

# Preservation Law: Rights and Authority

Preservation Planning and  
Commissioner Workshop

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Does the Commission have the right  
to take action?

Does the Commission have the authority  
to take action?

# Delicate Balance

There is a delicate balance, a tension, between individual rights and the public good

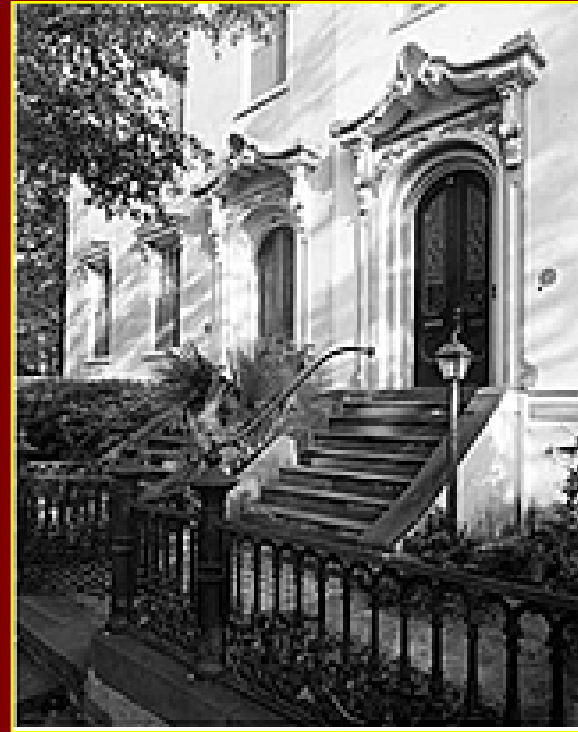


# Early Historic Preservation Programs

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

# Early Efforts to Regulate

- City of Charleston, “Old and Historic District,” 1931
  - No changes could be made to exterior architectural features that were subject to view from a public street or way.



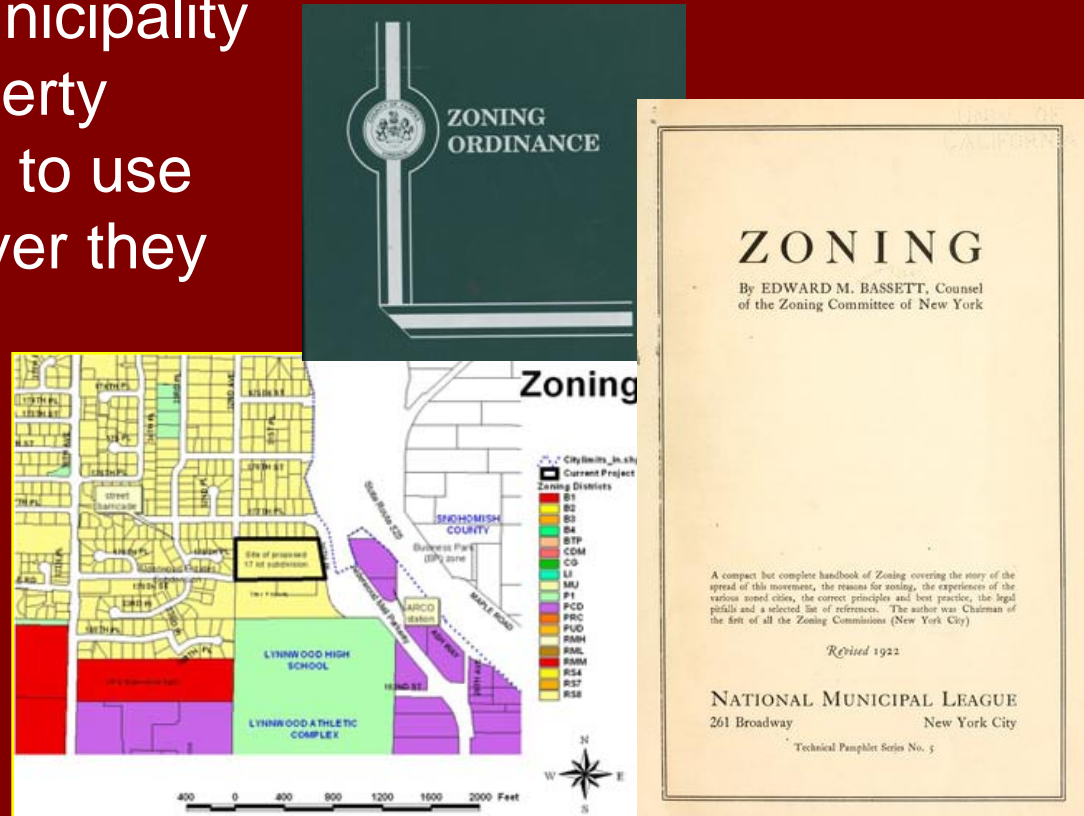
# Early Efforts to Regulate



New Orleans, 1937,  
Vieux Carre Commission  
created to protect the  
French Quarter

# Zoning

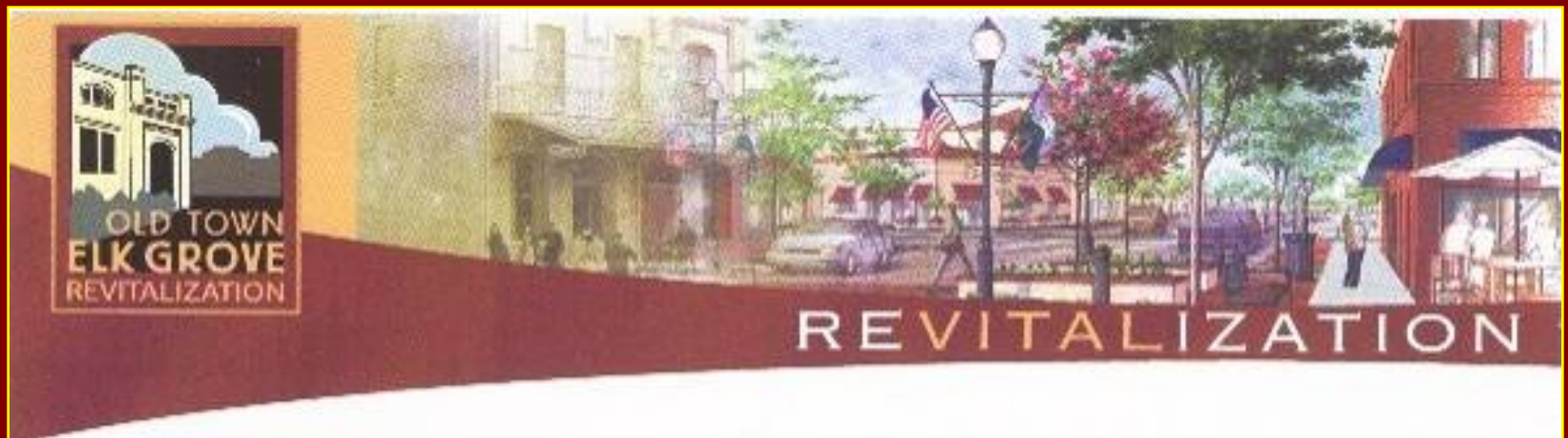
- Euclid v. Ambler (1922)
- Addressed the question of whether a municipality could deny property owners the right to use their land however they chose





# Changes in Direction of Preservation

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



# Changes in Direction of Preservation



- Shift of program responsibility from historical societies and museums to local government
- Historical societies & other organizations remain strong & important preservation advocates

# 10<sup>th</sup> Amendment

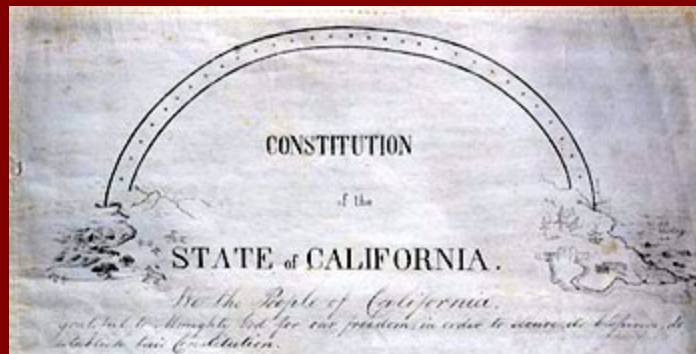
## Police Power of State and Local Governments

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

# 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 Gov. Code § 25373

# 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



# Police Power

- *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.*



Justice William O. Douglas  
Berman v Parker  
348 U. S. 26 (1954)

# 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.

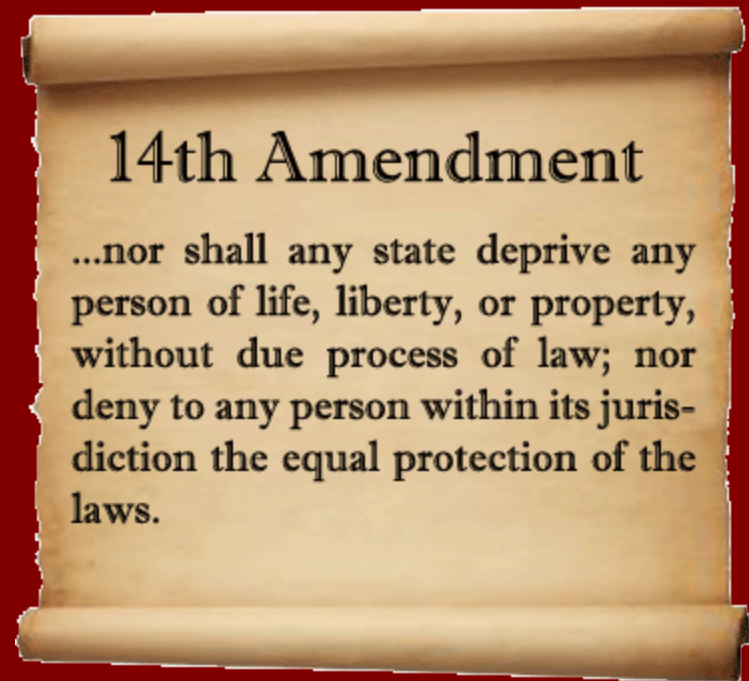
Protects citizens from encroachment by the federal government upon their property



# 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.

# Takings

## Physical Takings

- Eminent domain with just compensation

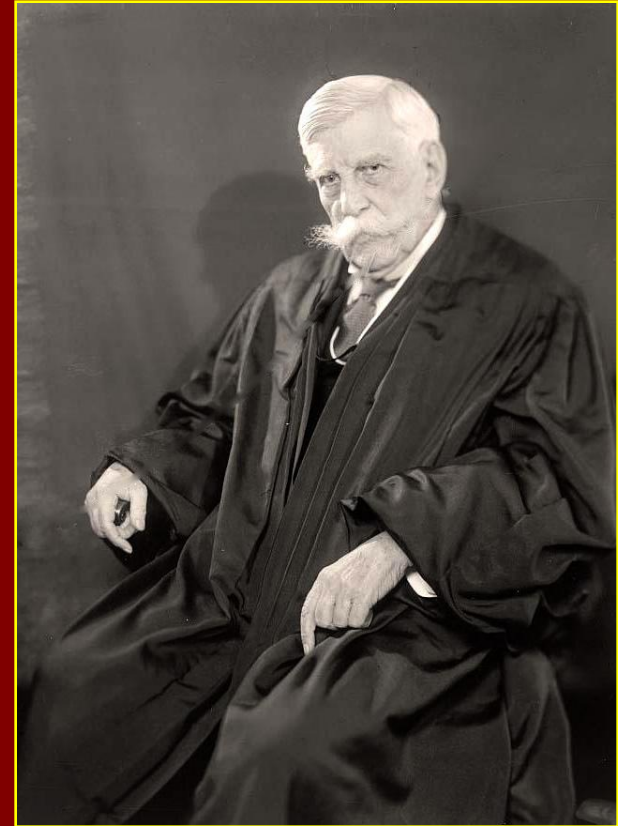
## Regulatory Takings

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

# Regulations

## How Far is Too Far?

- *The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*
- Justice Oliver Wendell Holmes
- Pennsylvania Coal Co. v. Mahon
- 260 U. S. 393 (1922)



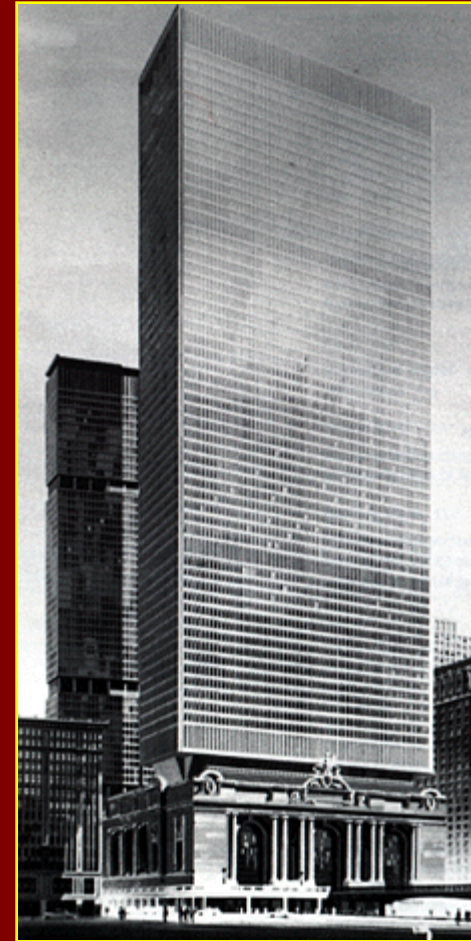
When does regulation go too far and become a taking?

Are preservation regulations a taking?

# Decline in revenues for railroad companies

- NY Pennsylvania Station demolished (1963)
- New York City Landmarks Law (1965)
- Penn Central Railroad Co. looked to new uses of Grand Central Terminal to increase revenues
- Landmarks Preservation Commission rejected plans on September 20, 1968
- LPC offered Pen Central the Transfer of Development Rights—Railroad rejected—Not enough compensation for loss of land use

# Penn Central Transportation Co. v. New York City



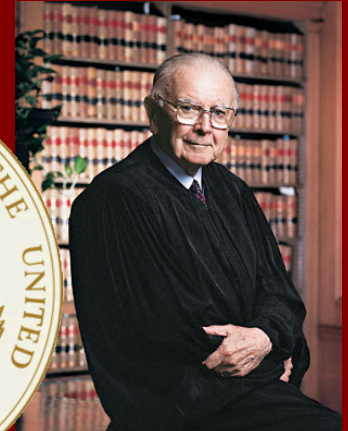
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- We have no fixed rule against making additions to designated buildings—it all depends on how they are done.... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the 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.



# 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 to 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.

# What is a Historic Preservation Ordinance?

*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*

# Historic Preservation Ordinance Local Authority

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



# KEY ELEMENTS

Purpose

Enabling Authority

Preservation Commission

Designation Procedures &  
Criteria

Actions subject to Review

Economic Effects



Appeals

Enforcement

Definitions

Severability

# Enabling Authority

- U. S. Constitution
- “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



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

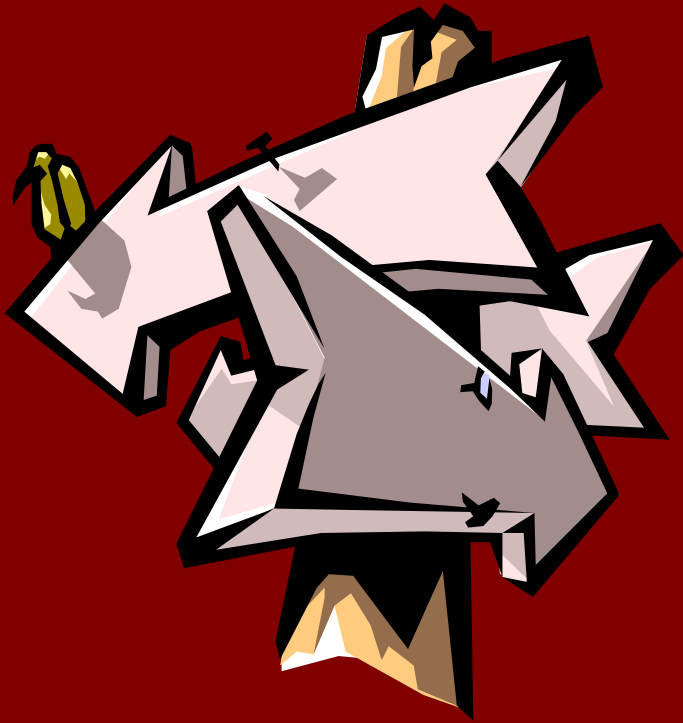
# Preservation Commission

## Scope of Powers

- ✓ Maintain local inventory
- ✓ Designation
- ✓ Review and Comment
- ✓ Make recommendations
- ✓ Incentives
- ✓ Public education
- ✓ Maintain relationship with Planning Commission, City Council, and other agencies



# Designating Historical Resources



- Provide clear designation criteria standards
- Define key terms
- Use criteria similar to National Register and California Register



# Designation of Historical Resources Procedures - Notice & Hearings

- Notice to owner and interested parties
- Public hearing
- Written findings



# Designation and Owner's Consent: Options

- 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



# Actions Subject to review

## Appropriate Level & Amount of Review



- Demolitions
  - Deny ?
  - Delay ?
- Alterations
  - Deny ?
  - Delay ?
- New construction/infill in historic areas
  - Deny ?
  - Delay ?

# Actions Subject to Review

## Appropriate Review Standards

- Standards need to be
  - Defined
  - Reflect local preservation goals
  - Provide for due process
  - Efficient
  - Fair
  - Limit administrative discretion
  - Result in predictable decisions



# Actions Subject to Review

## Procedures for Certificates of Appropriateness



- What kinds of projects/properties are subject to
- Basic Process
- Contents of Application
- Criteria
- Specific Powers

# Actions Subject to Review

## Level of Review - Delegated Authority

- WHO?
  - Administrative Staff
  - Preservation Commission
  - Other elected or appointed body
- WHEN?
  - Demolitions
  - Alterations
    - Major
    - Minor



# Actions Subject to Review

Do your procedures look like this?

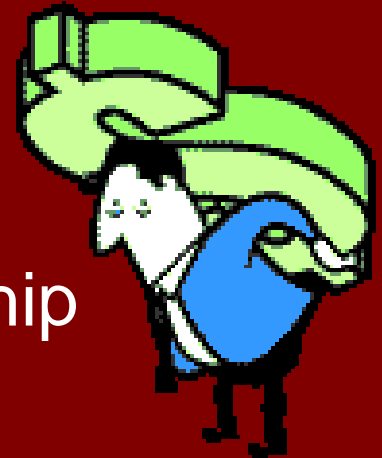


Or like this?



# Consideration of Economic Effects

- “Release valve”
- Will enforcement of COA 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





# 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
- How to avoid Takings Issues?



# 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?



# 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
  - Forcing reconstruction
  - Loss of further entitlement
- Notice of violation – Substantial Fine

# Enforcement

## Maintenance & Upkeep of Historic Properties

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



# 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
  - Difference between alterations and demolitions
  - Types of buildings, structures, signs, or other features



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