

# Creating an Effective and Useful Preservation Ordinance: One Size Does Not Fit All

## Preservation Planning and Commissioner Workshop



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# The Starting Question



How do you answer?

What is the legal basis for regulations related to preservation in your community?

You are considering the designation of the city's oldest house as a historic landmark. The owner, who objects to the designation, has asked if the city has the right to do so.



# Commission Authority

- The first issue facing any local historic preservation commission is whether it has the legal authority to act.

# What is a Historic Preservation Ordinance?

## Protection for Historic Resources

*Local historic preservation ordinances are the laws that communities implement to protect historic preservation resources. These laws protect individual sites and areas, and they offer the strongest form of legal protection for historic properties. Each ordinance is tailored to fit the needs that best suit the individual community.*  
(National Trust for Historic Preservation)

# 10<sup>th</sup> Amendment

## The 10th Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

# 10<sup>th</sup> Amendment

## Police Power of State and Local Governments

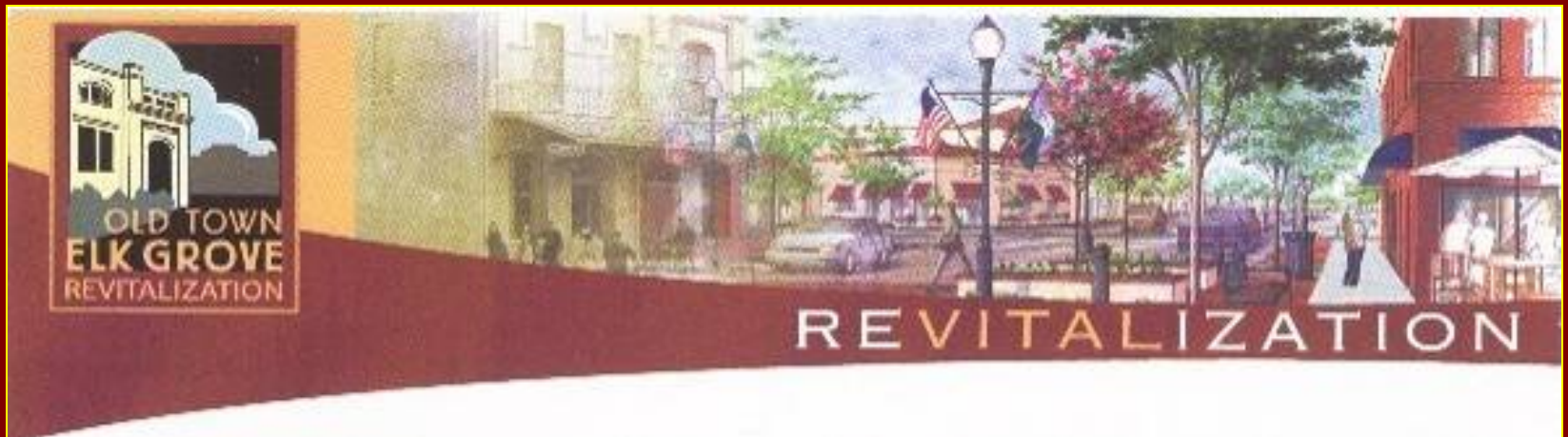
- Reserved to the states
- States may delegate to local governments
- Power of a government to provide for the public health, safety, morals and general welfare of its citizens, including historic preservation

# Early Historic Preservation Programs

- Informal
- Honorary designations
- Administered by community historical organizations
- Focus on great (white) men
- Focus on great architecture

# Changes in Preservation Direction

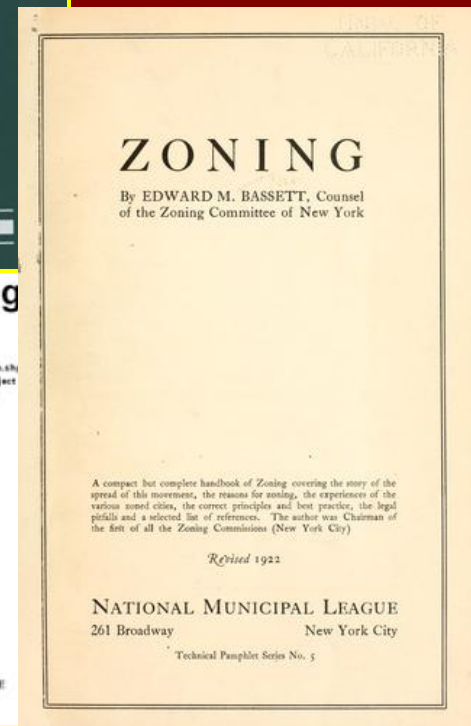
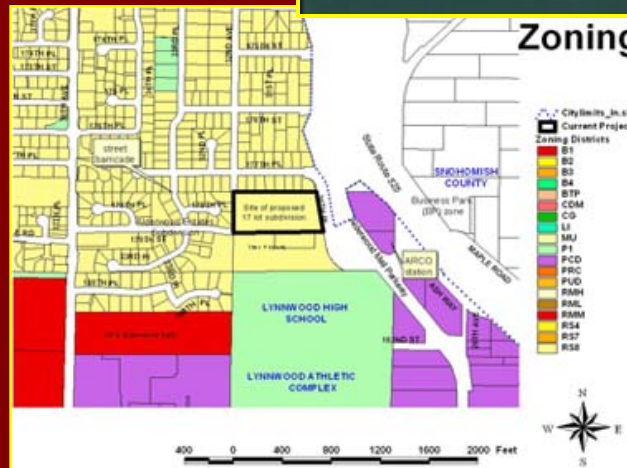
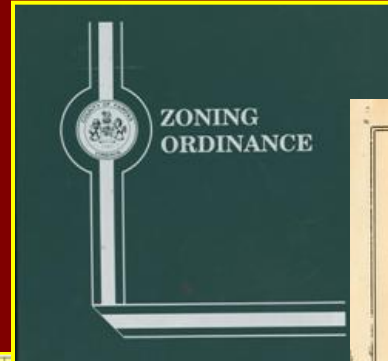
- Tied to land use planning
- Integration of historic preservation into city and county planning departments
- Preservation aligned with zoning





# Zoning

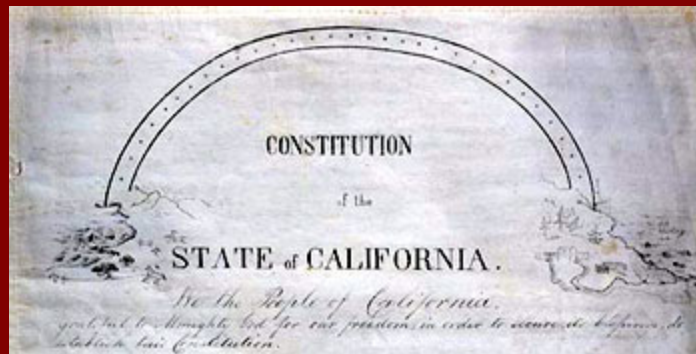
- Euclid v. Ambler (1922)
- Addressed the question of whether a municipality could deny property owners the right to use their land however they chose



# California Constitution

- *A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general law.*

Article 11, Local Government, Sec. 7



# California Statutes Counties

- (a) The board of supervisors may acquire property for the preservation or development of a historical landmark. The board of supervisors may also acquire property for development for recreational purposes and for development of facilities in connection therewith.
- (b) (b) The board 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. —

# California Statutes Cities

- a) The legislative body may acquire property for the preservation or development of a historical landmark. The legislative body may also acquire property for development for recreational purposes and for development of facilities in connection therewith.
- (b) The legislative body may provide for places, buildings, structures, works of art, and other objects, having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. California Gov. Code § 37361

# What is a Historical Preservation Ordinance?

## **Assurance of Due Process**

An equally important purpose of the local preservation ordinance is to ensure due process and equal protection

# 5<sup>th</sup> Amendment

## Individual Rights

Fifth Amendment  
To the U. S. Constitution

No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Protects citizens from encroachment by the federal government upon their property

# 14<sup>th</sup> Amendment

## Individual Rights

- Assures that American's rights are protected against federal, state and local governments
- Rights are protected against encroachment
- Nothing the state does can deprive Americans of the right to use their property

### 14th Amendment

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14

California Office of Historic Preservation  
Department of Parks & Recreation  
*Technical Assistance Series*

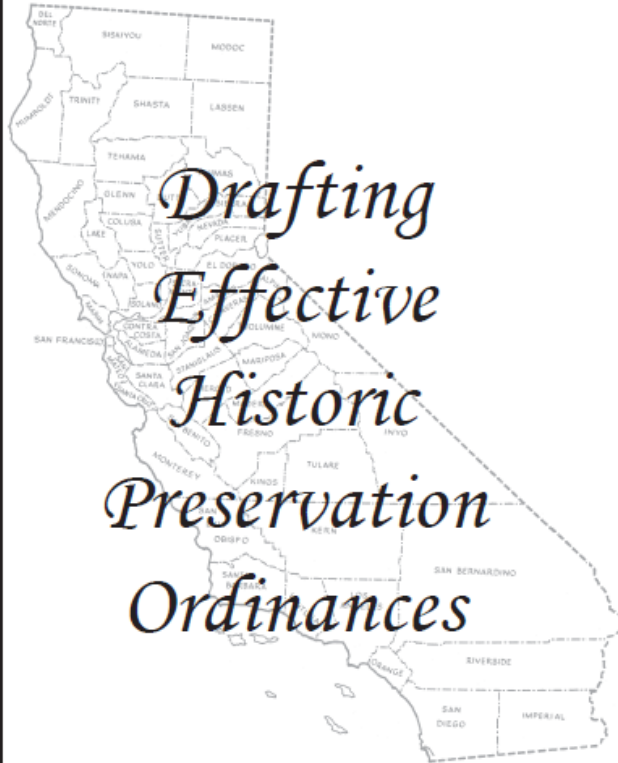


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# Questions to Ask

- What do you want your HP program to look like? Decide what you want first, then write an ordinance to fit those needs.
- Where does HP interact with other local government programs and regulations, such as zoning, land use planning, code enforcement or the building department?
- What provisions in the ordinance will be supported by the community and elected officials?

# KEY ELEMENTS

Purpose

Enabling Authority

Preservation Commission

Designation Procedures &  
Criteria

Actions subject to Review

Economic Effects



Appeals

Enforcement

Definitions

Severability

# What is the Purpose of Your Ordinance?

- What is the purpose behind the ordinance?
  - What resources should be protected?
  - How should resources be protected?
  - How should the ordinance be administered and enforced?
- 
- Each community is unique. Don't feel constrained by what other communities have done.

## 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.

# Enabling Authority

- U. S. & California Constitutions
- “Police power” of local governments to protect the health, safety and welfare of citizens
- California Government Code Sections 25373(b) for counties and 37361(b) for cities
- U.S. Supreme Court – Penn Central Transportation v. New York City



# Establishment of the Preservation Commission

You are a member of your local preservation commission. A proposal to rehabilitate a historic building is on the agenda. How will you and your colleagues operate as a commission? And how will you make your decisions?



# Establishment of the Preservation Commission



- Who administers and enforces preservation ordinance?
- Composition of Commission
  - Who appoints?
  - Term?
  - Professional qualifications
- Scope of powers



# Establishment of Preservation Commission

- Who will serve on the commission?



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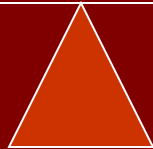
# ESTABLISHMENT OF PRESERVATION COMMISSION

What is the commission's authority?

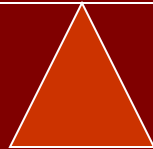
Advisory  
Only



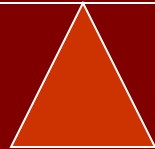
Final  
Authority



Split  
Authority



Assigned to  
other entities



## 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.**

# Preservation Commission Powers upheld by Courts

- Power to deny demolition or alterations
- Power to regulate new construction or development
- Power to impose affirmative maintenance requirements (intervene in demolition by neglect)

# Penn Central Transportation Co. v. New York City



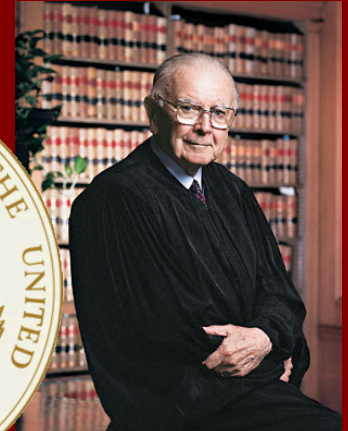
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- We have] no fixed rule against making additions to designated buildings—it all depends on how they are done.... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.
- Landmarks cannot be divorced from their settings — particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way — with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.



# Penn Central Transportation Co. v. New York City

- [The] New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.*



Court Justice William J. Brennan Jr.

# The Preservation Commission and Staff

## Role of Commissioner

- Serve the public interest
- Making designations
- Reviewing projects and advising
- Planning
- Administering incentives
- Monitoring & site visits
- Education

## Role of Staff

- Technical advisors
- Administrators
- Decision-makers

**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;



# Procedures and Criteria for Designating Historic Resources

A property owner wants to designate her property as a historic landmark under your preservation ordinance, and she wants to know what the process will be. How will you answer her?



# Designating Historical Resources Substantive Issues



## Criteria for the designation of historic resources

The resource should be listed on the National Register of Historic Places or meet one of the following:

- Be associated with significant events in the history of the area
- Be associated with significant people in history
- Exemplifies distinctive characteristics of a certain time in history
- Has provided or will provide insight to the history of the area

- Provide clear designation criteria standards
- Identify what can be designated
- Define key terms
- Uses criteria similar to National Register and California Register

# Designation and Owner's Consent -Choices-

- Owner must agree to initiate nomination
- Only named parties may nominate, e.g., city council, historic preservation commission
- Anyone may nominate
- Owner may object to listing



# Owner's 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*

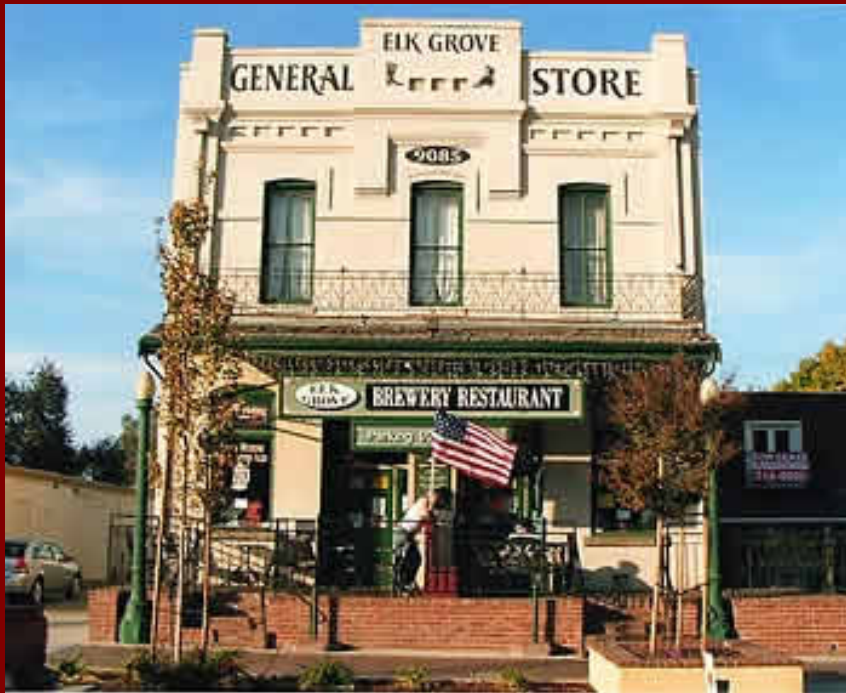
A. Description. H-1 zoning is intended to identify and protect the most important historical resources in the City, generally including properties with statewide, national, or international historic significance where that significance would be recognized outside of the City, and the City is steward 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.

# Designation of Historical Resources Procedural Issues

- **Step-by-step guidelines**
  - Outline contents of application
  - Written notice to owner and interested parties
  - Public hearing
  - Defined process
  - Written findings of fact for designation



# Procedures and Criteria for the Treatment of Historic Properties



- As a commissioner, you are preparing to review a proposal to alter a historic commercial building. The project would include repairs to existing features, some porch alterations and a rear addition. How will you determine if this work is appropriate?



# What Projects Can the Commission Review?

Infill



Demolition by neglect



Moving



Rehabilitation



Demolition

# What are the Standards for Review?

## Substantive Due Process

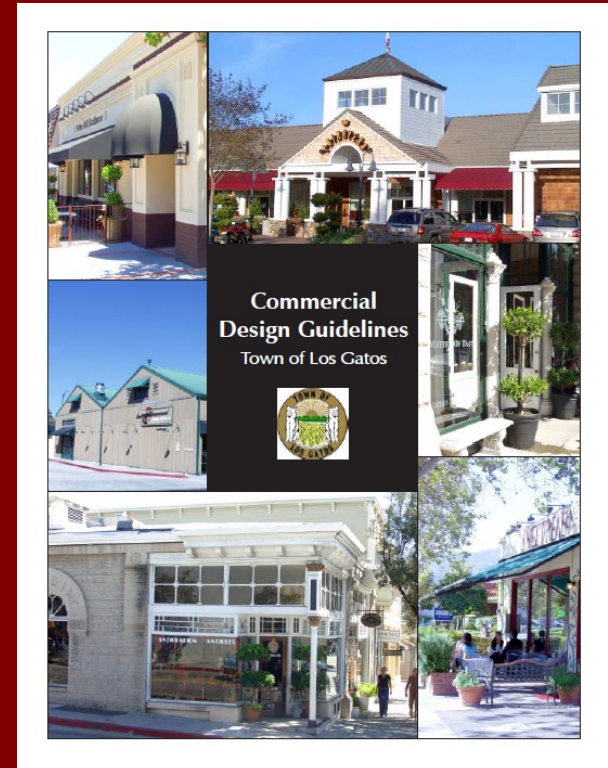
- Standards need to be
  - Defined
  - Reflect local preservation goals
  - Provide for due process
  - Limit administrative discretion
  - Result in predictable decisions
- Good to reference the SOI Standards





# Design Guidelines

- Objectives
- Graphic examples
- Terms and Definitions
- Mandatory or Advisory?



# Procedures for Certificates of Appropriateness



- **Step-by-step guidelines**
  - Define project types that can be reviewed under the ordinance
  - Outline the basic process
  - Define contents of application
  - Criteria/Standards

# Certificates of Appropriateness

## Level of Review - Delegated Authority

- WHO?
  - Administrative Staff
  - Preservation Commission
  - Other elected or appointed body
- WHEN?
  - By type of project
  - Size/Complexity of the project



### **City of Danville**

*Code of Ordinances, § 32-72.16 (Review and determination)*

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.

### **City of Palo Alto**

*Code of Ordinances, § 16.49.134*

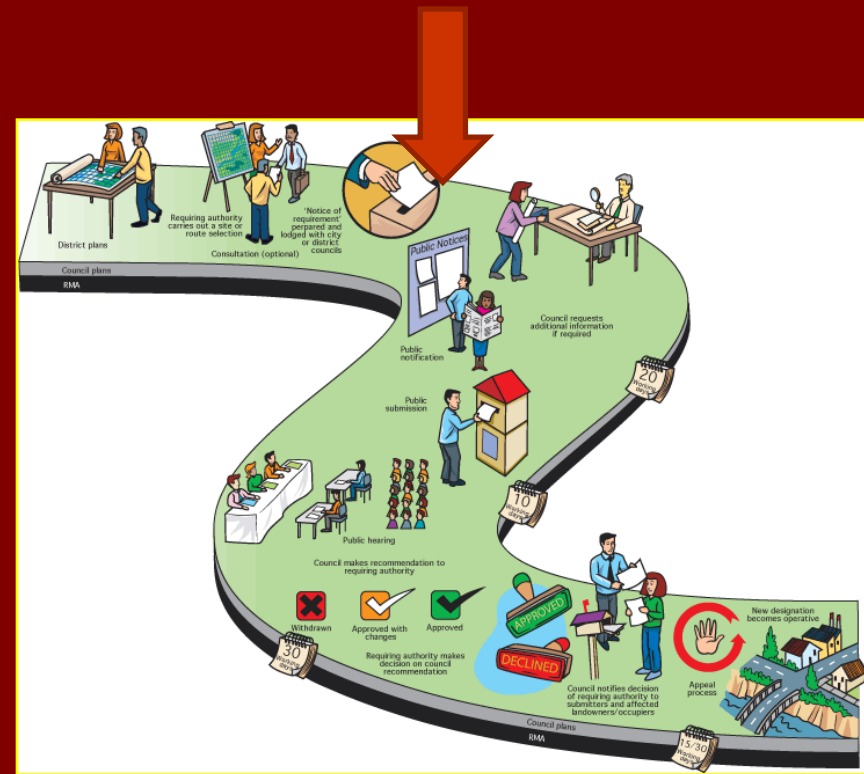
A minor alteration shall be subject to review by the director for the purpose of providing cooperative and constructive information to the property owner about alternative methods of **substantially complying with the Secretary of the Interior's Standards...** A major alteration shall be reviewed by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

# Certificates of Appropriateness

Do your procedures look like this?



Or like this?



# TAKINGS

- What is a Taking?
  - Results from a regulation that deprives landowner of ***all reasonable economic value*** of property
- When does a Taking occur?
  - Designation rarely = taking
  - Less than ***highest and best use*** or ***substantial diminution*** does not = taking
  - Historic conditions = reasonable expectations of use of property



# Takings

## Public Welfare v Individual Rights

### Physical Takings

- Eminent domain
- Just compensation

### Regulatory Takings

- When a general governmental regulation has the unintended effect of denying the owner a reasonable economic use of a property

# Penn Central Transportation Co. v. New York City

Whether a regulatory action that diminishes the value of a claimant's property constitutes a "taking" of that property depends on a three part inquiry for analyzing a broad range of regulatory takings claims:

- The economic impact of the regulation on the property-owner;
- The effect of the regulation on the owner's distinct investment-backed expectation; and
- The character of the governmental action.

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

Owners were not entitled to the so-called highest and best use, but rather to a reasonable and beneficial use of the property.



# Consideration of Economic Effects



The family which owns a historic building has applied for a demolition permit because otherwise keeping it would be an “economic hardship.” The building is badly deteriorated as well. How should you respond?

# Consideration of Economic Effects

## Establish an Evidentiary Checklist

- “Release valve”
- Enforcement of COA will cause *unusual and extreme economic* hardship
- “Reasonable return”
- *Bona Fide* attempt to rent or sell property
- Feasible or profitable alternative use
- Certificates of economic hardship



# Consideration of Economic Effects Hardship

## **San Francisco** *Planning Code § 1112.1*

(a) For **all** property:

- (1) The **amount paid** for the property;
- (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.

# Consideration of Economics Effects Preservation Incentives

## ☐ Economic Incentives

- Waiver or reduction of permit fees
- Reduction in parking requirements
- Non-compliance without variance for adaptive reuse
- Mills Act Property Tax Abatement Contracts
- Transfer of Development Rights
- Grants, low interest loans, revolving funds

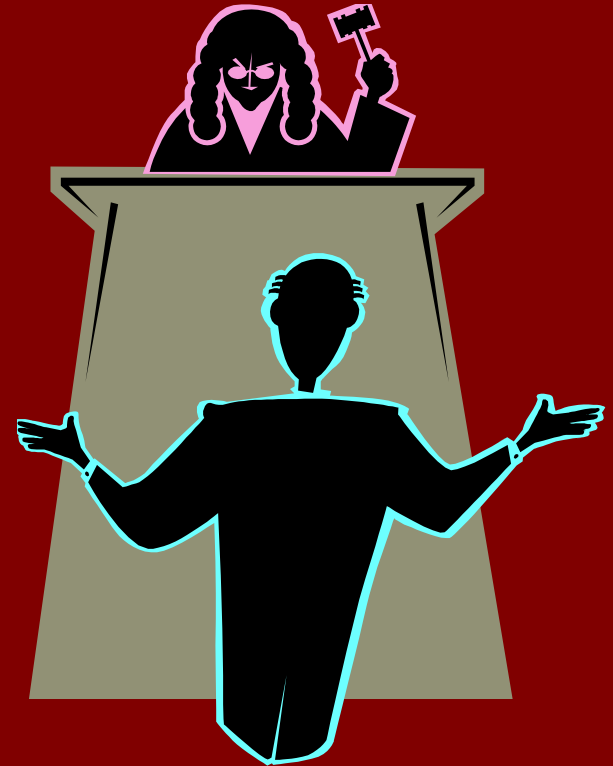
## ☐ Education and Technical Assistance

- Recognition & Awards



# Appeals

- Administrative resolution to avoid litigation
- Produce record for review in event of litigation
- Who can appeal?
- What decisions can be appealed?
- Who will respond to the appeal?
- What is the appeal process?



# Appeals

**Sacramento** *Landmarks Preservation Ordinance, § 15.124.360*

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.

**San Diego** *Municipal Code, § 123.0203*

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.

# Enforcement



## Primary Goal: **Compliance**

- Penalties for non-compliance need to outweigh the “benefits”
- Remedies for non-compliance
  - Fines
  - Injunctive relief to stop illegal demolition and enforce ordinance
  - Receiverships & entry onto land to correct
  - Forced reconstruction
  - Loss of further entitlement
  - Limit size of new project not to exceed what was demolished

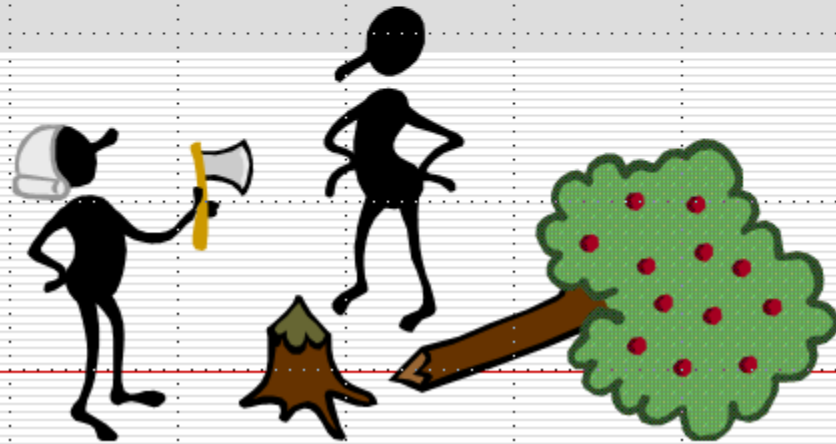
# Enforcement

## Loss of Further Entitlement

### Palo Alto

Section 16.49.090(a)(4)

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.





# Enforcement

## Maintenance & Upkeep of Historic Properties

- Administration should be uniform, efficient, practical
  - Avoid burdensome procedures
  - Sensitivity to Procedural Requirements
  - Demolition by Neglect
  - Public Safety Exclusion
- Affirmative maintenance requirements
  - State Historical Building Code



# Enforcement Fines

**Fresno**     *Code of Ordinances § 13.423 (Civil and Criminal Penalties)*

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.

# Definitions

- Use terms and definitions shared by National Register, California Register, and CEQA to promote better understanding
- Thorough and complete definitions needed to sustain judicial challenge
  - What is a demolition?
  - What is a locally designated property?



# Severability



## **Danville** *Section 5. Severability*

If any section, subsection, subdivision, paragraph, clause or phrase in this ordinance, or any part thereof, is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections or portions of this ordinance or any part thereof. The Town Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

# For More Information

- Local Government Assistance: Resources for Local Governments
- [http://www.ohp.parks.ca.gov/?page\\_id=1072](http://www.ohp.parks.ca.gov/?page_id=1072)

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