



## SECTION B

### LOCAL LAWS AS NEIGHBORHOOD GUARDIANS

#### Need a Neighborhood Guardian?

Do you live in an older or historic community that is not a designated “historic district”? A community, such as yours, represents a unique collection of resources, connected by time, place and feeling. Neighboring buildings and yards, streets, trees, sidewalks, alleys, public spaces, views, and vistas are all part of the “ensemble” you call home. This “collection” needs to be considered as important as each individual component, if the community character is going to remain for future generations to appreciate. Inappropriate changes that occur down the street or across town can ultimately affect an entire area.

#### Is any of this happening in your community?

- Inappropriate alterations to buildings and sites, such as removal of distinctive later features (“earlying up”); removal or alteration of windows; application of aluminum, vinyl, or concrete siding where the use of wood is traditional; construction of highly visible rooftop additions or other out-of-scale additions to commercial and residential structures; installation of new parking lots and driveways in residential yards; radical changes to traditional planting schemes; or incompatible accessibility solutions.
- Inappropriate alterations to the streetscape, such as installation of oversize signs or inappropriate awnings; brick sidewalks where they never existed historically; use of stock items from a product catalog to “revitalize” a public space; installation of “fake-historic” benches, lighting and signage; and planting out-of-scale decorative street trees.
- Construction of out-of-character houses and businesses, such as “monster new homes” in residential neighborhoods or out-of-scale commercial buildings—or even entire new subdivisions of large-scale houses within or adjacent to a neighborhood of smaller houses.

#### What can your community do now?

**Inform** your local elected officials about the features that make your neighborhood special and that these are important to keep. Tell them how you feel about loss and change “where you live.”

**Write** a local newspaper for the “letters-to-the-editor” column and get several signatures.

**Become a local historic district.** Adopt a local preservation ordinance with provisions for designating historic resources, creating a local review board, and writing local design review guidelines.

**Check into National Register of Historic Places designation.** The best combination is local historic district designation as well as federal National Register designation. While local designation creates an opportunity for local design review, federal designation provides additional potential for federal grant-in-aid funds and tax credits.

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The preservation ordinance is a law. And, since the notion of a law may seem somewhat overwhelming at first, here is what a national expert says:

“The preservation ordinance is nothing more than local legislation enacted to protect buildings and neighborhoods from destruction or insensitive rehabilitation...” *Pratt Cassity, Maintaining Community Character: How to Establish a Local Historic District. National Trust for Historic Preservation, 2000.*

When it comes to preserving private property in a historic district, most people are surprised to learn that a local law is generally stronger than a federal law—that only sharp local teeth are able to guard the historic character of a community.

Whereas federal historic preservation law is applied specifically to individual work projects when federal grants-in-aid or the federal rehabilitation tax credit are involved, a local historic preservation ordinance controls inappropriate "exterior remodeling," and demolition within an entire historic district.

This superior legal strength is derived from the combined voice of residents. It means that the majority of a community—after discussion and debate—has agreed to use local laws as a tool to preserve the historic character of their residences, commercial businesses, and streetscapes for long-term public benefit. And best of all, the local laws can be enforced locally.

Note that if your local government wants to become—or has already become—an official member of the national historic preservation partnership, there are some federal and state requirements for the local ordinance. [ See the page on Certified Local Governments (CLG) for more information. ]

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## **LOCAL LAWS AS NEIGHBORHOOD GUARDIANS**

### **Need a Neighborhood Guardian?**

#### **A Preservation Ordinance DOES**

- Provide a municipal policy for the protection of historic properties
- Establish an objective and democratic process for designating historic properties
- Protect the integrity of designated historic properties within a design review requirement
- Authorize design guidelines for new development within historic districts to ensure that it is not destructive to the area's historic character
- Stabilize declining neighborhoods and protect and enhance property values.

#### **A Preservation Ordinance DOES NOT**

- Require that historic properties be open for tours
- Restrict the sale of the property
- Require improvements, changes, or restoration of the property
- Require approval of interior changes or alterations
- Prevent new construction within historic areas Require approval for ordinary repair or maintenance

*Georgia Alliance of Preservation Commissions, University of Georgia School of Environmental Design, Athens, Georgia, 1999.*

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## **LOCAL LAWS AS NEIGHBORHOOD GUARDIANS**

### **Legal Basis in Land-Use Regulations**

"The legal framework in each state must be carefully considered before a local preservation ordinance is adopted...The case law interpreting that legal basis also varies somewhat from state to state. It, too, must be researched and considered to determine the constitutional basis of historic preservation in each state and the substantive and procedural points that must be addressed in a preservation ordinance..." Richard J. Roddewig, *Preparing a Historic Preservation Ordinance*, American Planning Association, 1983.

**Legal basis in land-use regulations.** Because local historic districts have direct impacts on private property, the question of their legal basis and constitutionality often arises. Historic district controls exist within the broader context of land use regulations that have been extensively reviewed and examined by the courts. The basic origin for historic preservation controls lies with the development of municipal land use and zoning controls in the early twentieth century. In 1926, the U.S.

Supreme Court decision in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), upheld the constitutionality of local zoning ordinances and established the ability of municipalities to regulate land use through the exercise of their police powers.

As land use controls evolved, they eventually began to encompass aesthetic considerations and the desire of communities to protect and preserve the character of their historic and architectural resources. In 1954, the U.S. Supreme Court affirmed the constitutionality of "aesthetic" zoning in the case of *Berman v. Parker*, 348 U.S. 26 (1954) (USSC+). With the development of historic district controls, state judicial opinions supported the use of such regulation as a valid exercise of the state's power to promote the general welfare.

It was not until 1978, when the U.S. Supreme Court decided *Penn Central Transportation v. City of New York*, 438 U.S. 104 (1978), that the constitutionality of local controls to further historic preservation was affirmed. In this landmark case, the Court considered whether historic preservation controls constituted a taking in violation of the Constitution's Fifth Amendment, which provides that private property shall not be taken for public use without just compensation. The Court found that historic preservation is a valid public purpose, and that the City of New York's landmark restrictions on Grand Central Station did not constitute a "taking," because the controls did not prevent a reasonable economic use of the property.

Although the courts have recognized the basic constitutionality of local historic preservation controls, they are still subject to legal challenge, often involving the claim of a taking. However, unless the regulation is found not to advance a legitimate public interest, or the restrictions on designated property are so severe as to deprive the owner of any reasonable economic use, historic preservation controls will remain solidly within the broad spectrum of constitutional land use controls.

Excerpt from *A Guidebook for Historic District Commissions*, Massachusetts Historical Commission, 1998.

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## LOCAL LAWS AS NEIGHBORHOOD GUARDIANS

### Contents of the Ordinance Package

"A municipal process for creating a local historic district and providing a regulatory method to protect a community's historic character is one of the strongest mechanisms to ensure that preservation occurs." Constance E. Beaumont, from *A Citizen's Guide to Protecting Historic Places: Local Preservation Ordinances*, 1992. National Trust for Historic Preservation.

### Typical Provisions of the Ordinance

It is important to remember that a typical preservation ordinance "package" does all of these things: states a public purpose; creates a local preservation commission; designates historic districts and landmarks; sets out design criteria that govern commission design review; establishes a process for enforcing design review; and also establishes an appeal process for owners who are denied a "certificate of appropriateness." These components have been summarized below. Note that there are special rules for a Certified Local Government's ordinance.

**Public Purposes.** The ordinance lists the public purposes served by the adoption of the preservation ordinance, including the promotion of aesthetic and architectural values, civic-mindedness or cultural education; the safeguarding of historical and cultural heritage; the improvement or stabilizing of property values; the enhancement of tourism or other types of business; the strengthening of the local economy; the encouragement of cultural diversity, or the provision of recreational amenities. The purposes section is important because it provides general direction for the implementation of the law. When an unforeseen situation arises and specific requirements do not exist or do not seem applicable, look to the purpose section for general guidance.

**Creation of the Local Preservation Commission.** The ordinance creates a local preservation commission (often described as a landmarks commission, historic district commission, or board of architectural review) to administer the preservation ordinance. Commission members may be required to provide expertise within the diversity of professions bearing upon preservation concerns, such as law, architecture, history, archaeology, real estate, and engineering. Some ordinances have district residency requirements, and many specify an odd number of members to avoid the risk of a tie in voting. The ordinance outlines the scope of the commission's powers, including its power to adopt procedural rules (e.g., open meetings, conflicts of interest, etc.), its authority to hire staff, and possibly its opportunity to receive funding from non-government sources. Ordinances often require the commission to record minutes of its meetings and provide annual reports. Ordinances also usually describe the process for appointing commission members and the duration of the term of appointment.

**Designation of Historic Districts and Landmarks.** The ordinance requires the commission to conduct a "study and survey" of local historic (and sometimes prehistoric) resources and to maintain an inventory of the survey results. The ordinance also requires the maintenance of a list of those surveyed properties that the local government has chosen to designate with all of the associated benefits and restrictions. It also specifies the designation procedures for historic districts and landmarks, as well as boundary descriptions relating to that selection, and lists significance criteria a property or district must meet in order to be designated. The ordinance then describes the mechanics of designation, including application procedure, provision for notification of owners or other interested persons, public hearings prior to the designation decision, and notification of the ultimate decision. Because a careful evaluation of significance takes time, the ordinance may also impose a moratorium on applications for alteration or demolition while the application for designation is pending. Establishing common criteria for historic resource evaluation is a central objective. Local officials are therefore encouraged to ensure that preservation ordinances incorporate these criteria and standards. Many local ordinances contain criteria of significance that are based on those used for the National Register of Historic Places. In some instances, official local designation involves an amendment to the local ordinance specifically mentioning the historic district. Other kinds of ordinances just describe the mechanism for local designation.

**Certificates of Appropriateness.** The ordinance requires that prior to material changes or major alterations to a designated historic resource, the commission or other local entity (such as a planning commission or city council) must approve a certificate of appropriateness. Maintenance, such as painting, caulking, and other minor repairs and targeted replacement in kind, usually does not require such a certificate). To make the ordinance understandable to property owners, it should carefully define the term or terms that trigger the need for the certificate, e.g., building/landscape alterations, new construction, etc.; the criteria for design review employed for the issuance of a certificate; the opportunity for a public hearing; and notification to the owner of the reviewing body's decision. To defuse potential takings and due process problems, ordinances should provide owners with an opportunity to claim economic hardship, and to require the reviewing body to prepare detailed findings supporting its decision on a certificate of appropriateness.

**Demolition Applications.** Preservation ordinances vary in their descriptions of a commission's ability to participate in the process for reviewing an application to demolish a locally designated historic resource. The strongest ordinances provide the authority for outright denial of demolition applications. Many others authorize the commission to impose a delay of proposed demolitions to facilitate additional study and public review, while a weaker type of ordinance simply authorizes a commission to make comments prior to demolition. Even where the ordinance only authorizes delay rather than denial of a demolition permit, that commission "discretion" is likely to be sufficient to provide enough time to consider economically feasible alternatives to demolition. Open and informed decisionmaking is what is being sought here, as well as for every instance of design review.

Some ordinances require consideration of post-demolition plans for the same site before the granting of a demolition permit. Some of the same considerations discussed in connection with certificates of appropriateness also apply to review of demolition applications, including the need for careful specification of review criteria, economic hardship provisions, and detailed findings.

**Government-Owned Property.** Some ordinances also require commissions to develop and maintain registers of significant government-owned properties, including those that are designated landmarks or within historic districts. These ordinances may require the agency owning the property to seek the advice of the commission before approving significant alteration, demolition of the property, or any other action that might have an impact on the historic district.

**Maintenance of Historic Properties.** The preservation ordinance often includes some requirement of minimum maintenance for designated historic resources, designed to control deterioration that leads to "demolition by neglect." Minimum maintenance provisions need to clearly specify what is required of property owners. In addition, ordinary maintenance of historic properties is often exempted from the requirement for a certificate of appropriateness. This and other consequences of local designation should become a part of the property's title information, so that new owners have adequate notice of their responsibility.

**Enforcement.** Enforcement provisions are needed to ensure that a commission's authority (whatever it is) under a preservation ordinance is binding. In other words, the ordinance should describe the consequences of failure to follow the law or legal decisions made pursuant to the law. The ordinance may establish specific penalties for violation or provide for civil remedies. Although these provisions may appear within the preservation ordinance, the ordinance is sometimes part of a larger zoning code that contains enforcement provisions. Local governments and landowners should be aware that in extreme cases the courts have validated a sanction requiring unauthorized demolitions to be rebuilt.

**Appeal.** In many cases, the ordinance allows a property owner to appeal to another local decision-making body a decision denying a certificate of appropriateness or a demolition application, with the final determination generally provided by the elected city council or county board of supervisors. The ordinance should specify the procedures and timing governing the appeal, and whether the entity deciding the appeal should be allowed to consider new evidence. The ordinance should clearly indicate what constitutes a final decision, so that interested parties will know when a decision is appropriate for judicial review.

**Moratoria and Emergency Measures.** Because time is often required before a local preservation commission or appeal body can carefully complete its review of a designation decision or a demolition application, a problem arises if the owner seeks to destroy or materially alter the property at issue while that determination is still pending. Moratoria are imposed to provide a period in which the consideration of designation or demolition application can occur free of concern about potential damage to the property. In addition, local jurisdictions sometimes specify a defined time period in which the commission is authorized to delay demolition and therefore permit further study. In general, preservation moratoria are likely to be upheld where they are of definite duration. By contrast, moratoria that fail to provide reasonable time limits are likely to be invalidated as violating due process requirements

**Severability Clause.** Many ordinances have a severability clause, which allows the ordinance as a whole to remain in effect even if a court has problems with a specific provision.

*Excerpted from a summary by Antonio Rossman of Stephen Dennis' Appendix A: Recommended Model Provisions for a Preservation Ordinance, With Annotations, pp. Ai-A127, in C. Duerksen, ed., A Handbook on Historic Preservation Law (1983, National Trust for Historic Preservation). Adapted for this learning web site by Susan Henry Renaud and John Renaud, Heritage Preservation Services, National Park Service.*