].

CITY OF COLTON

Section 15.40.050 Commission – Members.

The following regulations shall apply to the membership and organization of the Historic Preservation Commission:

a) The Historic Preservation commission shall consist of seven members appointed in accord with the provisions of Chapter 2.30 of the Colton Municipal Code.

b) The Historic Preservation Commission shall be appointed by the City Council of city residents from among professionals knowledgeable in the disciplines of history, architecture, architectural history, planning, prehistoric and historic archaeology, folklore, cultural anthropology, curation, conservation, and landscape architecture or related disciplines, such as urban planning, American studies, American civilization, or cultural geography, to the extent that such professionals are available in the community. Commission membership may also include lay members who have demonstrated special interests, competence, experience, or knowledge in historic preservation.

CITY OF LOS GATOS

Section 29.80.225. Historic Preservation Committee.

a) The Historic Preservation Committee acts as an advisory body to the Planning Commission on all matters pertaining to historic preservation. The Historic Preservation Committee shall consist of five (5) members, three (3) public members and two (2) Planning Commissioners. The public members shall be appointed by the Town Council and the Planning Commission members shall be appointed by the Planning Commission Chair and affirmed by the Town Council.

b) The Committee is composed of professional and lay members with demonstrated interest, competence or knowledge in historic preservation. Committee members shall be appointed from among the disciplines of architecture, history, architectural history, planning, archeology or other historic preservation-related disciplines such as urban planning, American studies, American civilization, cultural geography or cultural anthropology to the extent that such professionals are available in the community.

CITY OF SANTA MONICA

Section 9.36.040. Landmarks Commission.

A Landmarks Commission is hereby established which shall consist of seven members appointed by the City Council, all of whom shall be residents of the City over eighteen years of age. Of the seven members, at least one shall be a registered architect, at least one shall be a person with demonstrated interest and knowledge, to the highest extent practicable, of local history, at least one shall have a graduate degree in architectural history or have demonstrated interest, knowledge and practical or professional experience to the highest extent practicable of architectural history and at least one shall be a California real estate licensee.

SCOPE OF POWERS

Just as important as who sits on the review body is what authority that body has to regulate building and land-use activities. Review bodies in various communities across California have wide-ranging responsibilities, including, but not limited to, the following:

- Survey and identification of historically and architecturally significant structures and areas;
- Establishment of standards and procedures for designation of historical resources;
- Designation of historical resources;
- Review of applications for alteration, construction, or demolition of historical resources and all structures within historic districts;
- Coordination and supervision of educational activities;
- Purchase or sale of property;
- Acceptance of easements and other less-than-fee-simple donations of property;
- Enforcement of ongoing maintenance requirements for historical resources,
- Acceptance of preservation funds from various sources, and
- Review of zoning amendments and comprehensive plans relating to historic preservation.

The most important powers that can be vested in a preservation commission have all been held valid under the U.S. Constitution by various courts: the power to deny an application to demolish or alter historical resources; to regulate new construction or development in the vicinity of a historical resource or historic district; and to impose affirmative maintenance requirements on historical resource owners. Of course, courts retain the authority to review how such powers are exercised in individual cases, but, in legal parlance, such provisions are valid on their face. Thus, there is wide latitude available in granting powers to a preservation commission in an ordinance, keeping in mind appropriate federal and state constitutional requirements.

Just as there is no one correct way to empanel an effective review body, there is no commonly accepted set of responsibilities for that body. There are, however, common elements found in most ordinances. The City of Glendale's historic preservation ordinance contains a representative list of express authorities (See excerpt below.).

A preservation commission is commonly given the power to investigate and recognize as-yet unprotected historical resources within the locality through various mechanisms, such as preparation of historic resources surveys. Some communities establish a list of "structures of merit."[10] The Eureka, California, ordinance also provides several examples of other proactive powers that may be given to a preservation commission (See excerpt below.).

[10] See e.g., Berkeley, California, Code of Ordinances, § 3.24.070(A) ("the commission may establish and maintain a list of structures, site and areas deemed deserving of official recognition, although not yet designated…").

As is true with other provisions of a preservation ordinance, practical considerations, as much as legal requirements, will shape the scope of powers granted to a commission. If a community is concerned primarily with exterior facades of historical resources, then it makes little sense to add to the administrative burden by asserting control over interior changes. Similarly, in a town with a volunteer preservation commission able to meet only once a month, the commission may be overwhelmed if it must review every application for a building permit within a historic area. In such instances, it may be advisable to exempt certain changes or allow the local building official or planning staff to handle applications for "minor alterations" as defined by the commission (See the discussion below under "Section 5: Procedures and Criteria for Reviewable Actions: Allowing Staff-Level Reviews.").

On the other hand, in situations where any alteration in the general vicinity may be detrimental, the commission may need to control not only all external alterations to historical resources (even in the rear of a building) but also alterations to neighboring structures that are not of landmark quality,[11] and even interiors that are visible to the public. The City of Berkeley, for example, grants its preservation commission the power to condition the designation of a publicly owned historical resource upon the ability to review "proposed changes in major interior architectural features."[12] In the City of Davis, the Historical Resources Management Commission is empowered to provide advice on landscaping at the sites of historical resources.[13]

Probably the most crucial consideration in drafting the powers of a preservation commission is that the review body be given adequate power to protect historical resources. This will in many cases require that it have the power to forbid demolition or alteration, not just delay it, even though such power may be exercised infrequently.

CALIFORNIA CODE EXCERPTS:
SCOPE OF POWERS

CITY OF DAVIS
Section 40.23.050 Powers and Duties.
The historical resources management commission shall have the following powers and duties under this article:
A. Act in an advisory capacity to the city council in all matters pertaining to historical resources/districts;
B. Maintain a local inventory of historical resources/districts within the city; publicize and update periodically the inventory;
C. Recommend the designation of historical resources/districts, as hereinafter provided;
D. Recommend standards to be adopted by the city council, to be used by the commission in the review of applications for alteration permits;

[11] See, Glendale, California, Code of Ordinances, § 2.76.100(M) (commission may render a decision on any design review application "affecting" designated historical resources).
[12] Berkeley, California, Code of Ordinances, § 3.24.100(B)(1).
[13] Davis, California, Code of Ordinances, § 40.23.050(J).

E. Hear and render judgment on applications for alteration permits, as hereinafter provided; approve or deny issuance of alteration permits;
F. Investigate and report to the city council on the use of various federal, state, local, or private funding sources and mechanisms available to promote historical preservation in the city;
G. Review and comment on the decisions and documents (including environmental assessments, environmental impact reports, and environmental impact statements) of other public agencies when such decisions or documents may affect historical resources/districts or potential historical resources/districts in the city;
H. Cooperate with local, county, state, and federal governments in the pursuit of the objectives of historic preservation and request and receive any appropriate information from any city departments or commissions;
I. Participate in, promote, and conduct public information, educational, and interpretive programs pertaining to historical resources/districts;
J. Render advice and guidance upon the request of the property owner or occupant, on the restoration, alteration, decoration, landscaping, or maintenance of any historical resource, outstanding historical resource, or improvement located in a historic district;
K. Provide for adequate public participation in local historic preservation programs, including the process of recommending properties for nomination to the National Register;
L. Perform any other functions that may be designated by resolution or motion of the city council.

CITY OF EUREKA
Section 157.03 (Authority and Responsibilities of Historic Preservation Commission).
A. In addition to the responsibilities conferred by other provisions of this chapter, the Historic Preservation Commission shall:
1. Review applications to alter or demolish all or part of any structure which is located on a designated property under §§ 157.04 and 157.05 of this chapter.
2. Adopt maximum times for its historic preservation review, which if exceeded, may be treated as causing automatic HPC approval or HPC disapproval.
B. The HPC shall, to the extent it deems action appropriate, have the authority to:
1. Negotiate with owners of properties having special characteristics for, and may recommend to the City Council the approval of, contracts to restrict the use of such property and to retain such characteristics.
2. Establish and maintain a list of structures, other physical features, sites, and areas considered deserving of official recognition although not given regulatory protection. The purposes of the list shall be to recognize the merit of and encourage the protection, enhancement, perpetuation, and use of such structures, other physical features, sites, and area. For these purposes, the Commission may authorize such steps as it deems desirable, including but not limited to the issuance of certificates of recognition and the authorization of plaques.
3. Carry out or assist studies and programs designed to identify and evaluate structures, other physical features, sites, and areas which are worthy of preservation.
4. Inspect and investigate structures, other physical features, sites, and areas which may be worthy of preservation.
5. Consider methods other than those described above for encouraging and achieving preservation of worthy structures, other physical features, sites, and areas, including exploring means of financing the restoration or maintenance thereof.
6. Make appropriate recommendations on the general subject of preservation to the Planning Commission, City Council, other public and private agencies and bodies, and the general public.

CITY OF GLENDALE
Section 2.76.100 (Powers and duties generally).
The historic preservation commission shall have the power and it shall be its duty to perform the following acts:
A. To consider and recommend to the city council additions to and deletions from the register of historical resources;
B. To keep current and publish a register of historical resources;
C. To make recommendations to the planning commission, and the city council on amendments to the historic preservation element of the city general plan;
D. To grant or deny applications for permits for demolition, or major alterations of historical resources;
E. To grant or deny appeals from decisions of the director of planning and the permit services administrator as specified in Section 15.20.030 of this code;
F. To encourage public understanding of and involvement in the unique historical, architectural and environmental heritage of the city through educational and interpretative programs;
G. To explore means for the protection, retention and use of any historical resource, historic district, or potential historical resource or district;
H. To make recommendations to the city council on applications for properties to be included in the property tax incentives program which may be subject to historic property contracts as set forth in Section 15.20.070 of this code;
I. To encourage private efforts to acquire property and raise funding on behalf of historic preservation; however, the commission is specifically denied the power to acquire any property or interest therein for or on behalf of itself or the city;
J. To recommend and encourage the protection, enhancement, appreciation and use of structures of historical, cultural, architectural, community or aesthetic value which have not been designated as historical resources but are deserving of recognition;
K. To encourage the cooperation between public and private historic preservation groups;
L. To advise city council and city boards and commissions as necessary on historic preservation issues;
M. To render decisions on design review applications affecting designated historical resources pursuant to Section 30.16.820;
To perform any other functions that may be designated by resolution or motion of the city council.

FINAL REVIEW AUTHORITY

Another important issue closely related to the scope of the reviewing body's power is the question of where final authority should rest for designating structures and reviewing permit applications. In many communities, final decision-making authority rests with the preservation review body, while in other jurisdictions that body makes a recommendation to a planning commission or city council, which makes the final decision. Under California's broad enabling authority, local governments have wide leeway in where they place final decision-making authority, and the choices may be difficult.

- One approach, perhaps the least attractive to preservationists, is to have the local law grant the preservation commission advisory authority only regarding designations and permit reviews, and vest no absolute power to deny demolition

permits in either the preservation commission or the legislative body. The City of Burbank, California, has adopted this approach, which, while providing for close political control over preservation and limiting restrictions on owners who may want to demolish their historical resources, is not as aggressive in protecting historical resources as some preservationists might like.

- A second approach is to split authority between the preservation commission and the local legislative body. For example, in both the California cities of Alameda and Davis, the preservation commission makes decisions on permit reviews (though its decisions can be overridden by appealing to the local legislative body). The legislative body makes decisions on designations (with appeal to the courts), with only advisory input from the preservation commission. This model, more acceptable to preservationists because of the balance it strikes among conservation goals, property rights, and political control, is common throughout the country and has been upheld regularly by the courts.[14]

- Another option is to vest final review authority over designations and permit reviews with the preservation commission, with appeal to the city council or to the courts. From a preservation point of view, this approach is most attractive because, to a certain extent, it removes preservation from the political arena and allows local commissions to forbid demolition according to prescribed standards and procedures. Courts also have upheld uniformly this type of ordinance around the country. In California, the cities of Berkeley and Eureka have adopted this approach.

[14] See, e.g., *City of New Orleans v. Pergament*, 198 La. 852, 5 So.2d 129 (1941); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *900 G Street Associates v. D.C. Department of Housing and Community Development*, 430 A.2d 1387 (D.C. App. 1981); and *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal.4th 165, 172 n. 3, 105 Cal.Rptr.2d 214, 19 P.3d 567 (Cal. 2001) (Upholding Sierra Madre Ordinance No. 1036).

- Finally, some communities might assign some preservation-related responsibilities to other entities altogether, such as a design review commission. For example, in Pasadena, California, the Cultural Heritage Commission (CHC) has responsibility for most preservation review in the city, but the Design Review Commission (DRC) handles design review in the downtown preservation district. Also, for city-owned properties, the CHC serves in an advisory capacity to the DRC.

If other entities exist besides the preservation commission, such as a design review body, then the community should think carefully about the relationship between the multiple entities and ensure that there are no duplicative reviews that may unnecessarily add time and costs to the development review process. The jurisdiction of each entity should be carefully distinguished from the other entities (e.g., by geography or by type of project). The sequence of decision-making should be coordinated to prevent contradictory decisions. In California, local governments increasingly are moving toward fewer boards, rather than more, to avoid these types of potential complications.

If strong preservation controls are to be exercised by the preservation commission, then local elected officials almost inevitably will want final review authority over designations and permit applications to rest with the local legislative body, the mayor, or with a planning commission or similar body that has a broader view of community development. Preservationists may have to choose between having stronger controls exercised by a less sympathetic body or weaker controls vested in a friendly preservation commission. There are pros and cons to either approach. If the local planning commission or zoning board is put in charge of making final decisions, then preservationists may find that it is more difficult to get historical resources listed or that the review body occasionally allows demolition or site development that a more preservation-oriented body might reject. Yet the occasional reversal on appeal to another board may be worthwhile to preservation advocates if the alternative is vesting limited powers – perhaps authority only to delay demolitions rather than veto them – in a preservation commission.

In most instances, a good case can be made for establishing final review authority in a separate preservation commission with specific expertise and the time to devote to preservation programs. Moreover, as discussed earlier, for a local government to qualify for certain federal historic preservation programs and funding and to assert authority over local National Register nominations, the community must establish a preservation commission with adequate authority to designate historic districts, review proposals for alteration within a district, and protect significant structures.

In terms of vesting a preservation commission with final review authority, there are practical aspects to keep in mind as well. Is there sufficient expertise, or are there enough willing citizens available in the community to establish yet another volunteer commission, particularly in smaller towns? If an existing body, such as the planning commission, is given authority over historical resources, will these added duties overburden it? Who will do staff work for the review body? Would staff from a planning

or zoning commission be sympathetic to preservation goals? Should the review body concern itself only with major alterations or demolitions, or is greater control warranted?

DISCLOSURE OF PECUNIARY AND PERSONAL INTERESTS

People are often appointed to preservation commissions because they have some special expertise (i.e., architectural training, real estate experience, or legal knowledge) that should be helpful to the commission in making decisions. But the use of this expertise, and the past affiliations that are often part of such expertise, raise several interesting legal issues to which commissioners should be sensitive.

Occasionally, members of the preservation commission will have a pecuniary or personal interest in a case before the commission. What if a commissioner has a direct pecuniary interest in a case, perhaps through a partnership with the developer applying for a demolition permit? Almost universally, the commissioner should disqualify himself or herself in such situations. But that is the easy case.

What about cases in which the interest is only indirect – for example, when a commissioner owns nearby property that might appreciate in value if a big, new high-rise office building is allowed in a historic area? That question is a difficult one. In several zoning cases around the country, courts have invalidated zoning decisions because of the possibility of a conflict of interest.[15] Commissioners should be very careful to disclose any potential direct or indirect gain or loss that could flow from a commission decision.

Where a potential conflict of interest may be perceived but the commissioner has no tangible interest at stake, disclosure and affirmation of unbiased decision-making is still important. What if a commissioner, because of a past affiliation – say, the presidency of a local private preservation advocacy group – is perceived to have an inherent bias against, or for, a particular proposal? Should that person be disqualified? Generally not, unless the commissioner cannot keep an open mind and is not willing to consider evidence supporting a contrary position and to make a finding on the record presented. Present activity with local groups actively supporting or opposing a particular case before the commission will raise more questions and potential challenges to the commissioner's ability to vote in an unbiased manner; therefore disqualification or recusal may be appropriate in cases of active affiliation with a party in interest.

A related, common disclosure issue is whether commissioners can base decisions on personal knowledge or expertise. For example, if an architect knows from long years of

[15] For an example, see *Buell v. City of Bremerton*, 495 P.2d 1358 (Wash. 1972), striking down a local zoning decision because the chairman's property might increase in value as a result of the zoning. A recent California case involved the City of Torrance, where several council members had received campaign contributions from an opponent of a proposed conditional use permit before the board; *Breakzone Billiards v. City of Torrance*, 97 Cal.Rptr.2d 467,477 (the court held that recusal by the council members was not required because each had stated their decision would not be affected by the contribution and the court found no indication that the decision-maker's impartiality was tainted).

study and personal experience that a proposed development in a historic district is not compatible with the character of the district and that alternative designs are possible, can such knowledge form the basis for a negative decision? Similarly, can a commissioner make a personal visit to a historical resource that an owner wants to demolish and base his decision on impressions from that visit? Generally, the answer to both of these questions is "yes." A decision can be based on personal knowledge and expertise, provided that knowledge is noted in the record.[16]

[16] For a sampling of cases in support of this position, see *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); and *Russo v. Stevens*, 7 App. Div. 2d 575, 184 N.Y.S.2d 981 (1959).

SECTION 4: PROCEDURES AND CRITERIA FOR DESIGNATION OF HISTORICAL RESOURCES

What types of historical resources should be protected, and how? Should the ordinance consider both individual historical resources and also historic districts? Should distinctions be made to reflect different levels of historical and architectural significance? Who should receive notice of proposed historic designations? This section discusses the basic issues regarding designation procedures and criteria. Other related topics that are covered include owner consent; designation of interiors; and alternatives to designation, such as conservation districts.

CRITERIA FOR DESIGNATING HISTORICAL RESOURCES

California's communities have identified a wide range of resources that qualify for historical designation. In addition to numerous residential subdivisions and landmark commercial buildings designated throughout the state, communities have designated such unusual resources as a trailer park in Los Angeles (typical of the emergence of the city's car culture in the 1920s). Clear criteria for historical designation are a crucial aspect of a successful preservation ordinance.[17] Recognizing that there are a variety of reasons for designation (e.g., aesthetic, historic, social, cultural, or economic, among others), courts traditionally have given local communities great latitude in deciding what resources should be designated. Deference to the designation decision of a local community is based on the presumption that reasonably clear criteria are articulated prior to government action, and then applied by an expert body or by a legislative body on the advice of a qualified preservation commission.

An effective preservation ordinance must do more than just state that the preservation commission can designate structures of, for instance, "historical merit." The ordinance should give meaning to such key terms. For example, the model ordinance described by the National Trust for Historic Preservation defines the standard of "historical and cultural importance" as:

> (1) has significant character, interest or value, as part of the development, heritage or cultural characteristics of the City, State or Nation; or is associated with the life of a person significant in the past; or
> (2) is the site of an historic event with a significant effect on society; or
> (3) exemplifies the cultural, political, economic, social or historic heritage of the community.

The National Trust standard is not elaborate, but it is comprehensible to both owners and judges. Where an ordinance lacks the detail exemplified by this model ordinance,

[17] For a general discussion of basic survey and designation standards in California, see the seminal case of *Bohannan v. City of San Diego*, 30 Cal.App.3d 416, 106 Cal. Rptr. 333 (Cal. App. 1973). See also the more recent case of *League for Protection of Oakland's Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 903, [60 Cal.Rptr.2d 821,] (Cal. App. 1997), regarding the importance of a historical resources survey in the protection of a historic Montgomery Ward building in Oakland.

the local preservation commission should consider adopting its own guidelines to augment and explain the ordinance standard.

The State of California has established designation criteria for the California Register of Historical Resources. While there is no requirement that local governments adopt the same criteria for their own designation programs, there are substantial advantages in doing so. In particular, the California Register and National Register of Historic Places criteria are considered in CEQA and Section 106 evaluations; thus, local criteria that match the standard state and federal criteria are more likely to be relevant to environmental reviews conducted under CEQA and Section 106 (CEQA reviews are discussed in more detail later in this manual).

The California ordinances excerpted below identify very specific standards for designation, with various types of notable resources eligible for designation. In the City of San Jose, for example, unique engineering or architectural innovations may trigger designation. In the City of Redondo Beach, the function of a property as a wayfinding feature could permit designation.

CALIFORNIA CODE EXCERPTS:
CRITERIA FOR DESIGNATING HISTORICAL RESOURCES

CITY OF SAN JOSE
Section 13.48.110 (Procedure for Designation of a Landmark).
H. Prior to recommending approval or modified approval, the historic landmarks commission shall find that said proposed landmark has special historical, architectural, cultural, aesthetic, or engineering interest or value of an historical nature, and that its designation as a landmark conforms with the goals and policies of the general plan. In making such findings, the commission may consider the following factors, among other relevant factors, with respect to the proposed landmark:

1. Its character, interest or value as part of the local, regional, state or national history, heritage or culture;
2. Its location as a site of a significant historic event;
3. Its identification with a person or persons who significantly contributed to the local, regional, state or national culture and history;
4. Its exemplification of the cultural, economic, social or historic heritage of the city of San Jose;
5. Its portrayal of the environment of a group of people in an era of history characterized by a distinctive architectural style;
6. Its embodiment of distinguishing characteristics of an architectural type or specimen;
7. Its identification as the work of an architect or master builder whose individual work has influenced the development of the city of San Jose;
8. Its embodiment of elements of architectural or engineering design, detail, materials or craftsmanship which represents a significant architectural innovation or which is unique.

CITY OF REDONDO BEACH
Section 10-4.201 (Designation Criteria).

> For the purposes of this chapter, an historic resource may be designated a landmark, and an area may be designated an historic district pursuant to Article 3 of this chapter, if it meets one or more of the following criteria:
>
> A. It exemplifies or reflects special elements of the City's cultural, social, economic, political, aesthetic, engineering, or architectural history; or
> B. It is identified with persons or events significant in local, state or national history; or
> C. It embodies distinctive characteristics of a style, type, period, or method of construction, or is a valuable example of the use of indigenous materials or craftsmanship; or
> D. It is representative of the notable work of a builder, designer, or architect; or
> E. Its unique location or singular physical characteristic(s) represents an established and familiar visual feature or landmark of a neighborhood, community, or the City.

The standards above can be contrasted with those at issue in a case from another state in which courts invalidated historic designation because basic designation criteria were vague or absent entirely. In *Texas Antiquities Commission v. Dallas County Community College District,*[18] the Texas Supreme Court was asked to stop demolition of several state-owned structures under a state law that automatically designated and protected all state-owned buildings of "historical interest" as state archaeological landmarks. The court, troubled by the state statute's failure to define what "historical interest" meant, even though it had such power under the state statute, struck down the automatic designation on the grounds that such generalized language was overly broad and vague:

> …"historical" includes all of the past; "interest" ranges broadly from public to private concerns and embraces fads and ephemeral fascinations. All unrestorable structures ordinarily hold some nostalgic tug upon someone and may qualify as "buildings…of historical…interest" upon the basis of the statute now before us. We are unconvinced that we should renounce the settled law of Texas that the legislature may not delegate its powers without providing some criteria or safeguards.

In the context of historical resources, the courts may recognize in this and similar cases the historic and aesthetic merits of buildings or an area in question but will typically be compelled to uphold designation of historical resources only where clear standards exist. Without standards in a local ordinance or state regulation, courts are put in the position of having no basis to formulate a decision supportive of preservation law. Under California law, where a clear process and clear standards exist, courts will tend to uphold decisions of the local authority.[19]

---

[18] 554 S.W.2d 924 (Tex. 1977).

[19] In *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal.App.3d 893, 165 Cal.Rptr. 401 (Cal. App. 1980), the state appeals court held that, despite listing of the City of Paris Building as a State Historical Landmark and listing on the National Register of Historical Places, the lack of local listing, after appropriate review of a designation proposal by the appropriate City of San Francisco boards, precluded an action to compel designation on the local registry. *Cf.*, *Novi v. City of Pacifica*, 169 Cal.App.3d 678, 215 Cal.Rptr. 439 (Cal. App. 1985) (California courts permit delegation of broad discretionary power to local governments, including tolerance for a certain amount of

Generally, designation standards should not be hard to draft. There are several important points, however, that an ordinance drafter should consider. First, some commissions tend to define "historic" in terms of how old a building is. This is an inflexible approach that has serious shortcomings. There is merit to making age one factor among others in determining “historic” status, but some ordinances strictly prohibit designation unless a building is a predetermined age, typically over 50 years old. Such a standard runs the risk of eliminating a number of worthy historical resources from protection (some important Modernist architecture in California is barely 50 years old, for example). Of greater concern, a uniform age standard as a requisite to designation may prevent federal certification of the local ordinance for federal tax credit and other benefits. The federal government has denied certification when designation was predetermined by a qualifying age requirement of greater than 50 years, on the ground that the effects of alteration or demolition can best be evaluated on a case-by-case basis independent of age.

Buildings do not have to be of extraordinary significance to be protected. In one New York case, the opponents of a designation action argued that there was "no evidence to suggest that the Meeting House is of extraordinary architectural distinction or that it was ever the scene of any noted historical event or the residence of any noted personage.” The court in this case was not persuaded that designation should be such an exclusive category:

> While relevant, this is not determinative. If the preservation of landmarks were limited to only that which has extraordinary distinction or enjoys popular appeal, much of what is precious in our architectural and historical heritage would soon disappear. It is the function of the Landmarks Preservation Commission to ensure the continued existence of those landmarks that lack the widespread appeal to preserve themselves.[20]

Courts also have recognized the need to regulate non-landmark buildings that serve as a setting, or act as a buffer, for more significant structures. For example, in one famous case the North Carolina Supreme Court explicitly rejected the notion that protection could be extended only to historical resources:

> It is widely recognized 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. In rejecting a similar challenge, the District Court in *Maher v. City of New Orleans*, 371 F. Supp. 633, 663 (E.D. La. 1974), observed: "just as important is the preservation and protection of the setting and scene in which structures of architectural and historical significance are situated.”[21]

In another example, the Maryland Court of Appeals rejected the argument that local commissions are powerless to regulate development around historical resources:

---

vagueness within local ordinances).

[20] *Society for Ethical Culture v. Spatt*, 415 N.E.2d 922 (N.Y. 1980).

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

> The whole concept of historic zoning "would be about as futile as shoveling smoke" if. . . because a building being demolished had no architectural significance a historic district commission was powerless to prevent its demolition and the construction in its stead of a modernistic drive-in restaurant immediately adjacent to the State House in Annapolis.[22]

This same reasoning is applicable to grounds or gardens that might surround and complement a historical resource. If the surrounding landscape is not designated, then an owner may subdivide a historically significant site and sell off or build on the undeveloped part. This may present difficult problems even in a historic district where the preservation review body has power to control new construction, and it may completely hamstring a commission in dealing with a freestanding landmark. An owner may be able to subdivide the site and claim a "taking" of his property under the U.S. or state constitution if development is not allowed on the former grounds or garden. By coordinating its designation powers with the local subdivision ordinance, the preservation commission may avoid this problematic situation.[23]

DESIGNATION PROCEDURES: NOTICE AND HEARING REQUIREMENTS

The preservation ordinance must set forth a procedure to ensure that an owner of a property proposed for historic designation is given notice of the proposed designation and an opportunity for a hearing. Generally, written notice to interested parties and an opportunity to present relevant facts at an informal hearing are all that are required when designating a structure or district – something less than what may be necessary when an application to alter, demolish, or construct (all of which raise economic issues) is involved. [24]

Unlike, for example, state code provisions regarding subdivision and annexation,[25] the enabling legislation for historic preservation ordinances in California does not specifically identify notice and hearing requirements. However, general California guidelines for local government action are applicable to historic preservation. The Brown act prescribes the open meeting process for local jurisdictions. In addition, both counties and municipalities in California are subject to Section 50022 of the Government Code, which sets forth general notice and hearing requirements for ordinances of all types. Other notice and hearing requirements for preservation actions stem from CEQA Guidelines, Sections 15072 and 15073. In general, where a CEQA

---

[22] *Coscan Washington, Inc. c. Maryland-National Capital Park & Plan. Comm'n*, 590 A.2d 1080 (Md. App. 1991).

[23] *See*, *Victorian Realty group v. City of Nashua*, 534 A.2d 381 (N.H. 1987)

[24] *See*, *Weinberg v. Whatcom County*, 241 F.3d 746 (9th Cir. 2001). Note that the exact standards for notice and hearing to some extent hinge on the question of whether a designation proceeding before the preservation commission is legislative or adjudicatory in nature. *See*, *Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547, 555, 35 Cal.Rptr. 782 (Cal. App. 1994), *quoting*, *Horn v. County of Ventura*, 24 Cal.3d 605, 596 P.2d 1134. Insofar as a designation proceeding creates a zoning overlay district, it may be compared to zoning and rezoning actions that have been held legislative acts under California law; *see*, *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511 (1980).

[25] The Annexation Act, codified at Government Code § 35313, requires notice and hearing of certain affected property owners; *see*, *McMillen v. City of El Monte*, 180 Cal.App.2d 394 (Cal. App. 1960).

process is required for a preservation action, notice of the proposed action must be provided to all interested parties, as well as the public and various governmental "trustee" agencies (See detailed discussion later in this manual.).[26]

The Davis, California, ordinance provides an example of notice and hearing language very similar to proven language in zoning and subdivision ordinances (See excerpt below.). At paragraph (C) the ordinance specifies that a public hearing is required before the preservation commission, and stipulates that the timing of the hearing must be within ninety days of the filing of an application. Paragraphs (E) and (H) describe the notice procedure, with a standard mailing radius of three hundred feet around the subject property.

Most historic preservation commissions, such as the Davis commission, operating today not only meet but also exceed constitutional and statutory notice and hearing requirements.[27] There are several pitfalls, however, that review bodies should avoid. In some communities, listing of individual resources and districts on the National Register of Historic Places has preceded local designation. While current federal regulations require that the owner of a prospective National Register resource be given notice and an opportunity to be heard, in the past a hearing was not always held, simply because National Register listing had little real impact on the owner's rights. In a few instances, such listing has been the basis for local designations, which may take place without a new hearing, even though controls imposed pursuant to the local ordinance might be more far-reaching than those imposed under National Register listing. In those cases, the owner should be given notice and an opportunity to be heard to avoid a possible challenge on due process grounds. If a community is considering local designation at the time of the National Register listing, then it might utilize concurrent notice and hearings.

The local government should ensure that written findings of fact are prepared at the time of the designation decision. The Glendale, California, designation procedure, for instance, specifically requires written findings of fact that correspond to designation criteria enumerated elsewhere in the ordinance.[28] Typically, findings for designations need not be as elaborate as those for applications to alter or demolish or for new construction. A summary of the evidence presented, a recitation of standards applied, and a brief statement of the reasons why the commission took the action it did is sufficient.

Step-by-step guidelines for local commissions, beginning with the designation of historical resources, act as a mechanism to prevent, or at least minimize, the risk of

---

[26] *Fall River Wild Trout Foundation v. County of Shasta*, 70 Cal.App.4th 482, 491, 82 Cal.Rptr.2d 705 (Cal. App. 1999) (insufficient notice under CEQA for action related to zoning amendment).

[27] *See generally*, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (discussing due process and the availability of temporary delays of hearings in emergencies).

[28] Glendale, California, Code of Ordinances, § 15.20.060(d). Section 15.20.060(e) requires that the city council approval be recorded with the County recorder, assuring the preservation of a written record of the findings and designation.

procedural challenges to actions of the preservation commission. In varying amounts of detail, each of the ordinances excerpted below demonstrates an effective approach to procedural issues in general.

CALIFORNIA CODE EXCERPTS:
NOTICE AND HEARING REQUIREMENTS

CITY OF DAVIS

Section 40.23.070 Designation Process.

Historical resources, outstanding historical resources, and historic districts shall be designated by the city council upon the recommendation of the historical resources management commission in the following manner:

A. Initiation of Designation. Designation of a historical resource, an outstanding historical resource, or an historic district may be initiated by the historical resources management commission, by any resident of Davis, or by the owner of the property that is proposed for designation. Applications for designation originating from outside the commission must be accompanied by such historical and architectural information as is required by the commission to make an informed recommendation concerning the application, together with the fee set by the city council.

B. List. The commission shall publish and transmit to all interested parties a list of proposed designations, and shall disseminate any relevant public information concerning the list or any site, structure, or area contained therein.

C. Public Hearing. The commission shall schedule a public hearing on all proposed designations, whether originating with the commission or with another party. If an application for designation originates from outside the commission, the public hearing shall be held within ninety days of the secretary to the commission's receipt of a complete application.

D. Work Moratorium. While the commission's public hearing or the city council's decision on the commission's recommendation is pending, the city council upon the commission's recommendation may declare a work moratorium. During the moratorium, any work that would require an alteration permit if the improvement were already designated a historical resource or outstanding historical resource or if it were already located in a historic district shall not be carried out. The work moratorium will end upon the earlier of the city council's decision on the proposed designation, the moratorium termination date designated by the city council, or one hundred eighty calendar days event from the date of commencement of the moratorium.

E. Notice. In the case of a proposed designation of a historical resource or outstanding historical resource, notice of date, place, time, and purpose of the hearing shall be given by first class mail to the applicants, owners, and occupants of the property, and to property owners within three hundred feet of the property, at least ten days prior to the date of the public hearing, using the name and address of such owners as shown on the latest equalized assessment rolls or in other ownership records, and shall be advertised once in a daily newspaper of general circulation at least ten days in advance of the public hearing. The commission and city council may also give other notice, as they may deem desirable and practicable. In the case of a proposed historic district, notice of the date, place, time, and purpose of the hearing shall be given by first class mail to the applicants, owners, and occupants of all properties within the proposed district, and to all property owners within three hundred feet of the proposed boundary, at least ten days prior to the date of the public hearing, using

the name and address of the owners as shown on the latest equalized assessment rolls or in other ownership records, and shall be advertised five consecutive days in a daily newspaper of general circulation at least ten days in advance of the public hearing.

F. Commission Recommendations. After the public hearing, but in no event more than thirty days from the date set for the public hearing, the commission shall recommend approval in whole or in part or disapproval of the application for designation in writing to the city council, setting forth the reasons for the decision.

G. Approval of Commission Recommendations. The city council, within sixty days of receipt of the commission's recommendations concerning proposed designations, shall by ordinance approve the recommendations in whole or in part, or shall by motion disapprove them in their entirety. If the city council approves a proposed designation, notice of the city council's decision shall be sent to applicants and owners of a designated property. Notice shall also be sent to the building official and to the secretary to the commission.

H. Failure to Send Notice. Failure to send any notice by mail to any property owners where the address of such owner is not a matter of public record shall not invalidate any proceedings in connection with the proposed designation.

I. Amendment or Rescission. The commission and the city council may amend or rescind any designation of an historical resource, an outstanding historical resource, or historic district in the same manner and procedure as are followed for designation.

CITY OF SAN JOSE

13.48.130 Notice of Amendment or Rescission of Designation.

A. When a landmark has been designated as a landmark and when property has been designated as an historic district, such designation may thereafter be rescinded or amended by the city council. The procedure for amending or rescinding the designation shall be the same as that for designation of a landmark or a district in the first instance. The council may rescind a designation in whole or in part when it deems it to be in the public interest to do so. The council may amend a designation when the findings required for designation in the first instance may be made with respect to the amended designation. B. The city clerk shall promptly notify the owners of the affected landmark or property by mailing a certified copy of the resolution amending or rescinding the designation, and shall cause a copy of the appropriate resolution to be recorded in the office of the recorder of Santa Clara County.

The clerk shall also send a certified copy of said resolution to the director of planning, the director of neighborhood preservation, director of public works, the building official and the occupant of the property.

CITY OF GLENDALE

15.20.060 Procedure for Designation or Deletion of Historical resources.

A. Prior to city council consideration for designating or deleting historical resources or districts, written consent shall be obtained from the property owner(s) of record;

B. The city council shall set a public hearing prior to designating or deleting a historical resource or district;

C. The city clerk shall give notice of the public hearing which notice shall contain the date, time and place of the hearing, the general nature of the proposed designation or deletion and the street address or legal description of the property involved. Said notice shall be published once in the official newspaper of the city at least ten days before the date of the hearing. Said notice shall be mailed, postage prepaid, at least ten days before the date of the hearing to affected property owners and all persons, shown on the last equalized assessment roll as

owning real property located within a radius of three hundred feet of the exterior boundaries of the property which is subject to the proposed designation or deletion;

D. The city shall make findings of fact and determinations in writing pursuant to the criteria set forth in Sections 15.20.050 and 15.20.055 of this code; and

E. The decision of the city council shall be made by resolution which shall be recorded with the Los Angeles County recorder.

DESIGNATION PROCEDURES: OWNER CONSENT

A number of existing preservation ordinances allow property owners to object to historic designation, potentially exempting those properties from the community's preservation program. Most owner consent provisions take one of three basic approaches. Some give owners an absolute veto over designation if they file a written objection, an approach currently reflected in federal designations for the National Register of Historic Places.[29] A variation prohibits designation without affirmative, express consent of a historic property owner or a majority of owners in a proposed district. These two approaches are generally thought of as involving "owner consent." A third variety requires a supermajority vote of the governing body for designation if an owner or majority of owners object – so called "owner objection" or "protest" provisions.

Courts have held in some cases that such provisions amount to an unlawful delegation of decision-making authority by the legislative body to individual landowners (i.e., an individual landowner can "opt out" of the regulatory process, thereby usurping the legislative power that is lawfully held only by the governing body).[30] In an analogous situation—zoning ordinances—virtually no jurisdiction allows an individual property owner to opt out of or veto a zoning classification because such a provision would render the system ineffective.

Practical experience around the country shows that it is difficult to craft an effective historic preservation program if owner consent is required. Inevitably, the city will lose significant structures or deleterious alterations will be made. However, in some cases, practical and political considerations may dictate that owner consent provisions be present in order to ensure passage of a preservation ordinance.

In one of the few reported preservation case rulings on the validity of an owner consent requirement, a state court held that the provision violated state planning law. That case involved an Oregon state planning law that required local governments to inventory

[29] 16 U.S.C. 470a(a)(6) (2001).

[30] *Cary v. City of Rapid City*, 559 N.W.2d 891, 895-96 (S.D. 1997), *Eubank v. Richmond*, 226 U.S. 137 (1912); *see also*, *East Bay Asian Local Development Corp. v. State of California*, 24 Cal.4th 693, 730, 740 n. 6, 743-745 (Cal. App. 2000) (Werdegar, dissenting. Discussing, in the context of religious land uses, the legal problem of delegating to individual owners the authority to make a legislative finding). *But see*, *Di Lorenzo v. City of Pacific Grove*, 260 Cal.App.2d 68, 72 (Cal. App. 1968) (addressing owner consent in the context of free speech versus property rights), *quoting*, *Buxbom v. City of Riverside*, 29 F.Supp. 3 (S.D. Cal. 1939).

historical resources and develop a plan regarding their preservation and use. The local owner consent provision was ruled illegal because it subordinated all historical resources to individual property owner desires. The court ruled that state law required the inventorying and designation of all significant structures; competing use issues could be dealt with after designation, not before.

Generally, courts in general zoning cases dealing with consent provisions have expressed similar qualms. Because consent provisions tend to eliminate any involvement by the local legislative body, most courts, including the US Supreme Court, have invalidated such provisions as standardless and unlawful delegations of legislative power to private property owners. However, owner objection provisions in which a majority of objecting landowners can trigger a need for a supermajority vote have generally been reviewed more favorably. The rationale is that such provisions do not usurp legislative authority, or that they only allow property owners to waive an otherwise express legislative restriction enacted for their benefit.

The challenge is to balance preservation goals and the needs of the community as a whole with the need to bring landowners into the preservation process in a positive fashion. The vast majority of preservation ordinances nationwide wisely avoid any type of owner consent provisions. But, again, they may sometimes be necessary for political reasons. The two ordinances excerpted below illustrate two attempts by California communities to address this issue. The Burbank requires owner consent prior to designation (in fact, it requires owner consent even prior to staff research on a property to determine eligibility). The Monterey ordinance distinguishes between its most important historical resources (called "landmarks") and other historical resources; the former (called H-1 resources) may be designated without owner consent, while the latter cannot.

CALIFORNIA CODE EXCERPTS:
OWNER CONSENT

CITY OF BURBANK
Section 31-928 (c) Procedure for Designation – Heritage Commission Review and Recommendation
…Prior to setting the item on its agenda, the City Planner shall obtain the owner's written consent to the historic designation of the property, structure, or improvement and his/her agreement to abide by the historic preservation regulations of this Division through the execution of a covenant in a recordable form….

CITY OF MONTEREY
Section 38-75 H-1 Landmark Overlay Zoning
A. Description. H-1 zoning is intended to identify and protect the most important historical resources in the City, generally including properties with statewide, national, or international historic significance where that significance would be recognized outside of the City, and the City is steward of those resources are preserved for its citizens and a larger public. The City recognizes its responsibility for preserving these resources for a national and international public, and the H-1 zone may be established without owner consent in order to fulfill that responsibility. The H-1 zone includes a strong series of incentives to support and encourage preservation of the historical resources.

INTEGRATING HISTORIC PRESERVATION INTO THE ZONING ORDINANCE

Many California local governments integrate their historic preservation regulations into the local zoning ordinance by creating "historic preservation overlay zones." Overlay zoning is a tool that layers an additional set of regulations on top of the regulations that apply in the underlying zoning district, when special conditions are present. Overlay districts often are used to regulate special use areas (e.g., around airports) or to protect sensitive environmental resources (e.g., floodplains).

Overlay zoning also can be used to provide special protection and regulation for historical resources, either individually or in historic districts. Historic overlay districts typically provide for special review of modifications to designated historical resources, yet the underlying densities and dimensional requirements and use restrictions typically continue to apply.

One of the principal advantages of using overlay zoning to protect historical resources can be a strengthened linkage between preservation and other community land-use objectives, since the preservation efforts become more closely integrated into the overall development review process. This is an especially helpful approach where the preservation ordinance is administered by the same personnel as other development review functions.

A prominent example of the overlay zone approach is the City of Los Angeles, where the HP (Historic Preservation Overlay Zone) District is set forth in Section 12.20.3 of the zoning ordinance. The city already has designated over a dozen HPOZ's and more are pending approval. Each designated HPOZ has its own Historic Preservation Board (a somewhat complex approach) that evaluates application for certificates of appropriateness within the HPOZ and also performs other functions, such as updates of historic resources surveys. Other California jurisdictions presently using the overlay zoning approach include the Town of Los Gatos, the City of Tustin, and the City of Pasadena.

Though overlay zoning typically adds an additional layer of protection for historic resources, it is also an opportunity to provide special accommodations and special forms of zoning relief that may provide additional preservation incentives to owners of these resources. For example, Los Gatos allows existing uses not otherwise permitted in the underlying zoning districts to continue in its Landmark and Historic Preservation Overlay Zones, subject to certain conditions.[31]

[31] Los Gatos, California, Code of Ordinances, § 29.80.230(c).

SPECIAL CONSIDERATIONS IN ESTABLISHING REGULATED AREAS

Interiors

Most preservation commissions spend the bulk of their time reviewing proposals to alter the exterior of historic structures. As a result, there are few reported legal cases dealing with the increasingly controversial issue of regulating interiors. Nevertheless, such regulation is authorized under California law, and some communities, such as the cities of Pasadena and Vallejo, do regulate the interiors of select historic properties. Such regulation most typically involves large, often monumental-scale historical resources, such as churches, movie theaters, opera houses, and mansions. For example, in the 1980 San Francisco case involving the City of Paris building, a proposal to demolish an historical building was validly conditioned on the preservation of an interior rotunda.[32]

Pasadena's ordinance allows for preservation commission review of interior changes to any significant public building:

> The commission shall be notified in writing by the director of community development of any plans to materially alter or redecorate exterior or interior features of any significant buildings owned by the City or any other public entities so that the commission may study such plans and make recommendations to the director of community development…[33]

Similarly, Santa Monica's ordinance allows for limited regulation of interiors in historically significant public buildings:

> For the purpose of this chapter, any interior space regularly open to the public, but not limited to, a lobby area may be included in the landmark designation of a structure or structures if the Landmarks Commission, or the City Council upon appeal, finds that such public spaces meet one or more of the criteria listed under Section 9.36.100.[34]

Colusa's ordinance does not differentiate between public and private properties, limiting its regulation of interiors instead on the basis of the likely impact of a proposal to exterior features:

> No person shall do any work listed below without first obtaining a permit from the Heritage Preservation Committee.
> 1.) Exterior alterations to a designated landmark.
> 2.) Interior alterations that would affect the exterior of a designated landmark…[35]

For the most part, courts have supported designation of interiors of buildings as well as exteriors where a commission has been given the authority to designate and regulate

---

[32] *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal.App.3d 893, 903, 165 Cal.Rptr. 401 (Cal. App. 1980).
[33] Pasadena, California, Code of Ordinances, § 2.46.150; *see also*, Berkeley, California, Code of Ordinances, § 3.24.100(B)(1).
[34] Santa Monica, California, Code of Ordinances, § 9.36.110.
[35] Colusa, California, Code of Ordinances, § 28.05; *cf.* San Diego, California, Municipal Code, § 143.0220(b) (interior modifications generally exempt from historic review if they will "not adversely affect the special [historic] character").

"structures" or "buildings."[36] The reasoning in *Sameric Corp. v. City of Philadelphia*[37] is typical. There the court stated that the commission had authority to regulate "buildings, structures, sites, and objects" and that a building by definition had to create shelter. In order for a building to create shelter, it must have an interior. The court thus concluded that the ordinance must be aimed at protecting interiors as well as exteriors, particularly where the interior design reflects the same architectural elements as the exterior. The problem tackled by this court could be avoided by simply mentioning interiors in the enabling legislation.

Courts have generally applied the same standards in reviewing interior designations as they have to exteriors. Thus, in *Weinberg v. Berry*,[38] the court rejected out-of-hand a claim that no designation of a building interior could serve a public purpose unless the government requires public access. Moreover, the court found that since there were conceivable situations in which designation of a building interior would not constitute a taking, the act was not unconstitutional on its face, as claimed by the plaintiff.

Publicly Owned Property

Many communities struggle with the issue of publicly owned property. Some of the thorniest preservation disputes involve preservation commissions facing off against other public institutions, such as state colleges, county hospitals, or even other local agencies. When the government becomes a developer, it often attempts to ignore the rules that govern private enterprise. If it is politically feasible to do so, an effective local preservation ordinance should include a provision subjecting all owners of designated buildings, public or private, to its review procedures. If that is not realistic, the preservation commission should minimally have the authority to comment on the development plans of government agencies.

From a legal perspective, dealing with other agencies of the same local government is the easiest matter. If the local legislative body duly passes a preservation law requiring all local agencies under its jurisdiction to comply with historical resources review procedures, there is little question they must do so. (However, note that the power of a local government to give full effect to historic preservation by restricting access to and use of its public rights-of-way is limited under California law.[39])

But it is more difficult to require county or state institutions to follow the requirements of municipal preservation laws. Judicial decisions from around the country are split on this point. If the opposing public entity is another local government, or branch thereof (for example, a county hospital), then courts have generally required that the local

[36] *See*, *Schneider Partnership v. Department of Interior*, 693 F. Supp. 223 (D.N.J. 1988). Two California cases that have addressed the interiors of historical resources include: *Citizens for Responsible Development v. City of West Hollywood*, 39 Cal.App.4th 490, 45 Cal.Rptr.2d 917 (Cal.App. Dist.2 10/23/1995); and *Barron v. City of Selma*, No. F041147 (Cal.App. Dist. 5 10/03/2003).
[37] 558 A.2d 155 (Pa. App. 1985).
[38] 634 F. Supp. 86 (D.D.C. 1986).
[39] *Citizens Against Gated Enclaves v. Whitley Height Civic Ass'n.*, 23 Cal.App.4th 812, [28 Cal.Rptr.2d 451,] (Cal. App. 1994) (City of Los Angeles may not gate historic area and allow access only to residents for the purpose of protecting the neighborhood from crime and vandalism).

preservation law be observed.[40] If the public institution involved in the dispute is not coequal but rather a state agency, the problem is more difficult. A majority of courts in other jurisdictions hold state agencies immune from local regulation, the rationale being that state agencies operate under a higher authority than do local governments and they need not comply unless the state legislature specifically has made them do so.[41] In California, the applicability of CEQA to state government action tends to incorporate consideration of, though not expressly requiring adherence to the letter of, local preservation ordinances in many projects under both local and state jurisdiction. Detailed discussion of CEQA is found later in this manual.

Berkeley's ordinance illustrates how one community has chosen to regulate and review certificates of appropriateness for publicly owned properties. The ordinance contains a provision that acknowledges that some projects may be beyond its jurisdiction, in which case only authority to comment is sought:

> In the case of any publicly owned property on a landmark site, or in an historic district which is not subject to the permit review procedures of the city, the agency owning the property shall seek the advice of the commission prior to approval or authorization of any construction, alteration or demolition thereon, including the placement of street furniture, lighting and landscaping; and the commission in consultation with the design review committee of the planning commission, in appropriate cases, shall render a report to the owner as expeditiously as possible, based on the purposes and standards of this chapter.[42]

Sacramento specifically exempts projects on publicly owned property from the formal review process under its preservation commission, but requires that an informal administrative procedure follow the same criteria:

> (a) General: Except as provided below, the provisions of this Chapter requiring hearing(s) before the Board or the Preservation Director shall not apply to Development Projects involving, or requests for demolition or relocation of, Landmarks, Contributing Resources or non-Contributing Resources that are owned by the City of Sacramento; provided that the City Council or other decision-making body, entity or person shall apply the same standards, and make the same findings, required by this Chapter for private projects.
> (b) Exception: The Council may, by resolution or ordinance, provide for review of City projects by the Board or the Preservation Director, in which case the Board or the Preservation Director shall make recommendations to the City Council or other decision-maker.[43]

---

[40] *Pittsfield Charter Township v. Washtenaw County*, 633 N.W.2d 10 (Mich. Ct. App. 2001); *Mayor of Annapolis v. Anne Arundel* County, 316 A.2d 807 (Md. 1974).
[41] *County of Santa Fe v. Milagro Wireless, LLC*, 32 P.3d 214 (N.M. Ct. App. 2001); *State of Washington v. City of Seattle*, 615 P.2d 461 (Wash. 1980). *But see, City of Santa Fe v. Armijo*, 634 P.2d 685 (N.M. 1981) (favoring a balancing approach versus a strict immunity approach); *City of Temple Terrace v. Hillsborough Association for Retarded Citizens, Inc.*, 322 So.2d 571 (Fla. App. 1975), *aff'd*, 332 So.2d 610 (Fla. 1976).
[42] Berkeley, California, Code of Ordinances, § 3.24.320; *see also*, § 3.24.100(B) (review for publicly owned property).
[43] Sacramento, California, Code of Ordinances, § 32.05.512 (City Projects).

The situation where the interests of a federal agency overlap with a local preservation ordinance is a difficult one. Under the Supremacy Clause of the U.S. Constitution, the federal government is generally immune from local land-use regulations.[44] However, Congress has enacted several laws directing federal agencies to examine and avoid where possible the adverse environmental impacts of their actions or undertakings. Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. Section 106 gives equal consideration to properties that are included in the National Register of Historic Places and those that are not listed but meet National Register criteria. Also, Section 4(f) of the 1966 Department of Transportation Act requires transportation officials to give paramount consideration to the protection of historic properties in planning their projects.

Federal environmental laws such as the federal Coastal Zone Management Act (CZMA) apply to some of the most highly developed and densely populated areas of California. The CZMA, which requires state and local land-use plans to include a preservation element, requires that federal developments on private land in coastal areas covered by an approved plan be consistent with state and local land-use enactments to the extent feasible.

While neither Section 106, nor Section 4(f), nor CZMA, nor environmental impact laws such as the National Environmental Policy Act (NEPA) will absolutely stop project proposals that are adverse to historic preservation, they are useful in giving the local preservation review body some leverage in dealing with federal agencies, especially when review criteria and/or designated properties under the local ordinance are specifically intended to reference or overlap with federal preservation criteria or designated properties.

It is important to ensure that federal projects in local communities are coordinated with local historic preservation efforts to the extent possible. Problems can arise when, for example, federal funds (e.g., Community Development Block Grant funds) are distributed to a local community, and the Section 106 or environmental review of the expenditure of those funds is administered by the local community development or economic development department, which fails to communicate with the planning staff or historic preservation staff. Better coordination can help ensure that the expenditure of the funds is consistent with local preservation policies and regulations.

Telecommunication Facilities

Within the past ten years, the federal government has asserted control over wireless communication towers, cellular antennae, and other land-use components of the modern telecommunication system. The most significant source of this federal power is the Telecommunications Act of 1996,[45] which is intended to reduce various types of

[44] U.S. Constitution, Article VI, cl. 2.
[45] Pub. L. 104-104, 110 Stat. 56 (1996).

barriers and introduce more competition into the telecommunications industry. Section 704 of the Act[46] expresses federal intent regarding land-use regulation. Preemption of local zoning and other land-use controls is of a limited nature.[47] The two most important stipulations of federal law for preservation ordinances are, first, the instruction that local government "shall not prohibit or have the effect of prohibiting the provision of wireless services,[48] and, secondly, the requirement that "substantial evidence" in a written record must accompany a decision to deny a permit for a telecommunication facility.[49]

The primary concern of preservationists is that modern electronic equipment will detract from the historic and aesthetic character of historic structures and sites. In most cases, local government should be able to preserve the integrity of historical resources and still comply with federal telecommunication laws. Court holdings to date indicate that government interference in this will draw scrutiny from the courts,[50] yet reasonable regulations that do not effectively prohibit the provision of wireless services will be upheld.[51] Design review and design standards, especially mitigation measures (such as requiring antennae to be located on existing tall structures, use special materials, and/or employ stealth design) have been upheld as reasonable costs of preservation regulation, yet still in compliance with the federal Telecommunications Act.[52]

One common approach in local ordinances is to distinguish between cell towers, which tend to be large and relatively limited in their potential for modification for historical consistency, versus stand-alone antennae, which are smaller and easier to locate or disguise in a manner that minimizes visual impact. For instance, the Tallahassee, Florida, preservation ordinance expressly prohibits cell *towers* within 250 feet of historic districts or historic structures, while allowing an *antenna* in these areas by special review.[53] This approach protects historical resources and views yet also allows wireless services to be provided in historic areas.

The federal government also has a responsibility to consider the effects of telecommunications facilities on historical resources. Section 106 of the National Historic Preservation Act requires the Federal Communications Commission (FCC) to consider the effects of its activities, including granting permits and licenses for

---

[46] Codified at 47 U.S.C. § 332(c).
[47] 47 U.S.C. § 332(c)(7)(A) ("Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.")
[48] 47 U.S.C. § 332(c)(7)(B)(i)(II).
[49] 47 U.S.C. § 332(c)(7)(B)(iii).
[50] *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307, 313 (4th Cir. 1999) (federal requirement to analyze impact to telecommunications in every case would invite Tenth Amendment scrutiny under the U.S. Constitution); *Patterburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) (Niemeyer, J., concurring: Section 704 of the Telecommunications Act violates the Tenth Amendment).
[51] Brian R. Manuel, "Protecting Historic Landscapes Against the Proliferation of Cell Towers," 19 Preservation L. Rep. 1001, 1028-30 (2000).
[52] *Omnipoint Communications Enterprises, L.P. v. Warrington Township*, 63 F.Supp.2d 658 (E.D. Pa. 1999).
[53] Tallahassee, Florida, Telecommunication Ordinance, Chapter 27, § 18.7.

telecommunications facilities, on historic properties. The FCC has delegated to license applicants the responsibility for initiating Section 106 consultations with the California State Historic Preservation Officer. The Office of Historic Preservation has standardized the procedures to be following by applicants requesting SHPO Section 106 reviews of FCC undertakings. Application forms and background materials are available at the OHP website.

Religious Land Uses

Churches, synagogues, and other religious structures are commonly some of the oldest developed sites in California, and historic preservation laws therefore affect religious properties in many communities. Local regulation of religious uses has become increasingly contentious in recent years, as increased numbers of "mega-churches" attract thousands of worshipers and have potentially significant land-use impacts. Religious landowners have responded to land-use regulations of all varieties, including historic preservation, by asserting that religious properties are subject to special protections under the United States Constitution and state constitutions. This has resulted in an assortment of federal and state laws and court decisions that provide a complicated set of requirements that local governments must consider when drafting preservation ordinances. This section provides a brief overview of current developments in the law relating to religious land uses and historic preservation, as well as some legal background at both the federal and California levels.

Conflicts between religion and land-use regulation often center on the two religion clauses of the U.S. Constitution[54] and analogous provisions of state constitutions.[55] The First Amendment's establishment clause prohibits government action that endorses or advances religion; the free exercise clause prohibits certain government action that interferes with religion. Case law regarding these religious protections is highly nuanced, providing few categorical rules.

Religious institutions in California have relied on a variety of legal theories to maintain control of their property and resist preservation controls, and are likely to continue this course.[56] Given the contrast of settled legal authority for local governments to regulate historical resources and the unsettled state of law with regard to religious properties (discussed below), communities should continue to regulate all institutional property owners uniformly, placing the burden on religious land users to challenge regulations they consider unconstitutional. In other words, local communities should subject religious institutions to the same preservation laws as other institutional uses that have similar land-use impacts, such as schools.

---

[54] U.S. Constitution, Amendment I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

[55] *See*, California Constitution, Article I, Section 4 (Establishment Clause and No Preference Provision); California Constitution, Article XVI, Section 5 (government may not aid religion).

[56] *See*, *First Presbyterian Church v. City of Berkeley*, 59 Cal.App.4th 1241, 69 Cal.Rptr.2d 710 (Cal. App. 1997) (preemption of local preservation ordinance by California's Ellis Act, Government Code § 7060 [which authorizes landlords to remove residential rental properties from the rental housing market], gives church litigant the right to demolish an historic structure of merit used as rental property).

Federal Legal Background

In 2000, the U.S. Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),[57] partly to try and clarify the rules applicable to religious land uses. In short, RLUIPA prohibits federal, state, and local governments from imposing or implementing any land-use regulation that places a "substantial burden" on religious exercise, unless the regulation furthers a compelling governmental interest and it is the least restrictive means of furthering that interest.

To qualify for relief under RLUIPA, a religious property owner must first establish that the use is substantially burdened by a government regulation. Generally, courts are more receptive to arguments that religion is substantially burdened if the regulation directly creates a burden on the actual practice of the religion, as opposed to related activities such as day care. Provided a substantial burden is legally established, the burden then shifts to the government to show that its regulation serves a compelling government interest. In the land-use area, compelling government interests may include, for example, protecting the public safety, or controlling traffic and noise. According to congressional records, the intent of RLUIPA is not to provide a blanket exclusion for all churches from zoning and preservation laws: "This Act does not provide religious property owners immunity from land-use regulation."[58] In fact, in many previous instances, a substantial burden has been found *not* to exist, and almost never exists if a religious institution asserts a substantial burden on the basis of financial impact alone.[59]

Congress attempted to craft RLUIPA in such a way as to avoid the shortcomings that led to the demise of previous, similar statutes. For example, RLUIPA is limited in its application to areas in which Congress received specific testimony regarding an alleged pattern of discrimination against religious uses, especially smaller churches. Yet, despite such efforts, the constitutionality of RLUIPA is being vigorously tested in the courts, and thus its precise impacts on local regulation of religious land uses remains unclear. [60] If RLUIPA survives legal challenge, it may have the effect of prohibiting land-use laws that totally exclude or unreasonably limit religious assemblies or practices within a jurisdiction.[61] It may also determine whether religious uses may be subjected to standard land-use reviews, such as conditional use permit procedures, when not applied to similar types of facilities, such as schools.

---

[57] Pub. L. 106-274; 114 Stat. 803, 42 U.S.C. § 2000cc, *et seq.*

[58] 146 Cong. Rec. S7774, 7776 (daily ed., July 27, 2000).

[59] *See*, *Rectors, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990).

[60] "Congress Enacts Religious Land Use Law," 19 Preservation L. Rep. 1111, 1120, 1121 (2000).

[61] *Id.* at 1118; *See*, *Foothills Christian Ministries v. City of El Cajon*, No. 01 CV 1197 JM (S.D. Cal. 2001) (growing church claimed no compelling state interest could justify denial of a conditional use permit that would allow it to move into a larger, commercially zoned space).

Because the applicability of RLUIPA is currently uncertain, it appears that many California religious institutions and local governments are settling their disputes instead of committing to a trial and possible appeal.[62]

California Legal Background

Prior to the passage of the federal RLUIPA statute, California had previously passed a law that specifically allows religious institutions to exempt themselves from historic preservation laws. The exemption provisions within that law, California Senate Bill A.B 133 (1994), are codified at California Government Code §§ 25373(c),(d) and 37361(c),(d). The full text of the pertinent part states:

> (b): [Regulatory control of historical resources] shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur:
>
> (1) The association or corporation objects to the application of the subdivision to its property.
>
> (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.

While this statute establishes a procedure for obtaining a special religious exemption, it is not an automatic entitlement: A religious organization must formally object to a preservation regulation applied to its property and demonstrate a "substantial hardship" in order to remove itself entirely from the scope of historic preservation regulation. (In anticipation of such objections, California local governments might consider adopting procedures in their local ordinances to define "substantial hardship" for purposes of enforcing this law, and requiring religious institutions to demonstrate why their hardships are different than those suffered by other parties.)

In the California Supreme Court case of *East Bay Asian Local Development Corp. v. State of California*, decided in 2000, the constitutionality of this law was challenged on two grounds, specifically that the exemption endorses or assists religious institutions in derogation of the establishment clause of the United States and the California Constitutions,[63] and secondly that the exemption violates the "no preference provision" of the California Constitution. On both counts, the *East Bay Asian* court found no constitutional problems, reasoning that "these exemptions simply free the owners to use the property as they would have done had the property not been designated an historic landmark."[64]

---

[62] For information on current cases, presented by an organization supporting RLUIPA, *see* http://www.rluipa.com/cases/ .

[63] *East Bay Asian Local Development Corp. v. State of California*, 24 Cal.4th 693, 13 P.3d 1122 (Cal. 2000), *cert denied*, 121 S.Ct. 1735 (2001); United States Constitution, Amendment I; California Constitution, Article I, § 4.

[64] *East Bay Asian*, 24 Cal.4th at 721. The issue of improper delegation of legislative power was not reached by the court, though discussed by the dissent, as discussed above in this report with regard to owner consent provisions.

In addition to the statutory exemption procedure, some California communities have attempted to incorporate specific protections for religious uses into their preservation ordinances. For example, Vallejo, California, includes an accommodation for the interior of certain religious structures in its ordinance:

> Exceptions to Certificate of Appropriateness for Religious Properties – Nothing herein shall prevent any changes in the interior features of a church where such changes are necessitated by changes in the liturgy, it being understood that the appropriate church officials, as owner of the property, are the exclusive authority on liturgy and are the decisive parties in determining what architectural changes are appropriate to the liturgy; provided, that when it is proposed to make changed necessitated by changes in liturgy, the church officials shall communicate the nature of the change to the commission in order to receive comment and, if required, the commission shall issue a certificate of appropriateness. However, prior to the issuance of any certificate, the commission and church officials shall jointly explore such possible alternative design solutions as may be appropriate or necessary in order to preserve the interior features of such church.

However, the necessity of any such accommodation for religious uses is the basic subject of the ongoing litigation discussed above. (In any case, the interiors of religious facilities are a special case where development regulations and religion may conflict, and raise distinct concerns that do not exist in other provisions of land-use and historic preservation ordinances generally applicable to religious land use.)

Beyond regulatory control of historically significant religious properties, the ability of local governments to exercise condemnation powers against religious landowners is, as of this writing, also an area of active litigation in California.[65] Though condemnation power is not commonly contemplated within the scope of an historic preservation ordinance, it is a legally acceptable strategy to protect historical resources[66] and the outcome of condemnation cases may have some bearing on the standards applied to takings claims made under other historic preservation regulation.

ALTERNATIVE FORMS OF PROTECTION: CONSERVATION DISTRICTS AND CONSERVATION EASEMENTS

To supplement their existing historic district regulations, many communities have created a second type of resource district called a "conservation district." Geared to preserving the character of existing neighborhoods, conservation districts are being considered or have been adopted in a growing number of jurisdictions across the United States as alternatives to more stringent historic district regulations. Cities as varied as Dallas, Texas; Omaha, Nebraska; and Cambridge, Massachusetts have all adopted some form of conservation districts. Many conservation districts have been

[65] *See*, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, No. SA CV 02-60 DOC, Aug. 6, 2002 (C.D. Cal. 2002) (preliminary injunction granted when City attempted to condemn church-owned land planned for commercial redevelopment in an undeveloped business district).

[66] Robert Wright and Morton Gitelman, *Land Use in a Nutshell*, West Publishing, St. Paul, Minn. (2000), 270; *See*, *Prentiss v. City of South Pasadena*, 15 Cal.App.4th 85, 93, 18 Cal.Rptr.2d 641 (Cal. App. 1993) (noting that the California historic preservation enabling statutes authorize eminent domain).

implemented for areas that fall short of meeting the criteria for a local, state, or national historic designation, but nevertheless have important cultural, visual, or other significance. Some are intended as step-down, buffer, or transition areas immediately surrounding a protected historic district. Others are directed at preserving the residential character of a neighborhood, maintaining a unique community center, or emphasizing an important cultural element of a community.

Conservation districts are typically established as either base districts or overlay districts within the local zoning ordinance. One California example is the Fresno Residential Modifying District:

> "R-M" RESIDENTIAL MODIFYING DISTRICT. The "R-M" Residential Modifying District is an overlying zoning district which may be applied to the AE-5, R-1-B, R-1-A, R-1-AH, R-1-E, R-1-EH, and R-A districts, and is intended to provide special land development and street development standards which will create, protect, and maintain designated areas, streets, and adjacent properties as residential areas of exceptional public and private value by reason of their location, form, extent of trees and other vegetation, public improvements, and private improvements. All regulations for this district are deemed necessary for the protection of arcadian landscape quality and value and for the securing of the health, safety, and general welfare of owners and users of the private property and of pedestrian, equestrian, and vehicular traffic.[67]

The use of conservation districts to protect neighborhood character is particularly effective when the applicable zoning regulations include specific standards addressing those characteristics. The City of Sacramento, for example, has an extensive system of special zoning provisions to protect neighborhood character. A number of conservation districts are established in the zoning ordinance, cited as “Special Planning Districts” and including both residential and non-residential areas.[68] The purpose and intent statement of the Alhambra Corridor area, at Chapter 17.104.010 of the City code is excerpted below.

> The Alhambra Corridor area consists of properties located between 26th and 34th Streets from the Southern Pacific railroad mainline levee to the W/X Freeway. The district boundaries are identified on a map in Appendix A, set out at the end of this chapter. This area consists of a number of different neighborhoods and is intended to provide residential uses along with neighborhood related commercial uses in commercial districts. The plan is intended to assist in the preservation of the neighborhood scale and character along with providing additional housing opportunities in the area.
>
> The city council further finds and declares that, given the history, nature and scope of recent development within the Alhambra Corridor, special rules are necessary to regulate nonconforming uses, and nonconforming buildings and structures, within the corridor. The non-conforming uses and nonconforming buildings and structures that currently exist within the corridor are generally compatible with the conforming uses that are permissible within the corridor. It is therefore appropriate to allow for the nonconforming uses to continue, and to allow for the buildings and structures to be rebuilt or replaced with buildings and structures of the same or lesser size and intensity.
>
> The goals of the Alhambra Corridor SPD are as follows:

[67] Fresno, California, Code of Ordinances, § 12-242.
[68] Sacramento, California, Code of Ordinances, § 17.92, et seq. (Special Planning Districts).

A. Maintain and improve the character, quality and vitality of individual neighborhoods;
B. Maintain the diverse character and housing opportunities provided in these urban neighborhoods;
C. Provide the opportunity for a balanced mixture of uses in neighborhoods adjacent to transit facilities and transportation corridors;
D. Maintain the neighborhood character of existing commercial neighborhoods while allowing for limited office to serve the medical complex in this area;
E. Provide the opportunity for reuse and rehabilitation of heavy commercial and industrial neighborhoods to take advantage of close-in living while reducing the number of obsolete and underutilized buildings and sites.

The Alhambra Corridor provisions include detailed dimensional regulations, applicable to both conforming and non-conforming buildings. Sacramento also provides numerous other examples of both more and less intense regulation of conservation zones. For example, the Special Planning District established for the Central Business District includes a set of design guidelines and special procedures for development review.

In addition to conservation districts, the conservation easement is becoming increasingly popular as a tool for preserving natural and cultural resources. Conservation easements involve the acquisition of certain development rights by an organization seeking to preserve the character of a neighborhood or region. For example, a conservation easement for historic preservation might consist of an agreement between the owner and a city that an historic structure will not be demolished and will be maintained in good condition. The conservation easement is a real estate transaction and typically involves the creation of a covenant on the property under easement that will restrain any future development contrary to the intent of the easement. The conservation easement is possibly the most popular non-regulatory approach to historic preservation, though acquisition of historic properties by stewardship organizations or users who agree to adaptive reuse is also an important approach to consider.

SECTION 5: PROCEDURES AND CRITERIA FOR REVIEWABLE ACTIONS

Perhaps the most visible, and often most controversial, of powers exercised by preservation commissions is the review of applications for demolition or alteration of historical resources, or for new construction in historic areas (collectively these applications are usually called "certificates of appropriateness.") Applications to demolish a historical resource often will engender heated arguments, bringing commissions face-to-face with the difficult task of juggling and balancing preservation goals with economic and political pressures.

Dealing with alteration proposals—often less controversial than demolitions but far more frequent—is no less difficult. The challenge in these cases is to encourage upgrading and continued maintenance of existing historical resources and to guide the process of change so that it is sympathetic to the existing character of the historic area. In all but a few historic areas, freezing things in time will be neither feasible nor desirable. Applications for new construction can be equally controversial, involving, for example, the construction of a larger new building in and around the "airspace" of a historic building.[69]

This section discusses key issues surrounding the review of applications for development that affect historical resources.

DETERMINING THE APPROPRIATE LEVEL AND AMOUNT OF REVIEW

A key factor to consider for all types of resources is whether the community will have the discretion to deny a demolition or alteration proposal, as opposed to merely delaying a proposal. Many California jurisdictions allow their preservation commissions to *deny* alterations or demolitions to the community's most important historic properties, rather than merely *delay* such projects, though some California communities still lack such authority.

Experience throughout the nation demonstrates that, without the ability to say "no" to proposed projects when necessary, a community will probably not have an effective preservation ordinance. Being able to turn down projects strengthens the preservation commission's hand in negotiations with property owners, and is an approach that has been highly effective in other cities with strong preservation ordinances. Many communities with effective preservation programs, such as the City of Monterey, allow their preservation commissions to deny alteration projects and demolition proposals that would be incompatible with the goals of their preservation programs.

In order to ensure efficient use of time by both staff and the preservation commission, some cities adopt "tiered" review systems that graduate the level of review and

[69] *See*, *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 189 Cal.App.3d 498, 234 Cal.Rptr. 527 (Cal. App. 1987) (building proposed in airspace of historic building occupied by various restaurants); similar proposals for high rise construction in air rights around significant historic structures can be seen near older churches in several major U.S. cities.

regulatory control according to the significance of the resource. A higher level of review and control can be assigned over more significant properties, while correspondingly less review and control can be assigned to less significant properties. The preservation commission might be granted authority to deny demolitions of designated historical resources, yet merely delay demolitions of buildings that are not locally listed but are considered eligible for listing. A tiered system can improve efficiency and add predictability to the review process. On the other hand, many communities do fine by assigning the same level of review to all historical resources, provided that they have sufficient staff to administer the ordinance.

In determining what level of review to assign specific resources, California communities display a wide range of approaches. In Pasadena, for example, the preservation commission traditionally has been only able to deny projects involving a handful of individual properties in the city and in historic districts (though a recently adopted new ordinance expands this authority).

DRAFTING APPROPRIATE REVIEW STANDARDS

The review of certificates of appropriateness is governed by standards set forth in the preservation ordinance, which the preservation commission uses in deciding whether to approve the certificate. The process of setting standards is crucial not only from a legal standpoint, but also as a way for preservationists to evaluate where their preservation program is leading. What kind of development, if any, do they really want in the local historic area? How do they intend to evaluate proposed changes? What is the most efficient and fair method of administering proposed changes? What should be the relationship of the local standards to other historical resource regulations, such as the Secretary of the Interior's standards?

As preservation ordinances demand more from landowners and become broader in scope, they are increasingly likely to be challenged in court on the validity of these review standards. Challengers may argue that the standards violate due process because they are vague and unclear. While court decisions in most areas of land-use law have been very favorable in upholding relatively broad review standards, fairness and regulatory efficiency dictate that local ordinances contain clear standards that result in predictable decisions by staff and review commissions and limit administrative discretion.

Communities can typically narrow broad review standards through the use of detailed criteria set forth in the ordinance or in background documents such as historical resource surveys. The typical preservation ordinance sets forth broad review standards for demolition or development of historic properties. However, setting standards for reviewing such applications is normally a trickier task than setting standards for making designations. Preservation ordinances attempt to ensure that a demolition will "not have an adverse effect on the fabric of the district" or that new construction not be "incongruous," but "in harmony," with the "character," "significant features," or "atmosphere" of the area. The operative terms in determining the impact of a

development or demolition proposal are to a degree subjective and need to be defined and limited in some fashion to give applicants reasonable notice of what is expected of them and to allow courts to judge the validity of the local decision. In his treatise on land-use planning law, Professor Norman Williams lists various considerations that might be used by a local commission in determining whether a proposed demolition or change is compatible with the historical resource:

- Mass — the height of a building, its bulk, and the nature of roof line;
- Proportions between the height of a building and its width (is its appearance predominantly horizontal or predominantly vertical?);
- Nature of the open spaces around buildings, including the extent of setbacks, the existence of any side yards (with an occasional view to the rear) and their size, and the continuity of such spaces along the street;
- Existence of trees and other landscaping, and the extent of paving;
- Nature of the openings in the facade, primarily doors and windows—their location, size, and proportions;
- Type of roof — flat, gabled, hip, gambrel, mansard, etc.;
- Nature of projections from the buildings, particularly porches;
- Nature of the architectural details—and, in a broader sense, the predominant architectural style;
- Nature of the materials;
- Color;
- Texture;
- Details of ornamentation; and
- Signs.

Not all these considerations will necessarily be relevant to every historical resource, but the list does suggest how broad review standards can be narrowed. Drafting adequate review standards is much less difficult in historic areas that have a distinctive style or character. A proposal to add a redwood railing in New Orleans' Vieux Carré district is plainly at odds with the iron railings of historic buildings in the district. The distinctive characteristics of historic areas in New Orleans, Santa Fe, Nantucket, and other cities with strong identifying features provide examples of the features best used to define compatible development and measure the impact of proposals for new development. If a local ordinance does not contain such narrowing criteria, the preservation commission would be well advised to adopt them by way of regulation or informal review guidelines (assuming the commission has power to do so).

Many California jurisdictions have adopted generalized standards for review of certificate of appropriateness applications, consisting of a section about historic sites, another section about historic districts, and occasionally a third category devoted to other special classifications of historical resources.[70] The language of the Davis code is typical of ordinances that maintain a broad standard of review:

[70] *See*, Los Gatos, California, Code of Ordinances, § 29.80.290 (including a third category for pre-1941 structures); Berkeley, California, Code of Ordinances, § 3.24.260(C) (including, at (C)(1)(c), a third

> In evaluating applications for alteration permits, the commission or the City Council upon appeal shall consider the architectural style, design, arrangement, texture, materials, color, and any other factors. The commission or the City Council upon appeal shall approve the issuance of an alteration permit for any proposed work only if it finds:
>
> (a) With regard to a historical resources or outstanding historical resources, the proposed work will neither adversely affect the exterior architectural features of the resource nor adversely affect the character or historical, architectural, or aesthetic interest or value of such resource and its site.
>
> (b) With regard to any property located within a historic district, the proposed work conforms to the prescriptive standards for the district adopted by the commission and does not adversely affect the character of the district.[71]

The Davis ordinance also delegates authority to the preservation commission to "promulgate and publish" more specific standards "as are necessary to supplement the provisions of this article to inform property owners, tenants, and the general public of those standards of review by which applications for alteration permits are to be judged."

Another approach to review standards is to reference another authority, such as the Secretary of the Interior's Standards and Guidelines. San Diego makes use of such a reference in its ordinance, where compliance with the Standards and Guidelines may exempt a minor alteration proposal from other review.[72] (However, because the Standards and Guidelines are somewhat vague and imprecise, they should be used by the local community as a starting point for more tailored and precise standards.) Still another approach is to provide a blanket reference to the eligibility criteria of the state and national register programs, as Santa Monica does in its ordinance when it references proposals that do or do not:

> …embody distinguishing architectural characteristics valuable to a study of a period, style, method of construction, or the use of indigenous materials or craftsmanship and [do or do not] display such aesthetic or artistic quality that it would not reasonably meet the criteria for designation as one of the following: National Historic Landmark, National Register of Historic Places, California Registered Historic Landmark, or California Point of Historic Interest.[73]

PROCEDURES FOR REVIEWING CERTIFICATES OF APPROPRIATENESS

From a legal standpoint, the procedural considerations in reviewing applications for certificates of appropriateness are quite similar to those for designating historical resources. Basically, the historical resource owner must be given an opportunity to be heard, to present his or her case, and to rebut the opposing case, as discussed in the procedural section above regarding designation procedures. Commissions can help ensure fair, orderly hearings by making clear beforehand the rules that will govern their

---

category for structures of merit).

[71] Davis, California, Zoning Code, § 29-145.13 (Alteration Permit Standards of Review).

[72] San Diego, California, Municipal Code, § 143.0220(a).

[73] Santa Monica, California, Code of Ordinances, § 9.36.140(e)(1).

deliberations. Again, it is particularly important that the reviewing body gives reasons (or "findings of fact") for its decision on applications for a certificate of appropriateness.[74]

The main procedural elements that should be included in any local preservation ordinance include:

- The applicability of the review process and criteria (e.g., types of projects, any exemptions);
- The basic process (e.g., initiation, timing);
- Contents of an application;
- The criteria or source of criteria to be applied; and
- Any specific powers (e.g., conditional permit approval) deemed appropriate for the certification process.

The following excerpt from the Glendale preservation ordinance addresses many of these concerns.

> No person shall demolish, remove, or make major alterations to any designated historical resource without first obtaining a permit. An application for such permit shall be filed with the permit services administrator who shall thereupon transmit same to the historic preservation commission. The historic preservation commission may require that the application for permit be supplemented by such additional information or materials as may be necessary for a complete review by the historic preservation commission. The commission may impose such reasonable conditions or restrictions as it deems necessary or appropriate on a case-by-case basis to promote or achieve the purpose of this code.[75]

While some municipalities, like Glendale, use a common list of procedures and criteria for both alterations and demolitions, others use a heightened review for demolition proposals. For example, the ordinance of Danville, California, has separate provisions for alteration (§32.72.16) and demolition (§32.72.18). Each section has its own review criteria (such as alternative use strategies in cases of demolition), and also different timing -- there is a longer timeframe in demolition review to allow for potential acquisition or relocation of an historic structure. Santa Cruz also has developed a separate procedure for demolitions (See excerpt below.).

Numerous California communities require a replacement building permit if a protected historical resource or contributing building in a historic area is proposed for demolition. For example, Section 15.20.080(B) of the Glendale Code of Ordinances, states that, "No permit to demolish a historical resource may be issued without the issuance of a building permit for a replacement structure or project for the property involved." Also,

---

[74] Two cases that demonstrate the important role that is assigned to a complete set of findings and supporting evidence are *Figarsky v. Historic District of the City of Norwich*, 368 A.2d 163 (Conn. 1976) (successful appeal on the basis of extensive fact-finding in record of local review) and *Historic Green Springs, Inc. v. Berland*, 497 F.Supp. 839 (E.D.Va. 1980) (court critical of Secretary of Interior for lack of reasoned decision-making in record for designation).

[75] Glendale, California, Code of Ordinances, § 15.20.080(A) (Permit required for demolition, removal or major alterations of historical resources).

some communities require evidence that funding is in place to ensure that replacement projects can actually be completed. Such requirements can be an effective means of ensuring that demolition does not occur until a replacement project is feasible and that new development is compatible with any surrounding historic context. However, such requirements also may require significant time and staff resources to effectively administer and enforce.

CALIFORNIA CODE EXCERPT:
PROCEDURES FOR REVIEWING CERTIFICATES OF APPROPRIATENESS

CITY OF SANTA CRUZ
Section 24.08.1012 (Demolition of Buildings Listed in the Historic Building Survey – Procedure).

1. Any person desiring to demolish a building listed on the Santa Cruz Historic Building Survey shall first file an application for a historic demolition permit with the planning department. Demolition of any such building may be approved only in connection with an approval of a replacement project. In case of a residential use, Part 14 of this chapter (Residential Demolition/Conversion) shall also apply.
2. The historic preservation commission shall hold a public hearing and shall take one of the following actions:

a. Approve Permit. The historic preservation commission may approve the historic demolition permit in conformance with the provisions of Part 14 of this chapter.
b. Approve Permit, Subject to a Waiting Period of Up to One Hundred Twenty Days to Consider Relocation/Documentation…
c. Continue for Up to One Hundred Eighty Days to Consider Designation as Landmark, or Other Alternatives to Demolition.
    1. During the continuance period, the historic preservation commission may investigate relocation of the building on site or modification of the building for future uses in a way which preserves the architectural and historical integrity of the building…
    2. During the continuance period, the historic preservation commission may initiate an application for a landmark designation for the building and/or site.
d. Deny Permit.

ALLOWING STAFF-LEVEL REVIEWS

To what extent, if any, should responsibilities under the preservation ordinance be delegated to full-time administrative staff, as opposed to the preservation commission or some other elected or appointed review body? Nationwide, it is extremely common for preservation commissions to delegate authority for minor decisions to professional staff. This often is done to streamline the review process and liberate the preservation commission's time to work on more long-range and/or controversial issues. For example, staff might be given the authority to approve certificates of appropriateness for minor alterations to designated buildings (e.g., window replacement).

The City of Danville delegates to the city staff a relatively large amount of authority for administering design reviews on regulated historic properties. This ordinance reflects

an approach consistent with the notion that review by the commission is most effectively focused on controversial or questionable projects:

> 1. The Chief of Planning, or his or her designee, shall review the completed application within ten (10) working days after receipt. If the proposed work meets the minimum design standards in subsection 32-72.15, the Chief of Planning shall approve the application and notify the Heritage Resource Commission of such action.
> 2. If, in the judgment of the Chief of Planning, the proposed work does not meet the standards, the Chief of Planning shall forward the application to the Heritage Resource Commission for its review and determination. The Heritage Resource Commission shall make its decision within sixty (60) days after receipt of the application.[76]

Distinction between minor and major alterations also is seen in Palo Alto's ordinance:

> A minor alteration shall be subject to review by the director for the purpose of providing cooperative and constructive information to the property owner about alternative methods of substantially complying with the Secretary of the Interior's Standards… A major alteration shall be reviewed by the historical resources board.[77]

Delegation of review authority often is done in practice but not codified in the ordinance. One California community, for example, has for many years delegated a substantial amount of review under its preservation ordinance to its staff, probably as much as any other city in the country. Yet, until recently, that city's preservation ordinance did not explicitly authorize the type of staff-level review for minor actions that was taking place. This has now been addressed, however, through ordinance revisions.

The general rule for delegating authority from the preservation commission to staff is that responsibilities should not be delegated at random, but rather should be guided by detailed provisions included either in the ordinance or in formally adopted rules and regulations that are referenced in the ordinance.

In addition to delegating authority for minor project reviews to staff, many jurisdictions increasingly are choosing to delegate to staff the ability to grant minor modifications to certain standards, a process akin to a zoning variance, in order to streamline ordinance administration. This allows the staff, in reviewing development applications, to deal flexibly with unusual issues that may be addressed simply with minor modifications to existing standards. An administrative modification process can make the development review process more efficient and less time-consuming. Jurisdictions typically allow minor modifications if the deviation from ordinance requirements advances the goals and purposes of the ordinance requirements, is more or equally as effective in achieving the relevant standards from which the modification is granted, or relieves practical difficulties in developing a site for reasonable economic use.

In order to place bounds on the staff's discretion to approve such modifications, objective standards should be included that specify what may or may not be modified and the degree to which modifications may be granted. If certain types of standards are

[76] Danville, California, Code of Ordinances, § 32-72.16 (Review and determination).
[77] Palo Alto, California, Code of Ordinances, § 16.49.134.

especially significant or controversial in a community, then staff-level modifications of those particular standards could be prohibited altogether. For example, the ordinance might allow staff to approve encroachments of up to a certain percentage in required setbacks, yet would prohibit entirely any modifications to sign regulations in historic districts.

Decisions to grant or deny modifications and other actions under a preservation ordinance, like other staff decisions, should typically be subject to appeal to a review board (e.g., a preservation commission or a Board of Zoning Appeals). The City of Davis makes the availability and mechanism for an appeal clear within the same section of its ordinance that authorizes the delegation of authority to staff:

> The historical resources management commission is hereby given the authority to delegate certain minor projects to the city staff for review and approval or denial. The historical resources management commission shall establish guidelines for such projects to be reviewed by city staff. Appeals of city staff decisions shall follow the procedures established in chapter 40, article 40.37.[78]

THE TAKINGS ISSUE IN PRESERVATION LAW

The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation. If the government physically occupies private property (such as to build a post office), then that action clearly qualifies as a taking and compensation is required. However, much current litigation focuses on whether regulations – such as preservation ordinances – can so affect a property's value as to effect a taking.

The U.S. Supreme Court has held that, if regulations deny an owner all reasonable economic use of his or her property, then they do constitute a taking and the offending governmental body is liable for monetary damages for the period during which the regulations were applied.[79] If some economic use of a property is available, a takings claim is decided based on a case-specific factual inquiry, typically focusing on the nature of the government regulatory action and the landowner's investment-backed expectations.[80] Under these rules, well-drafted preservation ordinances rarely result in successful takings claims.

While the prospect of paying damages can be disconcerting to local regulatory authorities, the Supreme Court has also established a number of procedural requirements requiring a prospective developer to seek relief from the local government prior to filing a takings claim.[81]

---

[78] Davis, California, Code of Ordinances, § 40.23.080(B) (Alteration Permits).
[79] *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).
[80] *Palazzo v. Rhode Island*, 533 U.S. __ (2001). *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency et al.* (U.S. Supreme Court Docket No. 00–1167, decided April 23, 2002).
[81] *See*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

Determining When a Taking Occurs

The takings issue analysis plays out in a unique fashion in a preservation context, since preservation law is less concerned with use, bulk, and density issues and focuses more on protecting structures from demolition and on the aesthetic features of new construction. Thus, a key issue is typically whether an existing building constitutes a reasonable use of property, and if it does not, whether it might be renovated so that a reasonable return can be obtained. Similarly, with regard to new construction, the inquiry will focus not as much on the proposed use (for example, whether a parcel might be used for commercial instead of residential development as the locality desires) but whether the planned structure is compatible with existing buildings in a historic area. If it is not, the question is whether any compatible design is also economically feasible.

In terms of defining the threshold of a viable takings claim, several principles stand out from past litigation:

- Designation alone rarely creates a burden sufficient to sustain a takings claim.[82]
- Regulatory takings are not found in reference to highest and best use, nor does a substantial diminution in value necessarily result in a taking.[83] Rather, the question is whether the preservation regulation denies all reasonable economic use of the property.
- Historic conditions provide the baseline for reasonable expectations of use of the property.[84]
- A broad range of evidence and legal theories may be used to construct and defend a takings claim.[85]

The most famous preservation case to litigate the takings issue was *Penn Central v. New York City*, in which Penn Central proposed building a 50-story skyscraper using air rights atop Grand Central Terminal, a designated historic landmark.[86] The city turned down the application for a certificate of appropriateness to construct the skyscraper, deciding that the new building would so affect and change the exterior architecture of the landmark as to be inappropriate. The company appealed, arguing that the denial of the permit kept the company from using its air rights and thus was burdensome enough to constitute a taking. While a lower court agreed and held for the company, the U.S. Supreme Court reversed and upheld the denial of the permit. The bottom line in the

---

[82] *Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 848-49 (listing on the National Register of Historic Places is not a taking).
[83] *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980) (reduction in allowable height from 300 to 40 feet, diminishing value from $2M to $100K is NOT a taking).
[84] *District Intown Properties Ltd. Partnership v. District of Columbia*, (D.C. Circuit, Case No. 98-7209, decided December 17, 1999) (reasonable investment-backed expectations not frustrated when property bought then subdivided then landmarked then deemed entitled to only development on one overall lot).
[85] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (jury may determine deprivation of all reasonable economic use on many grounds).
[86] 438 U.S. 104 (1978).

case, according to the Supreme Court, was the fact that the property had not lost all reasonable economic value, since it could still be used as a train station.

Penn Central demonstrates the difficulties a landowner faces in establishing a takings claim: Regardless of the harsh economic and practical effects of a design control regulation – which the courts have made clear are treated no differently than any other land-use controls – it is very difficult to demonstrate that a regulation deprives a landowner of *all reasonable economic value* in his or her property.

Potential Procedures to Avoid Takings Issues

Some municipal governments in California have introduced administrative procedures intended to discourage takings claims and attain resolution without litigation. The following language from a Palo Alto ordinance is useful:

> A Heritage Property may be demolished if….(2) the city council finds, after review and recommendation from the historical resources board, that maintenance, use and/or alteration of the resource in accordance with the requirements of this chapter would cause immediate and substantial hardship on the property owner(s) because rehabilitation in a manner which preserves the historic integrity of the resource: (i) is infeasible from a technical, mechanical, or structural standpoint, and/or (ii) would leave the property with no reasonable economic value because it would require an unreasonable expenditure taking into account such factors as current market value, permitted uses of the property, the value of transferable development rights and the cost of compliance with applicable local, state, and federal codes.

This Palo Alto language could be adapted in other communities to cover not only demolition, but also new construction, and/or to place the administrative procedure entirely under the purview of the planning board or an administrative official.

Another strategy in drafting local preservation ordinances to avoid takings claims is to give owners of historic properties credit for transferable development rights (TDRs) when a significant property is preserved. Successful TDR programs exist in several California municipalities, with the specific purpose of strengthening regulatory programs for historic preservation. These municipalities include San Francisco,[87] Pasadena, Los Angeles, and San Diego.

CEQA AND HISTORIC PRESERVATION

Originally passed in 1970 and modeled after the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA)[88] is a statute intended to require specific review of environmental impacts on projects undertaken by government agencies. As with NEPA, CEQA is composed largely of procedures and study requirements, and frequently provides the basis for litigation related to controversial land development projects. Yet unlike NEPA, CEQA has actual substantive

[87] *See*, San Francisco, California, Planning Code § 128(a).
[88] Cal. Pub. Res. Code § 21000, *et seq*.

requirements for mitigation of project impacts, and requires that the environmentally least adverse alternative be adopted if feasible.

While CEQA deals with a broad range of environmental considerations, historical resources are clearly within the purview of the statute. The statute's purpose statement expressly notes that the quality of the "historic environment" is, through review, is to be maintained in California. CEQA issues are found in a variety of historic preservation cases. For example, redevelopment of a blighted downtown area may require a local government to weigh the benefits of preserving an historic building against the social and economic liabilities associated with maintaining the building in its historic location. Or, a local government may have to consider similar issues under CEQA when adopting a new preservation ordinance.

CEQA compliance is a complex topic and the discussion below is intended to provide only a general overview of this issue as it relates to historic preservation. The Office of Historic Preservation's website and Technical Assistance Series provide additional information.[89] In any case, this manual is not intended to provide legal advice, and it is recommended that an attorney be consulted with questions related to any potential legal issue related to CEQA.

Determining Whether CEQA Applies

The intent of CEQA is to require all public agencies to study thoroughly the impact of a project prior to rendering a decision. This includes local, county, and state governments, any special district, and any public college or university.

Local preservation authorities, who qualify as a public agency under CEQA, must consider several important questions as they determine whether or not a particular action falls under the CEQA statute and its extensive set of guidelines:[90]

- **Is the project subject to CEQA?** As discussed below, CEQA generally applies only to "discretionary" projects – those in which discretion is applied by a decision-maker. CEQA does not apply to "ministerial" projects that are evaluated based on fixed, objective criteria and involve no discretion. However, projects carried out by a public agency are always subject to CEQA.

- **Is the project exempt from CEQA?** There are both statutory exemptions created by the state legislature and also categorical exemptions. In most cases, projects that will meet the *Secretary of Interior's Standards for the Treatment of Historic Properties* are categorically exempt from CEQA.

- **Are historical resources involved?** Under CEQA historical resources include, without question, properties listed in the California Register or determined eligible

[89] CEQA Technical Advice Series, CEQA and Historic Resources: CEQA Provisions, *available at* http://ceres.ca.gov/topic/env_law/ceqa/more/tas/page3.html .
[90] Cal. Code Regs., tit. 14, § 15000, *et seq*.

for the California Register by the State Historical Resources Commission. Properties included in a local register or identified as significant in a historical survey are presumed to be significant for purposes of CEQA unless a preponderance of evidence demonstrates otherwise. Other resources may be considered to be a historical resource provided the lead agency's determination is supported by substantial evidence. Finally, the fact that a resource is not listed in, or determined to be eligible for listing in the California Register, not included in a local register, or identified in a historical properties survey does not preclude an agency from determining the resource may be a historical resource.

- **If CEQA does apply, will the project have a substantial adverse effect on the significance of a historical resource?** If the project will have no substantial adverse effect, the government agency taking action must issue a set of findings known as a Negative Declaration accompanied by the analysis that supports this conclusion (Initial Study). If the substantial adverse effects can be eliminated through mitigation measures, the agency may issue a Mitigated Negative Declaration (MND). Finally, on projects where the substantial adverse effects are too numerous or complex to reasonably address initially in an MND, CEQA requires the preparation of an Environmental Impact Report (EIR). The EIR analyzes project alternatives and the feasibility and effectiveness of various mitigation strategies. The EIR may be subsequently used to justify an MND.

The sections below cover several key issues related to these key threshold questions.

Discretionary Actions versus Ministerial Actions

Whether CEQA actually applies to a particular project depends on whether that project is a "discretionary" or "ministerial" action for the government agency taking action.

- **Discretionary actions** require some sort of judgment to be used by the decision-maker. CEQA applies to discretionary actions. If there is any aspect of the project that under any local ordinance, process, or procedure must undergo scrutiny, and there is review and discretion as to approval or issuance of a permit; or if the local ordinance places alterations to historic properties or their demolition under the review of a commission, then the project is discretionary and CEQA applies. For example, whether or not a proposed rehabilitation project will comply with specific conditions typically would be a discretionary decision. Importantly, CEQA review can apply to reviews of both demolitions and alterations, if that review is discretionary.
- **Ministerial actions** typically involve little or no judgment on the part of the decision-maker. They are based on fixed standards or objective measurements. For example, whether a proposed rehabilitation would meet the generally applicable off-street parking requirements of the local zoning ordinance typically would be a ministerial decision. CEQA does not apply to ministerial actions.

The distinction between ministerial and discretionary acts is not always clear in the context of historic preservation. Each local jurisdiction and special district must adopt procedures for implementing CEQA, and these procedures usually include a list of actions that are deemed ministerial. The language of the local preservation ordinance, and the inclusion or absence of certain elements, thus determines what CEQA procedures the local government will need to follow for projects affecting historic properties and how much authority to enforce preservation goals under CEQA is given to neighborhood associations and preservation advocacy groups.

The distinction between ministerial actions and discretionary actions is a case-specific inquiry that may provide the basis for a temporary injunction of demolition or alteration activities while the issue is being reviewed by the courts. For example, if a preservation organization learns of the issuance of a demolition permit for a historical building, that organization could file for a temporary injunction,[91] allowing a court time to rule on issue of whether CEQA review is required prior to issuance of the demolition permit.

Most CEQA case law regarding the distinction between ministerial and discretionary actions centers on the issuance of demolition permits. In some cases, a permit to demolish a building has been treated as a simple over-the-counter action under the Uniform Building Code, and thus California courts have found that the action is ministerial, rejecting claims that CEQA review is required.[92] Local ordinances that lack any specific authority to review demolition or alteration permits for adverse effects on the historic environment are likely candidates for classification in the ministerial category.

However, California courts have held that CEQA compliance is required where a city has an ordinance allowing discretionary review of demolition permits,[93] or where a proposed impact to an historic resource is part of a larger project that is discretionary.[94] For example, in the case of *Friends of Sierra Madre v. City of Sierra Madre*, the California Supreme Court recently held that, as a discretionary action, a city council must comply with CEQA before placing a measure on the ballot that would de-list designated historic properties.[95]

---

[91] Litigating while under temporary injunction is a common posture for cases in which a demolition is proposed and an intervening organization pleads inadequate CEQA compliance. *See*, *League for Protection of Oakland's Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 903, [60 Cal.Rptr.2d 821,] (Cal. App. 1997); *Citizens for Responsible Development v. City of West Hollywood*, 39 Cal.App.4th 490, 498, [45 Cal.Rptr.2d 917,] (Cal. App. 1995).

[92] *Id.*, 15 Cal.App.4th at 87; *Adams Point Preservation Society v. City of Oakland*, 192 Cal.App.3d 203, [237 Cal.Rptr. 273,] (Cal. App. 1987); *Environmental Law Fund v. City of Watsonville*, 124 Cal.App.3d 711, [177 Cap.Rptr. 542 (1981).

[93] *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App.3d 203, [174 Cal.Rptr. 784,] (1981).

[94] *Orinda Ass'n v. Board of Supervisors*, 182 Cal.App.3d 1145, 1171-72, [227 Cal.Rptr. 688,] (1986).

[95] *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal.4th 165, 183-91 [105 Cal.Rptr.2d 214, 19 P.3d 567,] (Cal. 2001) (distinguishing for the purposes of CEQA between council initiated (discretionary) ballot measures and voter initiated (ministerial) ballot measures).

Definition of Historical Resources

Section 21084.1 of the CEQA statute defines the resources that are considered "historical resources" for purposes of CEQA:

> For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1 [of the Public Resources Code], or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 [of the Public Resources Code], are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 [of the Public Resources Code] shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.

This broad definition is intended to be inclusive of all significant historic resources. This issue was litigated in a prominent recent case from Oakland, California, in which demolition of a 1923 Montgomery Ward department store building was proposed. The building had been noted as eligible for the National Register of Historic Places as part of a comprehensive inventory of the city's historical resources, even though it had not been formally designated on any local, state, or national register. In that case, the court found that the historic designation in the survey (which was part of the city's general plan) was sufficient to make the Montgomery Ward building historically significant for purposes of CEQA, even though there had been no formal designation action under the preservation ordinance.[96]

A Negative Declaration[97] is all that is required if the preponderance of evidence in the administrative record demonstrates that a structure in question is not a "historical resource" for purposes of CEQA.

Substantial Adverse Change

Another key question in CEQA cases involving historic preservation is whether or not the proposed action at issue is likely to have a substantial adverse change on the significance of a historical resource. According to CEQA, at Section 21084.1 of the California Public Resources Code, "a project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment."

A Negative Declaration is all that is required under CEQA if the proposed action will not have substantial adverse change on the historical resource.[98] A Mitigated Negative

---

[96] *League for Protection of Oakland's Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 908, [60 Cal.Rptr.2d 821,] (Cal. App. 1997).

[97] Cal. Pub. Res. Code §§ 21064, 21080(c)(1).

[98] *See*, *Baird v. County of Contra Costa*, 32 Cal.App.4th 1464, [38 Cal.Rptr.2d 93,] (Cal. App. 1995) (to fulfill CEQA requirements a project involving no change in environmental conditions is required only to

Declaration[99] is appropriate if mitigation measures (e.g., redesign of a building to preserve historically significant features) would eliminate the substantial adverse change in the significance of the historical resource.

Environmental Impact Reports

For projects involving an unmitigated significant adverse change on a historical resource, CEQA requires an Environmental Impact Report (EIR).[100] California law requires that there be some "substantial evidence" on the record that an adverse change may occur, but the standard for evidence to this effect[101] is easy to satisfy: A party claiming CEQA applicability need only assemble a "fair argument" from all available evidence that a project will negatively impact a significant historic resource.[102]

In general, the EIR "must describe all reasonable alternatives, including those capable of reducing or eliminating environmental effects."[103] One of the alternatives always must be a "no project" scenario (i.e., no building addition, no demolition, etc.); however, some alternatives need not be considered if they are clearly infeasible.[104] If there are historical resources present, one of the alternatives must be to preserve the historical resources. Also, cumulative impacts and pending projects must be accounted for in the analysis of alternatives.[105]

Though CEQA is primarily presented as a procedural statute, its provisions do have some substantive effect on the outcome of certain cases. Among a series of CEQA directives to local government, municipal authorities are not, for instance, permitted to approve environmental impacts if feasible alternatives or feasible mitigation measures addressing those impacts are available.[106] As a result, a project may be sent "back to the drawing board" by a court even after complying with all EIR requirements and procedures.[107]

---

have a Negative Declaration).

[99] Cal. Pub. Res. Code §§ 21064, 21080(c)(2).

[100] Cal. Pub. Res. Code §§ 21061, 21100, 21100.1 (definition and contents of EIRs), 21155 (EIR process).

[101] *See*, Cal. Pub. Res. Code § 21080(e).

[102] *League for Protection of Oakland's Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 908, [60 Cal.Rptr.2d 821,] (Cal. App. 1997) (without fulfilling EIR requirement, City could not proceed with demolition and redevelopment when its own documentation indicated an affected building was historically significant); *see also*, *Communities for a Better Environment v. California Resources Agency*, Cal. Ct. App., 3rd Dist. Case No. C038844, decided October 28, 2002 (holding invalid CEQA rule 15064(h), which permitted regulatory standards to serve as a benchmark for CEQA compliance, because the rule would undermine the statutory and judicial standard of a "fair argument" that significant impacts may occur).

[103] *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal.App.3d 893, 909-12, [165 Cal.Rptr. 401,] (Cal. App. 1986) (emphasis added).

[104] *Id.* ($1,000,000 loss to developer to maintain an existing structure at the City of Paris store site is not a feasible alternative requiring analysis in EIR for CEQA compliance).

[105] *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal.App.3d 61, [198 Cal.Rptr. 634,] (Cal. App. 1984) (Mitigated Negative Declaration is of little value and does not meet CEQA statutory requirements without placing the project in larger geographic and temporal context).

[106] Cal. Pub. Res. Code §§ 21002, 21002.1

[107] *See*, *Orinda Ass'n v. Board of Supervisors*, 182 Cal.App.3d 1145, 1168, [227 Cal.Rptr. 688,] (Cal. App. 1986) (razing historic structures disallowed when EIR showed no attempt to mitigate or demonstrate the

Closing the CEQA Process

Where a CEQA process is required, a city or county must demonstrate that it has prepared the Negative Declaration, Mitigated Negative Declaration, or EIR in order to fulfill its CEQA obligations. In a typical CEQA process a community will certify an EIR or Mitigated Negative Declaration before issuing a permit for any activity affecting historic resources.[108] After the community has adopted an EIR or MND, the CEQA process remains open to legal challenges, but with typically short time frames for appeal, in order to ensure that all project review takes place in a timely manner and within a consolidated process.[109]

Regarding the quality of CEQA documents, studies produced for CEQA compliance purposes are generally acceptable if they properly "ring the alarm bell" as to project impacts and disseminate project information in a manner that allows the public to intelligently weigh environmental (including historic) consequences of a project and have a say in the review process.[110]

The Relationship Between CEQA Procedures and Local Preservation Ordinances

Communities should reference the CEQA review process in their local preservation ordinances and clarify whether or not the local preservation decision-making review process will be influenced by the state-mandated CEQA review process.

As discussed above, CEQA has the potential to preclude further review of a proposal regarding an historic resource until the specific requirements of an EIR or MND have been initiated, if not completed. As a result, some communities draft preservation ordinances that allow local review only after appropriate CEQA procedures have been followed. The City of Fresno has taken this approach in its ordinance:

> …No hearing shall be held by the Commission for applications or proposals to demolish, grade, remove or substantially alter the Historic Resource until such application or proposal has undergone environmental review in accordance with the California Environmental Quality Act…[111]

---

infeasibility of mitigation).

[108] *See*, *Ciani v. San Diego Trust & Savings Bank*, 233 Cal.App.3d 1604, 1611, [285 Cal.Rptr. 699,] (Cal. App. 1991); *Vedanta Society of Southern California v. California Quartet Ltd.*, 84 Cal.App.4th 517 (Cal. App. 2000); *League for Protection of Oakland's Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 908, [60 Cal.Rptr.2d 821,] (Cal. App. 1997).

[109] *See*, Cal. Pub. Res. Code § 21167.4 (requests for hearing not filed within 90 days of CEQA challenge subject entire claim to dismissal); *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 189 Cal.App.3d 498, 504, [234 Cal.Rptr. 527 (Cal. App. 1987); *Mitchell v. County of Orange*, 165 Cal.App.3d 1185, 1192, [211 Cal.Rptr 563,] (Cal. App. 1985).

[110] *Dusek v. Redevelopment Agency*, 173 Cal.App.3d 1029, 1038-39, [219 Cal.Rptr. 346,] (Cal. App. 1985) (involving a proposal to demolish the Pickwick Hotel in downtown Anaheim, holding that compliance with CEQA does not require adherence to the minutiae of every technical provision).

[111] Fresno, California, Code of Ordinances § 13-412 (Historic Resource Permit Review Process).

Alternatively, some communities draft ordinances that allow local preservation review to proceed concurrently with the CEQA process, to the extent possible. For example, the City of Davis ordinance allows for extensions in the local review process to accommodate appropriate CEQA review.

> If any action under this article is subject to the provisions of CEQA, the time in which such action must be taken shall be extended in order to allow time to comply with said Act, provided, however, that such action is taken within the time limits imposed by the Permit Streamlining Act.[112]

CEQA's jurisdiction over properties of historic value may extend beyond those properties recognized under a local preservation ordinance. In other words, just because a historical property is exempt from a local preservation ordinance does not necessarily mean that it is excluded from applicable CEQA provisions.[113]

[112] Davis, California, Code of Ordinances § 29.145.20 (Time Extensions).
[113] *See*, Monterey, California, Code of Ordinances § 38.74(b) (exclusion from historic preservation ordinance do not create exemption for properties to which CEQA historic provisions apply).

SECTION 6: CONSIDERATION OF ECONOMIC EFFECTS

To ensure compliance with federal and state constitutional requirements, the ordinance should include a procedure allowing a property owner to make the case that, in some situations, enforcement of the ordinance will cause unusual and extreme economic hardship. This is analogous to the variance provisions of a standard zoning ordinance, which provide a "release-valve" in unusual cases where regulation of development and use of a property may potentially rise to the level of an unconstitutional "taking."[114] From a policy perspective, it may also be desirable to allow for some degree of flexibility within a preservation ordinance in order to encourage rehabilitation and economic use of the property, to avoid making "mothballing" of regulated properties the result of historic preservation efforts. As courts continue to reject frontal challenges to preservation ordinances and review standards, commissions should expect that much litigation will focus on economic matters, such as whether the owner is earning a reasonable return on the property.

CURRENT ECONOMIC RETURN

While economic considerations play no major role in designating historical resources, they can play a central role in reviewing applications for certificates of appropriateness. While most preservation commissions do consider the economic impact of the preservation regulation on the applicant, many do it somewhat haphazardly. Haphazard consideration of economic evidence is not only an invitation for a court challenge but may also fail to give the local commission all the information it needs to make a reasoned decision. In many instances, the real economic facts of a case may support preservation rather than demolition.

A key inquiry in determining whether preservation regulation is onerous centers on the current economic return on the property in light of the amount originally invested, taxes, and other considerations, including caliber of management. As the Supreme Court noted in *Penn Central Transportation Co. v. New York City,*[115] courts will examine whether a historic property owner can earn a "reasonable return" and whether the historic property is "economically viable" in its present use or form.

In some communities, like New York, the preservation commission applies a fixed statutory definition of what constitutes a reasonable return. This approach may work well if the commission has resources to make a sophisticated analysis of reasonable return. Other communities use the standard zoning variance approach, one that often does not produce useful information regarding economic hardship.

In most jurisdictions, a better answer is to establish an administrative procedure to bring out certain facts that courts have held important in determining whether land-use regulation is overly burdensome. The reviewing body should require an applicant for a

[114] U.S. Constitution, Amendment V ("nor shall private property be taken for public use, without just compensation").
[115] 438 U.S. 104 (1978).

certificate of appropriateness to produce information regarding the price originally paid for the property, potential rental or lease income, the level of taxes, and the net profit derived from the historical resource, if any, over the past several years. Opponents of the proposed application might be given an opportunity to show there are feasible alternatives to demolition or that the historical resource could earn a reasonable return if properly managed. If the local government has such a procedure, the landowner should be required to utilize it before suing in court.

The Washington D.C. preservation ordinance[116] demonstrates just how effective this approach can be. It establishes an administrative procedure whereby anyone seeking to demolish or alter a historical resource must produce evidence that a denial of a permit would cause serious economic deprivation. Since the ordinance was enacted, these provisions have been instrumental in court cases upholding the D.C. ordinance.[117]

OWNER'S BONA FIDE ATTEMPT TO RENT OR SELL PROPERTY

Courts in several jurisdictions have held that an important factor in determining whether an owner has been deprived of all economic use of his property is whether there has been any bona fide effort to rent or sell the property. If an owner is holding the property off the market in anticipation of being able to demolish it, then any claim that the regulations prevent all reasonable use rings hollow. As explained in *First Presbyterian Church of York v. City Council of York*:

> …the Church, having failed to show that a sale of the property was impracticable, that commercial rental could not provide a reasonable return or that other potential uses of the property were foreclosed, had not carried its burden of proving a taking without just compensation.[118]

Thus, a preservation commission should delve into these issues: Has the property been offered for sale through a real estate broker? Has the property been advertised in any newspapers? How was the selling price established, and was it reasonable?

FEASIBILITY OF PROFITABLE ALTERNATIVE USES

To present a case for a certificate of appropriateness for alteration or demolition, some communities require the historical resource owner to show that the existing use is not profitable and, furthermore, that it would not be feasible to renovate the property or undertake an alternative development compatible with the preservation of the property.

---

[116] D.C. Code Ann. §§ 5-1001-1015.

[117] *See*, *Committee of 100 v. District of Columbia*, 571 A.2d 195 (D.C. 1990); *Cf.*, *900G Street Assoc. v. Dep't of Housing & Community Dev.*, 430 A.2d 1387 (D.C. 1981) (diminution in cash value of property is not an undue economic hardship so long as some reasonable alternate economic use of property remains).

[118] 360 A.2d 257 (Pa. 1976). *See also*, *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *900 G St. Assoc. v. D.C. Department of Housing & Community Development*, 430 A.2d 1387 (D.C. App. 1981).

The owner of a historic property may claim that historic regulation or potential designation limits the economic use of a property, but California law does not recognize such a claim based only on maximum potential economic return. To illustrate, in an Orange County case, the planning commission found that an historic building at a noisy intersection could be appropriately intensified in use from single family residential to "garden office" uses. This recommendation did not, however, entitle the property owner to a change from the existing designation status.[119]

Evidence regarding a profitable alternative use of the existing structure or development sensitive to preservation concerns is relevant to the issue of reasonable use. As required by the court in *Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis*[120] a landowner could be asked to make a case that alternatives to demolition are impracticable:

> In order for the landowner to raise the question of unconstitutional application as to his property, he must prove that it is impractical to rehabilitate, and as we have stated, this contemplates not only infeasibility because of physical condition but also a negative answer to the question as to whether the property can be turned to use or account profitably. Economic profitability contemplates restoration, and if not, then the question arises: Can it be sold profitably? If the owner is unable to restore from an economic standpoint he must then establish it is impractical to sell or lease the property or that no market exists for it at a reasonable price. Only then is he entitled to a demolition permit. And only then are his constitutional rights denied.

In the context of an application for a demolition permit, economic practicability of alternative economic uses was specifically raised in the California case of *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*,[121] where the court determined that substantial evidence existed for the city's finding that no feasible economic use remained for the City of Paris building. More recently, the "substantial evidence" standard was again cited by a California court when affirming San Francisco's decision to allow portions of its downtown Emporium Building to be demolished as part of a revitalization project.[122] The court noted that, in making the determination that no feasible economic use existed for the Emporium property, the applicant had followed provisions of the City Planning Code specifically devoted to viability of rehabilitation for properties of historical significance. Particularly, Planning Code § 1112.1 states that an application to demolish an historically significant structure must include the following economic evidence:

> (a) For all property:
>
> (1) The amount paid for the property;

---

[119] *See*, *Mitchell v. County of Orange*, 165 Cal.App.3d 1185, 211 Cal.Rptr. 563 (Cal. App. 1985).
[120] 599 S.W.2d 61 (Mo. 1980); *see also*, *Committee of 100 v. District of Columbia Department of Consumer & Regulatory Affairs*, 571 A.2d 195 (D.C. App. 1990).
[121] 106 Cal.App.3d 893, 165 Cal.Rptr. 401 (Cal. App. 1980).
[122] *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (Forest City Development, Inc.)*, Case No. A095827, California Ct. App., First District, Division Three (decided Sept. 30, 2002, scheduled for publication in Cal. App. 4th).

(2) The date of purchase, the party from whom purchased, and a description of the business or family relationship, if any, between the owner and the person from whom the property was purchased;
(3) The cost of any improvements since purchase by the applicant and date incurred;
(4) The assessed value of the land, and improvements thereon, according to the most recent assessments;
(5) Real estate taxes for the previous two years;
(6) Annual debt service, if any, for the previous two years;
(7) All appraisals obtained within the previous five years by the owner or applicant in connection with his or her purchase, financing or ownership of the property;
(8) Any listing of the property for sale or rent, price asked and offers received, if any;
(9) Any consideration by the owner for profitable and adaptive uses for the property, including renovation studies, plans, and bids, if any; and

(b) For income-producing property:

(1) Annual gross income from the property for the previous four years;
(2) Itemized operating and maintenance expenses for the previous four years;
(3) Annual cash flow for the previous four years.

It is important that economic evidence be considered in any case involving a potential impact to historic property, and San Francisco's procedure provides a model for other California ordinances. Economic evidence is also an important consideration in the context of takings claims, as discussed in detail below.

CERTIFICATES OF ECONOMIC HARDSHIP

To keep the administration of a preservation ordinance running smoothly and to deal with cases of hardship, every ordinance should have what might be termed "safety valves." Generally, preservation commissions will need flexibility in dealing with two situations: first, when an owner faces economic hardship because there is no reasonable economic use for the historical resource; and, second, when there is an economic use, yet legal restrictions, such as zoning regulations or building codes, preclude necessary renovations. If the owner can satisfy the reviewing body that applicable preservation restrictions are causing a unique and serious economic hardship, that body might grant relief (in the form of a permit to allow an alteration or new construction). Local governments must determine when and what types of such relief might be appropriate.

While it is easy to sympathize with an owner who is having a difficult time making ends meet because of high taxes, energy costs, and the like, the simple fact that a property is located in a historic district should never be, in and of itself, a reason to allow a variance from local preservation and land-use controls or to grant a demolition permit. Nor is the owner's desire to increase the property's economic return adequate ground for relief. Such claims were rejected in a seminal case from New Orleans, in which the owner wanted to construct, in violation of the local ordinance, another building on a lot on which a historical resource was situated:

> . . . in the absence of a showing that approval of . . . non-violative construction could not have been obtained from the Vieux Carré Commission, we cannot hold appellant suffered

financial loss in being denied an opportunity to obtain an increased return from its property. Even if financial loss had been shown, such loss is only a factor to be considered in determining hardship and will not, standing alone, constitute a hardship sufficient to justify a variance. And here the hardship referred to, the requirement of conformity to two separate and sometimes conflicting standards of construction, is neither "unusual" nor "particular" to [the plaintiff]. It is common to all property owners in the zoning district in which [the plaintiff's] lot is located and therefore is not a hardship which justifies the granting of a variance. To hold otherwise would have the effect of destroying the zoning district.[123]

To the extent that local preservation controls are made part of the local zoning ordinance, state law may control situations in which relief due to economic hardship can be granted as part of the general variance process. Though the majority of California jurisdictions limit the variance power to special physical circumstances, there is no limitation placed on the consideration of economic hardships. California's preservation enabling legislation likewise does not specifically define economic hardship for purposes of variances, so it appears in all California jurisdictions that the best approach may be to establish an administrative procedure whereby an owner who seeks relief bears the burden of showing that the historical resource cannot be put to some reasonable economic use in its present state. If it is determined through such a procedure that the property cannot be put to some reasonable economic use, the procedure should set forth options for next steps, perhaps including incentives to allow use of the property, variances from certain standards, or possibly acquisition by the local government.

The administrative procedure used to accept and review economic hardship information need not be complicated. The Burbank ordinance contains a short section that succinctly establishes the purpose, content, timing, and criteria for issuing what is referred to as a Certificate of Economic Hardship (See excerpt below.).

CALIFORNIA CODE EXCERPT:
CERTIFICATE OF ECONOMIC HARDSHIP

CITY OF BURBANK
Section§ 31-929(b)(2).
An owner of a designated historic place or structure of merit may request that he be allowed to alter the place or structure in such a manner as will adversely affect its distinctive significance, or that he be allowed to remove the structure, on the basis of extreme financial [de]privation or adversity. An application made on this basis shall be in accordance with procedures pr[e]scribed by the Commission.

[123] *Phillips v. Board of Zoning Adjustments of City of New Orleans*, 197 So.2d 916, 916-20 (La. 1967).

> The Commission shall be authorized to request the applicant furnish material evidence supporting his request for a Certificate of Economic Hardship. The Commission shall review all the evidence and information required of an applicant and make a determination within ninety (90) days of receipt of the application as to whether the denial of a Certificate of Appropriateness will deprive the owner of the property of all reasonable use of, or economic return on, the property.
>
> If the applicant presents facts and evidence demonstrating to the Commission that failure to approve the application will cause an immediate hardship because of conditions peculiar to the particular structure or other feature involved, and the damage to the owner of the property is unreasonable in comparison to the benefit conferred to the community, the Commission may approve or conditionally approve such certificate.

As another example, the Santa Monica ordinance also includes provisions for a Certificate of Economic Hardship. [124] The Santa Monica ordinance is somewhat more elaborate, with specific examples of the type of economic and feasibility evidence the Commission may consider, including a number of items very similar to the economic evidence listed in the sample San Francisco ordinance in the above section of this Manual. In addition to purely fiscal evidence, the Santa Monica ordinance includes an architect or engineer's determination of structural stability and feasibility of rehabilitation. The Certificate of Economic Hardship procedure also specifically instructs that hardships may not be caused by the owner's negligence or intentional lack of appropriate maintenance.

As an example of policy in other jurisdictions, Denver has inserted a special use variance in its local zoning ordinance that permits nonresidential use of historical resources, such as professional offices, in residential zones where the owner can demonstrate economic hardship. Such relief is limited to designated historical resources, thereby avoiding the problem of widespread conversion of homes to commercial uses in residential areas.

[124] Santa Monica, California, Code of Ordinances, § 9.36.160.

SECTION 7: APPEALS

How are decisions made under the ordinance appealed, and to whom? A defined appeal process provides an option for a local administrative resolution to a claim that might otherwise spur litigation in the immediate aftermath of a decision by the preservation commission. Establishment of an administrative review process also produces a record for review in the event that a court challenge does follow from a preservation action.

An appeals section is a key feature in many historic preservation ordinances, though its presence is optional under typical enabling legislation. The appeals section generally clarifies the rights of property owners, public agencies, and other citizens to appeal decisions regarding local government historic preservation actions. Appeals provisions may also specify what types of decisions (e.g., designations, certificates of appropriateness) are open to appeal, as well as the timing and board action required for an appeal.

In California, the majority – though not all – of the local jurisdictions with current preservation ordinances contain an appeals section. Typically, staff decisions are subject to appeal to the preservation commission, and decisions by the commission are subject to appeal to the local legislative body. The City of Sacramento follows this approach:

> The decision of the Preservation Director shall be subject to appeal to the [Design Review and Preservation] Board pursuant to Article VIII herein. The decision of the Board, including the decision of the Board on an appeal from the Preservation Director, shall be subject to appeal to the City Council pursuant to Article VIII herein.[125]

The best approach is for preservation-related appeals to go to a specialized board, as is done in Sacramento, as opposed to a general Board of Adjustment, as is sometimes done when the preservation regulations are contained in the zoning ordinance.

Preservation ordinances often enumerate the specific types of decisions that can and cannot be challenged in an appeal. For example, the City of San Francisco specifically allows only appeals of disapproved, as opposed to approved, designation proposals.[126]

The community should consider what parties have the right to appeal decisions under the ordinance. Some communities, such as the City of Los Angeles, state in their ordinance that "an appeal may be filed by the applicant or any aggrieved party."[127] This broad authority allows any member of the community a right to appeal a preservation decision. Similarly, the City of Davis gives an unqualified right of appeal to "any resident of the city," but requires that the appeal must have at least one advocate from within the local community.

[125] Sacramento, California, Landmarks Preservation Ordinance, § 15.124.360.
[126] San Francisco, California, Planning Code, § 1004.5.
[127] Los Angeles, California, Municipal Code, § 12.20.3(J).

Other communities find it advantageous to provide a more explicit limitation on appeals, where an appealing party must have some sort of tangible or official interest in the outcome of the decision. The City of Berkeley, for example, allows for appeals by:

> …the City Council on its own motion, by motion of the Planning Commission, by motion of the Civic Art Commission, by the verified application of the owners of the property or their authorized agents, or by the verified application of at least fifty residents of the city aggrieved or affected by any decision of the [Landmarks Preservation] Commission….[128]

Generally, communities that choose to limit the appeals process typically allow appeals only from parties that participated in the initial decision in some way, including the applicant, adjacent landowners who received notice of the initial decision, persons providing verbal or written testimony at a public hearing on the initial decision, and members of the local governing body. Often, the decision is made to limit appeals in communities where an open-ended appeals process has been used in the past to slow down the development approval process.

In addition to specifying what decisions are subject to appeal and who may file an appeal, the ordinance may also spell out procedural requirements for the appeals process, such as the fee required and the timetable for the filing and/or processing of appeals. A fee has the dual benefit of recapturing the cost of holding hearings and administering an appeals case, while also discouraging the filing of frivolous appeals as a stalling or harassment tactic. Typically, an ordinance will authorize the establishment of a fee to process a case, but will specify the exact amount of the fee in a separate resolution (which may be periodically adjusted by the governing body). A deadline for filing appeals assures that any challenge to a preservation decision will be resolved in a timely manner. A five- to fifteen-day period during which appeals may be filed is generally considered reasonable. San Diego's language is typical:

> The action of the Historical Resources Board in the designation process is final 11 business days following the decision of the Board unless an appeal is filed with the City Clerk no later than 10 business days after the action of the Board.[129]

CALIFORNIA CODE EXCERPT:
APPEALS

CITY OF SANTA MONICA
Section 9.36.180(a)
Each of the following actions by the Commission may be appealed to the City Council:

- A determination of the Commission that an application for the designation of a Landmark or of a Historic District does not merit formal consideration by the Commission, and a determination thereto not to schedule a public hearing.
- A decision of the Commission, after a public hearing, to approve, in whole or in part, or disapprove the designation of a Landmark.

[128] Berkeley, California, Code of Ordinances, § 3.24.300(A).
[129] San Diego, California, Municipal Code, § 123.0203.

- A decision of the Commission, after a public hearing, defining and describing an appropriate Landmark Parcel upon which a Landmark is situated.
- A determination of the Commission, after a public hearing, amending, modifying or rescinding any decision to designate a Landmark or Landmark Parcel, or any preliminary or supplemental designations, determinations or decisions, as additions thereto.
- A decision of the Commission to approve in whole or in part, or disapprove an application for a certificate of appropriateness.
- Any decision of the Commission relating to a structure of merit.
- The approval or disapproval of an application of a Landmark, Historic District, Structure of Merit, or certificate of appropriateness that occurred as a result of the expiration of the required time periods for processing such applications.

SECTION 8: ENFORCEMENT

A preservation ordinance will only be as effective as the power and willingness of the community to enforce it. Ignoring the details of enforcement when drafting a local ordinance may have unfortunate consequences. In Chicago, for example, Rincker House, the second oldest structure in the city and a designated historical resource, was torn down without official approval by a developer who apparently found that the prospective profits from redeveloping the site far outweighed the puny penalties contained in the local preservation ordinance. In other municipalities, preservation commissions find that the enforcement of local controls, particularly in large districts, cause some serious administrative headaches—it is simply too expensive and time-consuming to keep an eye on designated historical resources to make sure the local law is being observed by owners. Thus, in drafting enforcement provisions of an ordinance, one should keep in mind several major issues, including remedies for noncompliance, maintenance and upkeep requirements, and ordinance administration.

REMEDIES FOR NONCOMPLIANCE

As more and more historical resources are designated and the scope of preservation controls is broadened to control everything from demolition of exterior features to day-to-day upkeep, the issue of remedies for noncompliance is certain to become more crucial. The challenge in drafting effective enforcement provisions is to craft remedies strong enough to deter violations and induce compliance, but not so draconian that courts shy away from imposing them. The experience with building and housing codes regulations is instructive. If monetary fines are set at a low level (as fines for ignoring preservation laws often are), owners conclude that, even if they are caught violating a building code provision, the economic consequences are insignificant or can be treated as just another cost of doing business. On the other hand, experience also demonstrates that heavy reliance on criminal penalties is less than optimal. For example, judges in most jurisdictions simply do not put people into jail for zoning code violations. The middle ground options outlined below are likely to be most effective, particularly when used in combination with one another.

Fines

Money fines are the most widely used method of enforcing local codes. A local government generally has statutory authority to issue a notice of violation (not unlike a traffic ticket) and then proceed to court and collect a fine if it can prove its case. For example, the Fresno ordinance authorizes substantial fines in its preservation code:

> It shall be unlawful for any person to permit or maintain violations of any of the provisions of this article by undertaking the alteration, grading, removal, demolition or partial demolition of an Historic Resource or a building, structure, object or site within a Historic District without first obtaining the written approval of the Specialist, Commission or Council as provided in this article, or to defy any order or decision rendered by the Specialist, Commission or Council. Any violations of this article may be enforced as provided in this Code, except in the case of administrative citations issued pursuant to this Code, wherein the administrative penalty imposed shall be up to $10,000 for each

> violation. As part of any enforcement proceeding, violators may be required to reasonably restore the building, structure, object, or site to its appearance or condition prior to the violation, under the guidance of the Development Department.[130]

The Fresno example notwithstanding, the major problem with fines in a preservation context is that they are generally not high enough to deter violations. A fine of $500 for an illegal demolition is simply inadequate to deter anyone, especially commercial developers who stand to gain much by clearing a site for new construction.

In order for fines to serve as effective deterrents, they must be based on the degree of the offense. A sliding scale might be used to cover a variety of situations: a nominal fine for a first offender who out of ignorance fails to, for example, secure a necessary alteration permit and who agrees to rectify the error; a larger fine, perhaps $300, plus a further fine of several hundred dollars for each day the violation continues, for second offenders or where a violator is recalcitrant; and a significant fine, measured by the amount of the pecuniary gain derived from the offense, for a persistent offender or one who acted willfully to demolish a building. When used in tandem with other remedies, such as injunctive relief, fines can be an effective method of deterring future violations and also depriving landowners from ill-gotten economic gains.

Injunctive Relief and Compliance Orders

The primary goal of an enforcement provision should be to secure compliance with the local preservation law and to protect historical resources, not to punish offenders. Thus, while fines may be necessary to deter future violations, the preservation ordinance should vest the local government with power to seek injunctive relief to, for example, put an immediate stop to an illegal demolition. In more minor, everyday cases (e.g., when an owner has altered a historical resource without permission) administrative compliance orders issued by the preservation commission may be useful in securing voluntary compliance, as well as establishing a firm ground for court action if necessary. The Berkeley ordinance expressly authorizes the use of abatement orders and injunctive relief: "In addition [to the city manager serving notice of the violation and ordering the violation to cease] the city attorney may seek injunctive relief or maintain an action in abatement to further the provisions of this chapter."[131]

Receiverships and Entry on to Land to Correct Violation

If an owner of a historical resource ignores an administrative compliance order, a court-ordered receivership, which a court can usually establish under its power authorizing injunctive relief, can be very effective. To create a receivership, the local commission will first secure a court order requiring that an illegal alteration be redone or that the owner undertake necessary repairs as previously demanded in the administrative action. The commission should then ask that the court establish a receivership overseen by a third party who would collect rents, make repairs, and manage the property until compliance is achieved. While an owner could also, in these

[130] Fresno, California, Code of Ordinances § 13.423 (Civil and Criminal Penalties).
[131] Berkeley, California, Code of Ordinances, § 3.24.380(B).

circumstances, be fined or held in contempt of court, neither of these remedies necessarily ensures that the historical resource is protected.

A variation on this approach is to give the local government the power, upon securing a judicial decree, to enter onto the owner's property, make necessary repairs or alterations, and then place a lien on the property. Then, before the property can be sold, the local government must be reimbursed.

Forcing Reconstruction

There will be times when preservationists feel that reconstruction is the only adequate remedy in a case when a historical resource (or at least part of it) has been destroyed. While it may be useful to include such a provision in the local ordinance as an option in egregious cases, experience in analogous zoning cases indicates that courts can be expected to enforce such a penalty only under the most exceptional circumstances. In zoning cases, the analogous situation is in reverse: an owner builds a structure in violation of the zoning ordinance, and the court forces it to be demolished. Such a remedy is granted in only the rarest of cases. Most likely, the application of a forced reconstruction provision will be cases of partial demolition, where the building can be repaired to its original state without starting from scratch.

The West Hollywood ordinance contains language that permits a removal order as one alternative method of enforcing the historic resources provisions of the zoning code:

> A. Any person who violates a requirement of this Chapter or fails to obey an order issues by the Advisory Board or comply with a condition of approval of any certificate or permit issues under this chapter shall be guilty of a misdemeanor and subject to provisions of Section 1200(a) of this Code.
> B. Any person who constructs, alters, removes or demolishes a cultural resource in violation of this Chapter shall be required to restore the building, object, site or structure to its appearance or setting prior to the violation. Any action to enforce this provision may be brought by the City of West Hollywood or any other interested party. This civil remedy shall be in addition to, and not in lieu of, any criminal prosecution and penalty and any other remedy provided by law.[132]

The local government may want to also consider including provisions for the removal (or modification) of new construction within historic districts where such new construction would adversely impact of the historic character of adjacent properties or the district as a whole. Recent cases in other jurisdictions have upheld the authority of local governments to apply such enforcement measures to new construction in historic districts.[133]

Loss of Further Entitlement

Especially in cases of demolition, a court may find forced reconstruction of the entire regulated structure to be an impractical remedy; however, a court will have little difficulty imposing a penalty that prohibits redevelopment of a previously regulated property in a

[132] West Hollywood, California, Code of Ordinances, § 19.58.180(B).
[133] *See*, *City of Dayton v. Carroll*, 515 S.E.2d 144 (Ga. 1999).

way that is detrimental to its historic characteristics or in a way that provides unjust enrichment to the violator. For example, the Palo Alto ordinance restricts future building and development entitlements on a property where a preservation violation has taken place:

> Alteration or demolition of a historic structure in violation of this chapter shall eliminate the eligibility of the structure's lot for any transfer of development rights, pursuant to the Palo Alto Comprehensive Plan, and such lot, if it is the site of an unlawfully demolished historic structure from which development rights have been transferred, shall not be developed in excess of the floor area ratio of the demolished structure for a period of twenty years from the unlawful demolition.[134]

San Clemente's ordinance provides an additional example:

> Any person, whether principal, agent, employee or otherwise, who demolishes a structure on the City's Designated Historic Structures List in violation of Section 17.16.170 Demolition of Historic Properties, shall be guilty of a misdemeanor. In addition, no Building Permit shall be issued for any new development on the property in question for a period of five years from the date the violation occurs, other than as may be required to comply with applicable health and safety requirements and regulations, and in no event shall any permit authorize the new construction to exceed the building square footage, lot coverage, and use of the original structure.[135]

MAINTENANCE AND UPKEEP OF HISTORIC PROPERTIES

Many communities impose affirmative maintenance requirements on historic properties to ensure these properties are occupied, looked after, and repaired in a manner that will protect the historic integrity of both the structure and the surrounding area. Courts have been very supportive of ordinances that require general maintenance and upkeep of historic properties. Nevertheless, there are four primary issues to be considered in this area:

- First, communities should be sensitive to the possibility that complex and time-consuming procedures associated with preservation controls may persuade some owners to forego needed repairs simply to avoid the bureaucratic hassle.
- Second, maintenance requirements should be accounted for in the local ordinance and may then be used to set a standard for improvement to historic properties.
- Third, there may be situations that call for the imposition of affirmative maintenance requirements where, through neglect, historical resources are eroding to a state of being beyond repair—so-called "demolition by neglect."
- Finally, preservation code drafters should be aware that most local building and health codes allow historical resources to be torn down despite opposition from the local preservation review body, based on the specific finding that the buildings have fallen into such disrepair that they are a threat to public safety.

[134] Section 16.49.090(a)(4)
[135] San Clemente, California, Code of Ordinances, § 17.16.170(F) (Penalty for Demolition of Historic Structures).

This section examines these four issues and suggests considerations for drafting local ordinances to avoid associated problems.

Sensitivity to Procedural Requirements

Communities should think carefully about subjecting every minor change or alteration of a historical resource to review by the local preservation commission. The downside of such close scrutiny is that, if owners are forced to obtain a permit for every minor repair to their properties, the results will probably be either that the repairs are not made or are made without a permit. Moreover, burdensome procedures will win the preservation review process no friends politically.

One answer to this problem is to insert an exclusion in the ordinance for ordinary maintenance or minor alterations, as discussed below. The precise language will vary from community to community – based in part on established local procedures for granting building permits. The ordinance might give local officials some leeway in deciding what constitutes a major change that must be reviewed by the preservation commission, or it might exempt improvements below a specified dollar amount unless the impact on the historical resource is significant. As with other operative terms in a preservation ordinance, "ordinary maintenance" should be defined carefully.

Maintenance Requirements

Many local preservation ordinances require that historical resources be maintained in accordance with local building and housing codes. Others go further, specifying a list of structural defects or faults that must be repaired by an owner on a continuing basis. The Pasadena ordinance is typical and creates a broad duty to keep historic resources in good repair.

> A. Nothing in this chapter shall be construed to prevent the ordinary maintenance and repair of any exterior architectural feature of any designated landmark that does not involve a change in design, material, color or appearance thereof; nor the repair of an unsafe or dangerous condition as provided in Section 2.75.330.
> B. Every landmark and historic treasure shall be maintained in good repair by the owner or such other person who has legal possession or control thereof, in order to preserve it against decay and deterioration to the extent practicable.[136]

Minimum maintenance standards are not particularly controversial from a legal standpoint. The leading case is *Maher v. City of New Orleans*, in which the court rejected an argument that the local ordinance's maintenance provision was unconstitutional:

> Once it has been determined that the purpose of the Vieux Carré legislation is a proper one, upkeep of buildings appears reasonably necessary to the accomplishment of the goals of the ordinance.... The fact that an owner may incidentally be required to make

[136] Pasadena, California, Code of Ordinances, § 2.75.150 (Maintenance of landmarks and historic treasures); *see also*, Santa Monica, California, Code of Ordinances, § 9.36.190 (duty to repair); Berkeley, California, Code of Ordinances, § 3.24.290.

> out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking. In the interest of safety, it would seem that an ordinance might reasonably require buildings to have fire sprinklers or to provide emergency facilities for exits and light. In pursuit of health, provisions for plumbing or sewage disposal might be demanded. Compliance could well require owners to spend money. Yet, if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand [an] attack of invalidity.[137]

Many other cases from across the country uphold minimum maintenance requirements contained in local building codes. However, that is not the end of the legal inquiry. Notice that the *Maher* court said the regulations could withstand a frontal attack. That was legal shorthand for the proposition that if an owner can show affirmative maintenance requirements are overly burdensome as applied, then they may be invalid. That is the general rule for virtually all building code requirements. A law that obligates owners of new apartment buildings to install expensive smoke detectors, fire and other prevention equipment may be valid on its face, but a court might strike it down as applied retroactively to a small, 50-year-old apartment building on which the rental return is very low. Although courts have almost uniformly upheld tough code provisions despite relatively large expenditures, for the most part, courts apply a reasonableness test in assessing the constitutionality of building code provisions—the importance of the public interest at stake versus the economic burden on the owner. Local review bodies thus should be prepared to defend affirmative maintenance requirements with proof of public need and evidence that rehabilitation is economically feasible, or the local preservation ordinance may include relief provisions in the local ordinance to deal with more difficult cases.

In California, local governments are required to administer and enforce the State Historical Building Code (SHBC). This code is specially tailored to meet the needs of historic properties in need of maintenance and repair. Local preservation ordinances frequently contain language requiring conformance with the SHBC, but even lacking that language, individual owners still have the statutory right to utilize the SHBC.

Maintenance requirements raise another important legal issue related to property inspections. Compliance with most preservation restrictions, notably those relating to demolition or alteration, can be policed with relative ease because violations are obvious and usually can be discovered from a public street without entering onto the property itself. But what about cracks in the foundation that threaten a historic building or a leaky roof that might eventually cause serious structural problems? To detect such problems, preservation commissions may include language that allows a program of periodic inspections. In the landmark case of *Camara v. Municipal Court*,[138] the U.S. Supreme Court ruled that the Fourth Amendment did apply to administrative searches and that a warrant based on "administrative probable cause" was required before an inspection could occur.

---

[137] 516 F.2d 1051, 1066-67 (5th Cir. 1975).

[138] 387 U.S. 523 (1967); *see also*, Meffert, "Affirmative Maintenance Provisions in Historic Preservation: A Taking of Property?" 34 S.C. L. Rev. 713 (1983).

The Court explained that there is sufficient probably cause to issue a warrant:

> …if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards…may be based on the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

A periodic inspection program may run into fewer Fourth Amendment objections in practice than in legal theory. Still, it is important that such a program be governed by predetermined standards as suggested in *Camara* to dispel any claim that the program does not meet the requirements announced in that case.

Demolition by Neglect

Many communities in California are seeking guidance on how to address the gradual destruction of historic buildings by property owners who fail to engage in regular maintenance and upkeep of their properties, and who then request a demolition permit on the grounds that rehabilitation of the structure is no longer practicable. In this situation, one alternative is to authorize the jurisdiction to fix neglected properties and then place a lien on the property and recoup the cost of its expenditure at the time the property is sold.

Local commissions will find it very useful if they have the authority to protect a property that is being demolished by neglect. A number of communities have enacted laws that permit a specified local agency to take necessary steps to secure a derelict historical resource against vandalism. Others take the additional step of granting the local government and its preservation agency the power to make repairs and bill the owner. In at least two U.S. cities (Richmond, Virginia, and San Antonio, Texas), the local preservation commission has the power to initiate or recommend condemnation proceedings where demolition by neglect is occurring, allowing the local government to assume ownership of and begin repairs on neglected properties. The viability of these more far-reaching ordinance provisions will generally depend on the economic impact to an owner. Courts may be less inclined to make an owner pay for necessary repairs if the chances of earning reasonable return on the property are slim. Nevertheless, courts have not hesitated to impose costs or deny development rights to historical resource owners who have allowed properties to fall into serious disrepair.[139]

Fresno's Minimum Maintenance provisions, included below, are a model for creating specific maintenance duties, enumerating areas of neglect that could lead to serious repair costs if left unattended, and also serve as a model of a general regulation prohibiting demolition by neglect.

---

[139] *District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. App. 1994) (demolition permit for dilapidated structure revoked because building condition was caused by neglect of owner, contrary to D.C. preservation act).

a. All designated Historic Resources including Contributors to any Historic District shall be preserved against decay and deterioration, kept in a state of good repair and free from structural defects. The purpose of this section is to prevent an owner or other person having legal custody and control over a property from facilitating demolition of a Historic Resource by neglecting it and by permitting damage to it by weather and vandalism.

b. Consistent with all other state and city codes requiring that buildings and structures be kept in good repair, the owner or other person having legal custody and control of a property shall repair such building or structure if it is found to have any of the following defects:

1. Building elements so attached that they may fall and injure members of the public or property.
2. Deteriorated or inadequate foundation.
3. Defective or deteriorated flooring.
4. Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration.
5. Members of ceilings, roofs, ceiling or roof supports or other horizontal members which sag, split or buckle due to defective materials or deterioration.
6. Fireplaces or chimneys which list, bulge or settle due to defective material or deterioration.
7. Deteriorated, crumbling or loose exterior plaster.
8. Deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors.
9. Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other protective covering.
10. Any fault, defect or deterioration in the building which renders it structurally unsafe or not properly watertight.

c. If the Commission has reason to believe that a Resource is being neglected and subject to damage from weather or vandalism, the Commission shall direct staff to meet with the owner or other person having legal custody and control of the Resource and to discuss with them the ways to improve the condition of the property. If no attempt or insufficient effort is made to correct any noted conditions thereafter, the Commission may, at a noticed public hearing, make a formal request that the Development Department or other appropriate department or agency take action to require corrections of defects in the subject Resource in order that such Resource may be preserved in accordance with this article.[140]

Public Safety Exclusion

Many local preservation ordinances contain provisions whereby a historical resource declared to be a public hazard can be altered, repaired, or demolished without the local preservation review body having any say whatsoever. The code in Berkeley contains a provision for a public safety exemption from historic preservation regulations, but carefully instructs that the exemption is specifically limited to activities necessary to correct public safety issues (preventing demolition in many cases):

None of the provisions of this chapter shall be construed to prevent any measures of construction, alteration or demolition necessary to correct or abate the unsafe or dangerous condition of any structure, other feature, or part thereof, which such condition has been declared unsafe or dangerous by the planning and community development department or the fire department, and where the proposed measures have been declared necessary, by such department or departments, to correct the said condition;

[140] Fresno, California, Code of Ordinances, § 13.421 (Minimum Maintenance).

> provided, however, that only such work as is reasonably necessary to correct the unsafe or dangerous condition may be performed pursuant to this section. In the event any structure or other feature is damaged by fire or other calamity or by an act of God, or by the public enemy to such extent that in the opinion of the aforesaid department or departments it cannot reasonably be repaired or restored, it may be removed in conformity with normal permit procedures and applicable laws.[141]

On their face, public safety exclusions appear reasonable—if a building is about to tumble down on pedestrians below, surely something must be done quickly—but in practice, they are sometimes used by a local government or owner to circumvent local review procedures or to avoid facing up to hard choices between a proposed redevelopment scheme and preservation of an important historical resource.

At a minimum, local preservation ordinances should attempt to strike a balance between concerns about public safety and preservation, perhaps allowing the preservation commission to comment on the proposed demolition unless the legislative body specifically finds there is an immediate and serious threat to the public safety that cannot be addressed through less drastic measures. At least one city, Washington, D.C., has taken an additional step. Its local preservation ordinance provides that the local Board of Condemnation cannot issue permits for demolition of private historical resources except in accordance with the procedures and standards set forth in the preservation law.

EMERGENCY DEMOLITION BANS AND DEVELOPMENT MORATORIA

Several California communities, including Palo Alto most recently, have adopted interim regulations to prevent demolition of historic resources or new construction in historic areas while new permanent regulations are being drafted or a comprehensive historical resources inventory is being prepared. Palo Alto will not process applications for development of a property while designation procedures are taking place under the preservation ordinance, stating in the City code that,

> …no building, demolition, or other city permit for a change that would constitute an alteration or demolition of a proposed heritage property shall be issued while the application for designation is pending…[142]

The Redondo Beach ordinance contains a similar provision to suspend the issuance of permits once historic preservation review is initiated:

> Once a completed application has been accepted for the designation of a landmark or an historic district, no building, alteration, demolition, removal, or relocation permits for any historic resource, improvement, building, or structure relative to a proposed landmark or

[141] Berkeley, California, Code of Ordinances, § 3.24.280 (Landmarks, historic districts or structures of merit – Unsafe or dangerous conditions – Effect); *see also*, Davis, California, Code of Ordinances, § 29-145.17 (Unsafe or dangerous conditions).
[142] Palo Alto, California, Code of Ordinances, § 16.49.80.

> within a proposed historic district shall be issued until a final determination is made regarding the proposed designation, except as provided under Article 6 of this chapter.[143]

In California, municipal government moratoria on development permits are allowed under the authority of Government Code Section 65858.[144] Courts have also generally upheld such emergency provisions, realizing that surveys, studies, and ordinance drafting may be necessary and cannot be done overnight. A recent U.S. Supreme Court case from California affirmed the ability of local governments to enact temporary moratoria.[145]

Because many local governments lack a comprehensive survey of historical resources, situations continue to arise in which an owner secures a permit to demolish a building of possible designation quality. When preservation interests learn of the plans, a battle to protect the structure often ensues. In other instances, a preservation commission may announce its intent to study a neighborhood for possible designation. Some owners, in an attempt to circumvent future restrictions, may rush to city hall to secure demolition permits. What can a local government do under these circumstances to protect threatened historical resources without violating the legal rights of property owners?

Surveys take time and can be expensive, and, even when a survey has been completed, it may be several years before identification is translated into designation. What, then, should a local commission do when a building of landmark quality that enjoys no official protection is threatened with demolition? Provided the Government Code authorization for local government moratoria applies in the given situation, the local government or commission may enact a temporary ban or moratorium that would halt all activities that could be affected by the survey or designation process, including, potentially, revocation of an already issued building permit or halting demolition. The availability of this type of authority in California may be evidenced by Davis's ordinance, which contains the following provision that could potentially halt a wide variety of development activities:

> While the commission's public hearing or the City Council's decision on the commission's [designation] recommendation is pending, the City Council upon the commission's recommendation may declare a work moratorium. During the moratorium, any work that would require an alteration permit if the improvement were already designated a historical resource or outstanding historical resource or if it were already located in a historic district shall not be carried out. The work moratorium will end upon the earlier of the City Council's decision on the proposed designation, the moratorium termination date designated by the City Council, or one hundred eighty calendar days from the date of commencement of the moratorium.[146]

Invoking emergency demolition bans raises two major legal issues, involving procedural due process and "vested rights." While the constitutional guarantee of due process

[143] Redondo Beach, California, Code of Ordinances, § 10.4.305 (Delay of work pending hearing).
[144] *See*, *Bank of the Orient v. Town of Tiburon*, 220 Cal.App.3d 992 [269 Cal.Rptr. 690] (Cal. App. 1990).
[145] *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency et al.*, U.S. Supreme Court Docket No. 00–1167, decided April 23, 2002.
[146] Davis, California, Code of Ordinances, § 29-145.11 (Designation Procedures – Work Moratorium).

generally requires that affected persons be given notice and an opportunity to be heard before adoption and application of a restrictive ordinance, it is well established that a governmental body may take temporary emergency action without prior notice or hearing if affected persons are afforded an opportunity to be heard before such action becomes final. For example, as soon as possible after enacting a demolition ban, the local government should afford the owner or developer an opportunity to be heard and contest designation or revocation of a building permit.[147]

Assuming that the local government has satisfied procedural due process dictates, it must still face the so-called "vested rights" issue. This arises, for example, when a developer, relying on existing law, spends money in anticipation of demolishing a building of landmark quality. Although there is no such thing as a "vested right" under the U.S. Constitution, most state courts recognize it in some form. If developer has done nothing more than obtain a demolition or building permit, they probably cannot claim a vested right to proceed. If, however, the developer has signed a contract with a demolition company and has spent funds to plan for a new development on the site prior to enactment of the ban, the question is a more difficult one. The vested rights issue can be defused by establishing an administrative proceeding that places the burden on developers to produce evidence that they should be allowed to proceed. In this way, the local government can determine if the facts support its decision to forbid demolition.

While valuable and often essential to preservation, moratoria have serious ramifications and thus require forethought. Of equal importance, they should not be used as an excuse to do nothing. The ordinance establishing the moratorium should state the reasons for its invocation, set forth a specific expiration date, and contain a safety valve to allow the preservation commission to deal with hardship cases. From a practical perspective, the types of development or alteration to be prohibited or made subject to review should be carefully delineated.

ADMINISTRATION

Elaborate controls on alterations, strong affirmative maintenance requirements, and tough enforcement provisions may look good on paper but be unworkable in practice if the local government lacks adequate staff to enforce the law.

From a practical aspect, local commissions should establish procedures to ensure uniform and efficient enforcement of the preservation law. Communities should consider all options to reduce the administrative burden of monitoring demolition and alterations as well as the affirmative maintenance of hundreds of historical resources. A portfolio of photographs of existing (pre-modification) conditions for each historical resource can often be a useful tool toward this end. If an owner illegally alters a structure, the change will usually show up clearly in photographs. Photos also are very useful evidence in court enforcement proceedings.

---

[147] *See*, *Selinger v. City Council*, 216 Cal.App.3d 259, 270-71 [216 Cal.Rptr. 499] (Cal. App. 1989).

What other information should be in the records maintained for each property? Not to be overlooked is the simple fact of who owns each property and where they may be served with legal notice. This information may be crucial if emergency action is necessary to stop an illegal demolition or alteration. The file also should include a history of the property from an enforcement perspective—past violations, inspection results, and so forth.

All this information will be crucial if a case goes to court. It is not uncommon for enforcement cases to be handled by a municipal attorney who is largely unfamiliar with the case and who has little time to brush upon the facts before trial. Thus, whether a case is lost or won may depend on whether the preservation commission and enforcement staff has put together a good factual case. The property file can supply essential evidence, particularly photographs and inspection records. A chronology summarizing the case for the attorney—notices of violation, attempts at voluntary compliance, and the like—will also be very helpful.

A subsidiary issue is who should be liable for the fines or duty to repair. Most land-use ordinances provide that the property owner or person controlling the property, particularly a lessee, can be held liable for violations. In a preservation context, the ordinance drafters should consider allowing actions against entities such as construction firms or demolition companies responsible for illegal demolition or alterations.

Another issue is who should be able to enforce local preservation regulations—the local government, private citizens, or both. Many environmental and land-use laws allow citizens to bring suits to enforce preservation provisions, particularly when the relevant government body has refused or failed to act. Who is empowered to initiate enforcement actions will depend largely on local considerations. Does the local government have adequate resources to enforce the law? Is a citizen suit provision politically feasible? Is it likely that citizens or neighborhood groups would use such a power?

Clearly, municipalities should attempt to enforce preservation restrictions as evenhandedly as possible. Failure to do so should not lead to wholesale invalidation of such restrictions, but in close cases in which compliance would, for example, create a serious economic hardship, the courts may be hesitant to enforce the local law.

SECTION 9: DEFINITIONS

Effective local preservation ordinances will contain a thorough and carefully conceived set of definitions for essential terms. Nationally, court cases have shown that it is not sufficient to rely on common sense where terms may be subject to judicial challenge. A District of Columbia court, for example, found that a proposal to completely gut an historical hotel, leaving only the façade standing, was not subject to the preservation ordinance because the D.C. ordinance at the time applied only to "alterations." The court found that the proposal was a "demolition" and therefore specifically exempted from preservation regulations. According to an Ohio case, signs in an historic district were not subject to the rules of a local preservation ordinance because the ordinance applied to only "buildings" and "structures." In both these cases the authority of a local preservation ordinance was diminished without adequate definitions to clarify its intent.

The ordinance should clearly define the distinctions between alterations and demolitions, and should clarify the types of buildings, structures, signs, or other features that are regulated under the ordinance. Other essential terms that should be defined in a typical ordinance include:

- "Historical resource" (or "landmark," "historical monument," or other term used in the local ordinance to designate a property of preservation quality),
- "Contributing building or structure,"
- "Significant features or characteristics,"
- "Structure of merit,"
- "Dangerous building,"
- "Certificate of appropriateness,"
- "Project" (or "development"),
- "Environmental change," and
- "Affected property."

Most preservation ordinances also contain a set of definitions for the various actors in the preservation process. Terms such as "applicant," "planning director," and "preservation commission" are routinely defined, often in a shortened form for convenience (*i.e.*, "commission" for preservation commission). Local governments that authorize an "interested party" or "aggrieved party" to file appeals should also define those terms, as appropriate.

Other terms will require definition based on the specific policies enacted in a local preservation ordinance. For example, if a local jurisdiction elects to provide an administrative process for economic hardship claims, then such terms as "economic hardship" and "reasonable return" should be defined. Similarly, if a timetable for appeals is incorporated into the ordinance, definitions should be provided for "business days" or other measure of time used in the appeals section. Finally, the definitions section may be used to provide for a shortened version of any phrase used multiple

times within the ordinance (*e.g.*, “Secretary’s standards” refers to the Secretary of the Interior’s Standards for the Treatment of Historic Properties).

Placement of the definitions section at the end of a preservation ordinance, like a glossary in a book, is recommended as a way to clarify that the definitions are uniformly applicable to all provisions of the preservation ordinance. Where a preservation ordinance is codified within a larger development or zoning code, it is advisable to incorporate preservation-related definitions within the general definitions section of the overall ordinance. Consolidating all definitions within a single section is an effective way to identify and eliminate potentially conflicting uses of the same or similar terms.

DEVELOPING A COMPREHENSIVE PRESERVATION PROGRAM

A local preservation ordinance should be just one part of a multi-faceted, comprehensive program aimed at protecting all of the community's historic resources. Such a program should rely on both regulatory and non-regulatory techniques. From a legal perspective, if a local government can demonstrate that it has made preservation part of its overall effort to foster and promote the general welfare and well-being of the community as a whole, the local preservation ordinance stands a better chance of surviving judicial scrutiny. From a practical standpoint, a comprehensive preservation program not only gives the local government greater access to federal and state funding and greater leverage over federal projects that affect historic properties and areas; it can also inject an element of certainty into the local development regulatory process, thereby fostering needed and compatible economic development, while preserving the community's historic and cultural values.

While the elements that constitute a comprehensive preservation program will vary greatly by jurisdiction, there are a few features common to all, including preparation of reliable background studies and surveys, economic assistance, and education and technical assistance. This section discusses these three topics. Also, as is discussed throughout this manual, coordination with other local laws and programs is an important consideration when refining a local preservation ordinance.

SURVEYS AND STUDIES

The most effective preservation ordinances are supported by thorough, methodical studies and surveys of the community's historic resources. Resources of potential historical significance should be surveyed and the architectural or historical significance of individual resources and districts documented before designation takes place. Surveys and studies regarding what is important for the community to preserve are often critical as they may help to counter any argument that the act of designating a structure is arbitrary and capricious.

In the landmark *Penn Central* case, the Supreme Court pointed out the importance of background surveys and studies, stating that the "function…of identifying properties and areas of historical and architectural importance is critical to any landmark preservation effort." Historic building surveys are a key element in making preservation planning complementary with development goals. Such surveys help to evaluate the impact of new development; they enable planning decisions to be made against a preservation background; they are useful in developing special planning tools and incentives; and, by making information available early in the project planning process, such surveys help the review process to operate more efficiently.

Ideally, experienced professionals will conduct such surveys, but, in smaller communities especially, volunteer efforts should suffice, particularly when they draw on the extensive expertise available through state historic preservation offices, the federal

government, universities, and preservation organizations such as the National Trust for Historic Preservation. The key is to maintain high standards in documentation. Helping to bolster the defensibility of its ordinance, Colton, California, defines "survey" in a way that provides guidance regarding documentary standards:

> Survey is the accepted method of systematically studying historic resources. It includes a physical description and a photograph of each historic resource, legal information from title or assessment records, statements of significance according to the criteria in this ordinance, and a statement of any threat to the integrity or continued existence of the resource. The information for each resource is recorded on a survey sheet.

Some California jurisdictions require or recommend at least an informal, "windshield" survey for a property to be determined eligible for designation. For example, the Burbank Municipal Code contains this provision:

> Windshield survey. The City Planner shall maintain an inventory of potentially significant historic places, structures, or improvements. The purpose of this inventory is to identify properties, improvements, or structures which may warrant further research for the purposes of establishing historical significance.[148]

Using the survey as a guide, the community then should choose carefully those structures or areas it believes worth preserving. Attention to detail in the survey and designation stages will pay dividends later on. As an illustration, the Colorado Supreme Court struck down a preservation ordinance that designated the entire city as a historic district on the ground that, in practice, the local commission treated areas within the district differently, thus indicating that district boundaries should have been drawn with greater precision.[149]

Once a community has completed its initial survey and designated landmarks and districts, it should ensure that the survey is periodically reviewed and updated. Buildings that were overlooked the first time around may be discovered, or some that were consciously omitted may assume a new significance. What a community considers unworthy of protection may change over the course of only a few years. For this reason, many ordinances contain provisions similar to those found in the Ventura County, California, ordinance, requiring that the architectural survey be "periodically" updated.[150]

Surveys and studies take time to gather essential documentation and to complete necessary fieldwork. When owners of potential historical resources catch wind of such activity, some may react by rushing to city hall for a demolition permit. The answer may be for the local government to enact a development or demolition moratorium during the study period. Moratoriums have been upheld in the historical resource preservation context.[151]

---

[148] Burbank, California, Municipal Code, § 31-928(a)(1).
[149] *South of Second Associates v. Georgetown*, 580 P.2d 807 (Colo. 1978).
[150] County of Ventura, California, Code of Ordinances, § 1364-11 (Surveys).
[151] *City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974) (city successfully argued that a 60-day development moratorium was essential to protect landmarks while the city was formulating a

The importance of conducting historical resource surveys before designation occurs cannot be overestimated. Local officials will look to such surveys for guidance when presented with development applications that affect historical resources. Also, some landowners may challenge designations and permit denials. Courts will scrutinize the actions of preservation commissions in such cases and will examine relevant background materials such as historic resource surveys. Fortunately, courts show deference to local designations in most instances in which the locality has made an honest effort based on the information before it. Indeed, designations probably will withstand judicial scrutiny even if credible supporting evidence and documentation are produced after the fact at trial. The local government's determination carries with it a presumption of validity and local governments must take care that this presumption is not squandered. (There are, however, from a few courts, some rumblings of discontent about eleventh-hour attempts by local governments and preservationists to designate a historical resource, thereby thwarting demolition or alteration permitted under the then existing law.)

Any sort of survey, amateur or professional, will reinforce the local government's position that its action has a rational basis. However, while it may be best to conduct professional surveys of historic resources before designation, they are not a legal requisite. There is no constitutional requirement that a survey be performed prior to designation if the local government can prove at trial that the designated structure or districts of architectural or historic significance at issue is defined by a valid local ordinance.

Finally, it should be noted that inclusion of a structure or district in a survey of potentially eligible historic resources is not the same as designation. A survey is only the first step toward affording a structure or district protection under an ordinance.[152] While under CEQA a property included in a survey with a certain status assigned to it is presumed to be a historical resource, which must be considered by a decision-maker, the survey itself provides no formal protection, as does an ordinance.

ECONOMIC ASSISTANCE

Many California communities not only protect historic resources through regulations that restrict what property owners may do; they also provide economic incentives and assistance to encourage preservation. The adoption of economic incentives is an important tool to assist owners in returning often underused historic resources back to active service within the community.

One of the most important forms of economic assistance is a state law (the Mills Act, California Govt. Code §§ 50280, et seq.) that allows owners of certain historic properties

---

preservation plan).

[152] *See*, Citizens for Responsible Development v. City of West Hollywood, 39 Cal.App.4th 490, 504, 45 Cal.Rptr.2d 917 (Cal. App. 1995) (characterizing an inventory of potentially historic properties as "an overinclusive list… never, in any way, intended to constitute a final determination" as to actual historic value).

and local government assessors to enter into contracts for property tax reduction. Qualification for property tax reduction under this law is conditioned on maintenance of the property as a historic resource for a set period, usually the duration of the property tax credit and/or ten years.[153]

In addition, many jurisdictions have established direct grant programs or revolving funds for rehabilitation. Still others have passed laws enabling owners to donate facade easements to the local government or private organizations, thereby making the owner eligible for special federal income tax deductions.

Many communities attempt to make several forms of economic assistance available. For example, the Glendale, California, ordinance lists several forms of incentives and assistance, including the Mills Act property tax relief, reduction in parking requirements, and allowance of a broad range of allowable uses.[154]

The Glendale example shows that government funding money is not the only tool available for preservation programs. Several cities have initiated programs to help owners of historical resources obtain private financing for rehabilitation or locate prospective buyers. Communities might also consider adopting policies to house government offices in designated historic buildings, or establish a listing service to attract potential tenants to a landmark building. The Danville, California, ordinance provides several other incentive options:

> The Town of Danville may offer the following incentives to the owner(s) of property meeting the criteria for designation in order to encourage their participation in the preservation program:
> a. Waive restrictions contained in Section 32-45, Downtown Business District, subsections 32-45.11, 32-45.12 and 32-45.14 on the location of personal service, service/commercial, service office, and office uses in Downtown Business District Areas 1, 2, and 4;
> b. If located within area 1, 2 or 3 of the Downtown Business District, a reduction in the parking requirements for any approved addition to the structure and/or site, or approved change in use;
> c. Relaxation of development standards for additions to designated structures and/or site;
> d. A reduction in the fees for the appropriate building permits required to do improvements;
> e. Expedited processing of permit applications;
> f. Liberal interpretation of the Historic Building Code;
> g. If located in the Downtown Business District, a reduction of the anticipated beautification assessment;
> h. Availability of low interest loans for alteration of the improvement;
> i. Availability of grants for rehabilitation from a portion of the Town's retail sales tax revenues, as may be budgeted from time-to-time;
> j. A reduction in property taxes;
> k. Inclusion in a pamphlet to be distributed to residents and tourists;
> l. Identification plaques for designated improvements;

[153] More information on the Mills Act can be found at the website of the California Office of Historic Preservation, Technical Assistance Series #12, "Mills Act Property Tax Abatement Program."
[154] Glendale, California, Code of Ordinances, § 15.20.070 (Incentive program for historic resources).

m. Such other incentives as Town Council may from time-to-time implement.[155]

The approaches identified above have one thing in common; they tend to defuse many of the economic issues surrounding historic resource regulation.

Not every community, particularly smaller ones, will be able to offer the various forms of economic assistance noted above - nor does the law require that they do so. Fortunately, the economic development stakes are not as great in those places as they are in big cities in which millions of dollars may be involved in a single development.

The idea is to make preservation easy for owners of historical resources. Economic assistance may not only help preserve buildings but may also help keep a difficult case out of court. And if litigation does arise, such aids may make the difference to a court that would like to uphold restrictions but is troubled by a seemingly severe economic impact on the owner.

EDUCATION AND TECHNICAL ASSISTANCE

In addition to economic assistance, cities and towns should recognize the importance of technical assistance for landmark owners. Many people have questions about the legal and practical framework for historic preservation activities in their community. For instance, there may be confusion about how the National Register of Historic Places relates to local and state activities and whether national listing, by itself, imposes any special requirements on property owners. Often, there are common perceptions about the extent of the local government's regulatory reach — just what actions may the city deny or delay?

For these reasons, an important part of a comprehensive preservation program should be educational and outreach efforts to educate homeowners, developers, and others about why historic resources are significant in the community, and what steps the city is taking to protect those resources. The education effort might target specific audiences with information that will be useful to them; the real estate community, for example, may wish to understand better any impacts that historic regulation will have on local home sales prices. Several cities, such as Seattle and Cincinnati, have set up special offices to advise owners and developers about rehabilitation plans.

In California, many current preservation ordinances (e.g., San Francisco, Oceanside, Oakland) note that it is the purpose and duty of the preservation commission to promote the preservation program. In many cases, California preservation boards produce and disseminate informational materials regarding their ordinances and the benefits of the program. The preservation board may also, as part of its educational mission, field questions and provide advice to specific property owners, particularly those with properties that are candidates for designation.

[155] Danville, California, Code of Ordinances, § 32-72.5 (Incentives).

Notwithstanding the publicity often given demolition battles, they are not the norm. Effective education and outreach programs can help inform the public about the many benefits of preservation, and thus can help build support for voluntary compliance with preservation ordinances. The education process can both explain the specific mechanics of the protections afforded by the ordinance, and also can help citizens understand the local history and why historic resources are worth preserving.