

SPECIAL HISTORICAL COMMISSION MEETING AGENDA

6:00 PM - Monday, August 18, 2025

***Sequoia Room, Los Altos Community Center, 97
Hillview Avenue, Los Altos, CA***

PARTICIPATION: Members of the public may participate by being present at the Los Altos Community Meeting Chambers at Los Altos City Hall located at 1 N. San Antonio Rd, Los Altos, CA during the meeting. Public comment is accepted in person at the physical meeting location, or via email to HCPublicComment@losaltosca.gov.

REMOTE MEETING OBSERVATION: Members of the public may view the meeting via the link below, but will not be permitted to provide public comment via Zoom or telephone. Public comment will be taken in-person, and members of the public may provide written public comment by following the instructions below.

[**https://tinyurl.com/jwrthy9h**](https://tinyurl.com/jwrthy9h)

Telephone: 1-253-215-8782 / Webinar ID: 831 5403 3216 / Passcode: 679869

SUBMIT WRITTEN COMMENTS: Verbal comments can be made in-person at the public hearing or submitted in writing prior to the meeting. Written comments can be mailed or delivered in person to the Development Services Department or emailed to HCPublicComment@losaltosca.gov.

Correspondence must be received by 2:00 p.m. on the day of the meeting to ensure distribution prior to the meeting. Comments provided after 2:00 p.m. will be distributed the following day and included with public comment in the Historical Commission packet.

AGENDA

ESTABLISH QUORUM

PUBLIC COMMENTS ON ITEMS NOT ON THE AGENDA

Members of the audience may bring to the Commission's attention any item that is not on the agenda. The Commission Chair will announce the time speakers will be granted before comments begin. Please be advised that, by law, the Planning Commission is unable to discuss or take action on issues presented during the Public Comment Period. According to State Law (also known as "The Brown Act") items must first be noted on the agenda before any discussion or action.

ITEMS FOR CONSIDERATION/ACTION

CONSENT CALENDAR

These items will be considered by one motion unless any member of the Commission or audience wishes

to remove an item for discussion. Any item removed from the Consent Calendar for discussion will be handled at the discretion of the Chair.

1. Historical Commission Minutes

Approve the minutes of the special meeting of April 28, 2025

PUBLIC HEARING

2. That the Historical Commission adopt a Resolution removing the property located at 81 Pepper Drive from the City of Los Altos Historic Resource Inventory (HRI); and find the project is exempt from environmental review pursuant to Section 15061(b)(3) of the California Environmental Quality Act (CEQA).

DISCUSSION

3. Review and Comment on Proposed Zoning Code Amendments for Historic Preservation, and Mills Act Contracts.

INFORMATIONAL ITEMS

COMMISSIONERS' REPORTS AND COMMENTS

POTENTIAL FUTURE AGENDA ITEMS

ADJOURNMENT

SPECIAL NOTICES TO PUBLIC

In compliance with the Americans with Disabilities Act and California Law, it is the policy of the City of Los Altos to offer its programs, services and meetings in a manner that is readily accessible to everyone, including individuals with disabilities. If you are a person with a disability and require information or materials in an appropriate alternative format; or if you require any other accommodation, please contact department staff. Advance notification within this guideline will enable the City to make reasonable arrangements to ensure accessibility.

Agendas, Staff Reports and some associated documents for the Planning Commission items may be viewed on the Internet at <https://www.losaltosca.gov/calendar>.

Decisions of the Historical Commission are final unless appealed by filing an appeal with the City Clerk within 14 calendar days of the decision. No building permits shall be issued during this 14-day period.



HISTORICAL COMMISSION MEETING MINUTES

6:00 PM – Thursday, April 28, 2025

***Manzanita Room, Los Altos Community Center, 97 Hillview
Avenue, Los Altos, CA***

CALL MEETING TO ORDER

At 6:04 p.m. the Chair called the meeting to order.

ESTABLISH QUORUM

PRESENT: Commissioners Adams (arrived 7:10 pm), Atkinson, Coe and Maguire-Negus

ABSENT: None

STAFF: Senior Planner Gallegos

PUBLIC COMMENTS ON ITEMS NOT ON THE AGENDA

Maria Bautista commented on the historic landmark orchard and civic center buildings..

Alice Mansell commented on improvements at Los Altos Youth Center building.

CONSENT CALENDAR.

1. Planning Commission Meeting Minutes

Approval of the DRAFT minutes of the Planning Commission's regular meeting of January 27, 2025.

Public Comment

Maria Bautista commented on status of February 6, 2025, Joint Planning Commission and Historical Commission meeting.

Staff responded

Action: Upon a motion by Commissioner Atkinson to approve the Historical Commission minutes of January 27, 2025, seconded by Commissioner Adams.

AYES: Adams, Atkinson, Maguire-Negus and Coe; NOES: None; ABSENT: None

The motion was approved (4-0).

DISCUSSION

2. Historic Preservation Award

Consider nominations for the 2025 Los Altos Historical Preservation Award.

Public Comment

Gary Hedden spoke in favor of the nomination of Walter Chapman.

Alice Mansell spoke in favor of the Los Altos Chapter of the National Society of the Daughters of the American Revolution (NSDAR) and Walter Chapman.

Maria Bautista commented on The Fucilla Family (1485 Fremont Avenue) and raised concerns regarding Walter Chapman due to being active designer.

Staff responded to question regarding Walter Chapman.

Closed Public comment

Commission discussed each potential award recipient.

Staff responded to questions from the commission.

Action: Upon a motion by Commissioner Adams to approve the nomination of Walter Chapman for the Historic Preservation Award, seconded by Commissioner Atkinson.

AYES: Adams, Atkinson, Maguire-Negus and Coe; NOES: None; ABSENT: None

The motion was approved (4-0).

INFORMATIONAL ITEMS

3. City of Los Altos - Margaret Thompson Essay Contest
Receive a status of the Margaret Thompson Essay Contest

Staff provided an update on the Margaret Thompson Essay Contest.

4. City of Los Altos – Mills Act Quinquennial Inspections
Receive a status of the Mills Act Quinquennial Inspections.

Staff provided an update on the Mills Act Quinquennial Inspections

5. City of Los Altos – Historic Plaque Program
Receive a status of the Plaque Program

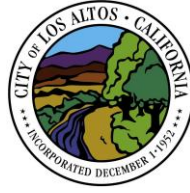
Staff provided an update on the Historic Plaque Program.

ADJOURNMENT

Chair Coe adjourned the meeting at 7:25 PM.

Staff Liaison

DRAFT



HISTORICAL COMMISSION AGENDA REPORT

Meeting Date: August 18, 2025

Subject: Request to Remove 81 Pepper Drive from the City of Los Altos Historic Resource Inventory

Prepared by: Brittany Whitehill, Senior Planner

Initiated by: James and Effat Parivash, Property Owners

Attachments:

1. Draft Resolution
2. DPR Form - prepared by Circa
3. Letter from Property Owners, James and Effat Parivash
4. Historic Resource Evaluation - prepared by Evans & De Shazo
5. Historic Resource Evaluation Peer Review - prepared by Page & Turnbull
6. Public Comments

Recommendation

That the Historical Commission adopt a Resolution removing the property located at 81 Pepper Drive from the City of Los Altos Historic Resource Inventory (HRI); and find the project is exempt from environmental review pursuant to Section 15061(b)(3) of the California Environmental Quality Act (CEQA).

Background

Project Site

The property located at 81 Pepper Drive is a 0.23-acre site with a single-family residence constructed in 1929 and a detached garage built circa 1933. In 2008, the property was evaluated as part of a City-wide historic resources survey and identified as an example of the Colonial Revival architectural style in Los Altos. This determination is documented in the DPR Form prepared by Circa (Attachment 2).

According to the DPR Form, the home exhibits character-defining features of the Colonial Revival style, including a side-gabled roof with three gabled dormers, one-and-a-half-story massing, wood lap siding, dentiled cornice, eave returns, six-over-one wood windows (with and without shutters), flat wood trim and simple window moldings, a glazed wood panel front door with sidelights and

Subject: H25-0001– 81 Pepper Drive

wood trim, and a chimney with brick coping. Based on this evaluation, the property was found to be individually eligible for local listing or designation.

Following its inclusion in the Los Altos Historic Resources Inventory Update, the property was officially designated as a Historic Resource in the Los Altos Historic Resources Inventory (HRI). It is not listed on, nor is it considered eligible for state or national historic register designation.

Unpermitted Addition and ADU Conversion

In August 2024, City staff were notified that construction of an addition at the rear of the house had commenced without permits. During a review of the property, staff discovered that the detached garage had also been converted into an Accessory Dwelling Unit (ADU) without permits. It is staff's understanding that the ADU conversion occurred prior to the current owners' purchase of the property.

The Building Division issued a stop-work notice, and the property owners were informed their project would require historical advisory review and design review approvals from the Planning Division, in addition to a Building Permit for the addition and a separate permit to legalize the unpermitted ADU conversion.

In September 2024, the property owners submitted a historical advisory review and design review application for an approximately 800-square-foot, single-story addition at the rear of the house. A building permit application was also submitted in September 2024, to legalize the garage conversion to an ADU; however, they withdrew the application in October 2024 to study alternative approaches to the project.

In January 2025, the owners, James and Effat Parivash, submitted a formal request to remove the property from the City of Los Altos HRI (Attachment 3).

Analysis

Included in the request to remove the property from the Los Altos HRI was a new Historic Resource Evaluation (HRE) prepared by Stacey De Shazo of Evans and De Shazo (Attachment 4). The evaluation was completed by Principal Architectural Historian Stacey De Shazo, M.A., and Architectural Historian Nicole Wyton, M.S., who both exceed the Secretary of the Interior's qualification standards in Architectural History and History, and Researcher Bee Thao, M.A. The HRE prepared by Evans and De Shazo concluded that the property did not meet all the required criteria for local listing described in Los Altos Municipal Code Section 12.44.040. The analysis from the report prepared by Evans and De Shazo is summarized below and provided in its entirety in Attachment 4.

Evans and De Shazo Findings

The HRE prepared by Evans & De Shazo examined the history of the property in detail and evaluated the property for historical significance at the state and local level. Regarding the required criteria for local listing, the assessment presented the following findings:

Subject: H25-0001– 81 Pepper Drive

12.44.040 - Criteria for designation. A structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy each of the three criteria listed below

- A. Age. A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).*

Evans and De Shazo's HRE finds the 1929 house and 1933 detached garage are over 50 years old and meet this criterion.

- B. Determination of Integrity. A structure or property should retain sufficient historic integrity in most of (3 or more) the following areas:*

- 1. Design: The combination of elements that create the form, plan, space, structure and style of a property.*
- 2. Setting: The physical environment of a historic property.*
- 3. Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.*
- 4. Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.*
- 5. Feeling: A property's expression of the aesthetic or historic sense of a particular period of time.*

Evans and De Shazo's HRE finds that the property does retain integrity of setting and materials, but does not retain significant integrity of design, workmanship, or feeling.

- C. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:*

- 1. Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;*
- 2. Person/People: Associated with the lives of persons important to the local, California or national history;*
- 3. Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or*
- 4. Archaeology: Yields important information about prehistory or history of the local area, California or the nation.*

Evans and De Shazo's HRE finds that the property was not clearly associated with any of these areas of significance.

In conclusion, the assessment finds that the property at 81 Pepper Drive only meets one criterion (Criterion A - Age) of the three required criteria for local listing on the City of Los Altos HRI.

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Historic Resource Evaluation and Peer Review prepared by Page & Turnbull - Summary of Findings

When a jurisdiction receives two Historic Resource Evaluations with different conclusions, The California Office of Historic Preservation (OHP) recommends the jurisdiction conduct a third party, independent evaluation to arbitrate. Following receipt of the request to remove the property from the local historic register, the City hired Page & Turnbull to conduct an independent analysis of the property and a peer review of the report prepared by Evans & De Shazo, entitled 81 Pepper Drive HRE Peer Review (Attachment 5). Page & Turnbull's peer review and assessment was prepared by Jen Hembree, Cultural Resource Planner, and Stacy Kozakovich, Project Manager, both of whom exceed Secretary of the Interior's qualification standards in Architectural History and History. With regard to the required criteria for local listing, Page & Turnbull's assessment presented the following findings:

12.44.040 - Criteria for designation. A structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy each of the three criteria listed below:

- A. Age. A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).*
- B. Determination of Integrity. A structure or property should retain sufficient historic integrity in most of (3 or more) the following areas:*
 - 1. Design: The combination of elements that create the form, plan, space, structure and style of a property.*
 - 2. Setting: The physical environment of a historic property.*
 - 3. Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.*
 - 4. Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.*
 - 5. Feeling: A property's expression of the aesthetic or historic sense of a particular period of time.*

Page & Turnbull does not concur with Evans & De Shazo's assessment and instead finds that the property does retain integrity in all five of these criteria.

- C. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:*
 - 1. Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;*
 - 2. Person/People: Associated with the lives of persons important to the local, California or national history;*

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3. *Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or*
4. *Archaeology: Yields important information about prehistory or history of the local area, California or the nation.*

Page and Turnbull concurs with Evans and De Shazo that the property was not clearly associated with any of these areas of significance.

Where Evans & De Shazo found that the property met only Criterion A (Age) for local listing under Section 12.44.040, Page & Turnbull determined that the property meets both Criterion A (Age) and Criterion B (Integrity). However, neither firm found that the property satisfies Criterion C (Historic Significance). For this reason, both assessments, though differing in certain findings, conclude the property does not meet all the required criteria for listing in the City of Los Altos HRI.

Environmental Review

The removal of 81 Pepper Drive from the City of Los Altos HRI is exempt from environmental review under the California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3), which applies when it can be seen with certainty that there is no possibility the activity may have a significant effect on the environment.

Based on the preponderance of evidence presented in both the HRE prepared by Evans & De Shazo and HRE Peer Review prepared by Page & Turnbull, the property does not meet the minimum eligibility criteria for listing on the City of Los Altos HRI. Furthermore, the property has never been listed on a state or national historic register, nor does any evidence suggest that the property has ever been eligible to be listed on any state or national historic register. For these reasons, the property does not qualify as a historic resource as defined by California Code of Regulations Section 15064.5(a). Because the property does not meet the criteria to be eligible for listing on any local, state or national Historic Resource Inventory, it can be seen with certainty that the act of removing from the City of Los Altos HRI will have no significant impact on the environment.

Public Notification

A public meeting notice was posted on the property, mailed to property owners within a 300' radius, and published in the newspaper. The applicant also posted the public notice signs at the site in compliance with the Planning Division posting requirements.

At the time of preparation of the agenda report for the project, two written comments regarding the project have been received by staff (Attachment 6).

RESOLUTION NO. HC 2025-__

A RESOLUTION OF THE HISTORICAL COMMISSION OF THE CITY OF LOS ALTOS TO REMOVE THE PROPERTY LOCATED AT 81 PEPPER DRIVE FROM THE CITY OF LOS ALTOS REGISTER OF HISTORIC RESOURCES

WHEREAS, the property located at 81 Pepper Drive is listed on the City of Los Altos Historic Resource Inventory; and

WHEREAS, the property owners, James and Effat Parivash, submitted an application to the City of Los Altos requesting the property be removed from the City of Los Altos Historic Resource Inventory; and

WHEREAS, pursuant to Section 12.44.060 of the Los Altos Municipal Code the Historical Commission has the authority to list properties on the City of Los Altos Historic Resource Inventory when each of the criteria listed in Section 12.44.040 (Criteria for designation) is met; and

WHEREAS, pursuant to Section 12.44.090 (Termination of designation) stipulates that the only legitimate reason for terminating the designation of a historic resource or historic landmark is when clear evidence is presented that shows the resource no longer meets the criteria of Section 12.44.040 due to loss of integrity and/or historic significance; and

WHEREAS, Based on the preponderance of evidence presented in the Historic Resource Evaluation prepared by Evans & De Shazo and the Historic Resource Evaluation Peer Review prepared by Page & Turnbull, the Historical Commission finds that the property at 81 Pepper Drive does not meet all three required criteria of Los Altos Municipal Code Section 12.44.040 (Criteria for designation) and is therefore not eligible for listing on the City of Los Altos Historic Resource Inventory; and

WHEREAS, the removal of 81 Pepper Drive from the City of Los Altos Historic Resources Inventory is exempt from environmental review under the California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3), which applies when it can be seen with certainty that there is no possibility the activity may have a significant effect on the environment. Based on the preponderance of evidence presented in both the Historic Resource Evaluation prepared by Evans & De Shazo and Historic Resource Evaluation Peer Review prepared by Page & Turnbull, the property does not meet the minimum eligibility criteria for listing on the City of Los Altos Historic Resources Inventory. Furthermore, the property has never been listed on a state or national historic register, nor does any evidence suggest that the property has ever been eligible to be listed on any state or national historic register. For these reasons, the property does not qualify as a historic resource as defined by California Code of Regulations Section 15064.5(a). Because the property does not meet the criteria to be eligible for listing on any local, state or national Historic Resource Inventory, it can be seen with certainty that the act of removing from the City of Los Altos Historic Resources Inventory will have no significant impact on the environment; and

WHEREAS, the project was processed in accordance with the applicable provisions of the California Government Code and the Los Altos Municipal Code; and

WHEREAS, the Historical Commission held a duly noticed public hearing to consider the request to remove the property at 81 Pepper Drive from the City of Los Altos Historic Resource Inventory on August 18, 2025, and considered the written record and all public comment.

NOW, THEREFORE, BE IT RESOLVED, that the Historical Commission of the City of Los Altos hereby removes the property located at 81 Pepper Drive from the City of Los Altos Historic Resource Inventory, based on the following findings (Exhibit A) and Conditions of Approval (Exhibit B) attached hereto and incorporated by this reference.

EXHIBIT A

FINDINGS

With regard to the request to remove 81 Pepper Drive from the City of Los Altos Historic Resource Inventory, the Los Altos Historical Commission finds that the required criteria in Los Altos Municipal Code Section 12.44.040 cannot be met.

1. Section 12.44.040 Criteria for designation. A structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy each of the three criteria listed below:

- A. Age. A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).

This criterion can be met because the property, consisting of the house that was constructed in 1929 and the detached garage that was constructed circa 1933, is older than fifty (50) years in age.

- B. Determination of Integrity. A structure or property should retain sufficient historic integrity in most of the following areas:

This criterion can be met as the property satisfies each of the five sub-criterion of Determination of Integrity, as described below.

- a. Design: The combination of elements that create the form, plan, space, structure and style of a property. This sub-criterion can be met because the house retains the integrity of its design as a single-family home built in 1929 in a modest Colonial Revival style, with character defining features including symmetrical fenestration consisting of rectangular, double-hung multi-light windows, gabled dormers, and a cornice decorated with dentils and eave returns.
- b. Setting: The physical environment of a historic property. This sub-criterion can be met because, although property's setting has changed since the construction of the 1929 house, the setting remains a small neighborhood with modest-sized houses set back from the street and designed in various styles, and that the property retains integrity of setting.
- c. Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property. This sub-criterion can be met because the house retains original materials, including original wood clapboard siding on three of the four elevations, ten divided light wood windows, two paired divided light windows, and wood shutters on the primary façade; and the detached garage retains some original materials including exterior cladding and some windows.

- d. Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory. This sub-criterion can be met because, although the detailing of the home is relatively simple, the use of standardized window sash, dentils, shutters, and wood siding does reflect workmanship that would have been characteristic of technological practices of the time, in this instance, the technological advance of mass milling production of the time.
 - e. Feeling: A property's expression of the aesthetic or historic sense of a particular period of time. This sub-criterion can be met because the 1929 house is a modest example of Colonial Revival architecture, specifically the Cape Cod cottage subtype. Although not an excellent example of the Colonial Revival style, given the lack of an accentuated and more elaborate front entry, the house does appear to express the aesthetic of a modest Cape Cod cottage of the 1920s and therefore retains integrity of feeling.
- C. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:

This criterion cannot be met because the property is not clearly associated with any of the following areas of historic significance:

- a. Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States. This sub-criterion cannot be met. Although the 1929 house is associated with the general trend of growth in Los Altos during the 1920s, the property is not specifically important to this trend and thus does not convey significance for its association with that particular growth period.
- b. Person/People: Associated with the lives of persons important to the local, California or national history. This sub-criterion cannot be met. Although the original owner/occupant of the house, Harry Van Epps, was a carpenter in the “house building” industry, no documentary evidence was found to confirm his involvement in the construction of the 1929 home. The property subsequently changed ownership no less than ten times and no evidence has been identified suggesting that any occupant of the property had particular importance to local, California, or national history owned or occupied the property.
- c. Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value. This sub-criterion cannot be met. While the 1929 house exhibits elements of Colonial Revival style and particularly exhibits the one-story or Cape Cod cottage subtype (due to its form and massing), a subtype built throughout the Colonial Revival decades and that became especially common in the 1940s, the house is a modest representation of the style as shown by its use of wood cladding in lieu of masonry and lack of elaborate front entry, the house thus does not fully exemplify the distinctive characteristics of the Colonial Revival style required to be individually significant, nor

does it exemplify a method of construction, nor does it possess high artistic values. As no architect of record is known, the house does not represent the work of a master.

- d. Archaeology: Yields important information about prehistory or history of the local area, California or the nation. This sub-criterion cannot be met because the property has not yielded any archaeological artifacts that could be important to the prehistory or history of the local area, California or the Nation.
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2. The removal of 81 Pepper Drive from the City of Los Altos Historic Resources Inventory is exempt from environmental review under the California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3), which applies when it can be seen with certainty that there is no possibility the activity may have a significant effect on the environment. Based on the preponderance of evidence presented in both the Historic Resource Evaluation prepared by Evans & De Shazo and Historic Resource Evaluation Peer Review prepared by Page & Turnbull, the property does not meet the minimum eligibility criteria for listing on the City of Los Altos Historic Resources Inventory. Furthermore, the property has never been listed on a state or national historic register, nor does any evidence suggest that the property has ever been eligible to be listed on any state or national historic register. For these reasons, the property does not qualify as a historic resource as defined by California Code of Regulations Section 15064.5(a). Because the property does not meet the criteria to be eligible for listing on any local, state or national Historic Resource Inventory, it can be seen with certainty that the act of removing from the City of Los Altos Historic Resources Inventory will have no significant impact on the environment.

EXHIBIT B

CONDITIONS OF APPROVAL

- 1. Indemnity and Hold Harmless:** The applicant/owner agrees to indemnify, defend, protect, and hold the City harmless from all costs and expenses, including attorney's fees, incurred by the City or held to be the liability of the City in connection with the City's defense of its actions in any proceedings brought in any State or Federal Court, challenging any of the City's action with respect to the applicant's project. The City may withhold final maps and/or permits, including temporary or final occupancy permits, for failure to pay all costs and expenses, including attorney's fees, incurred by the City in connection with the City's defense of its actions.
- 2. No Development Authorized:** This permit (H25-0001) does not authorize any development or modification to the property and its structures. The property owners must obtain all required Planning and/or Building permits prior to any modifications.

State of California The Resources Agency
DEPARTMENT OF PARKS AND RECREATION

PRIMARY RECORD

Primary # _____
HRI # _____
Trinomial _____
NRHP Status Code _____

Other Listings _____
Review Code _____ Reviewer _____ Date _____

Page 1 of 3 *Resource Name or #: (Assigned by recorder) 81 Pepper Dr.

P1. Other Identifier: _____

*P2. Location: ☐ Not for Publication ☒ Unrestricted

*a. County Santa Clara and (P2c, P2e, and P2b or P2d. Attach a Location Map as necessary.)

*b. USGS 7.5' Quad _____ Date _____ T _____; R _____; _____ of _____ of Sec _____; _____ B.M.

c. Address 81 Pepper Dr. City Los Altos Zip 94022

d. UTM: (Give more than one for large and/or linear resources) Zone _____, _____ mE/ _____ mN

e. Other Locational Data: (e.g., parcel #, directions to resource, elevation, etc., as appropriate)

APN: 170 41 007

*P3a. Description: (Describe resource and its major elements. Include design, materials, condition, alterations, size, setting, and boundaries)

This one-and-a-half story, simplified Colonial Revival style residence has a side gable roof with three gabled dormers on the front elevation and a one-story shed extension to the rear. All roof surfaces are clad in composition shingle and the exterior walls appear to be clad in wood lap siding. Notable architectural details include a dentiled cornice along the front elevation and eave returns at the side gables. Six-over-one wood windows with shutters punctuate the first level and six-over-one wood windows are set in the gable dormers. All windows are framed by flat wood trim and simple moulding. The glazed, wood panel front door with sidelights is also framed with this wood trim and sheltered by a modern arbor/trellis. A stucco-clad chimney with brick coping pierces the gable peak. A side-gabled detached garage is set at the northwest corner of the lot.

*P3b. Resource Attributes: (List attributes and codes) HP2. Single family property

*P4. Resources Present: ☒ Building ☐ Structure ☐ Object ☐ Site ☐ District ☐ Element of District ☐ Other (Isolates, etc.)

P5b. Description of Photo:

Primary Elevation

June-08

*P6. Date Constructed/Age and

Source: ☒ Historic ☐ Prehistoric

Both

Built 1933

(Los Altos Planning Dept)

*P7. Owner and Address:

W/K Joseph Living Trust

81 Pepper Dr. Los Altos, CA 94022

*P8. Recorded by:

Circa: Historic Property Development

1 Sutter St., Ste. 910

San Francisco, CA 94104

*P9. Date Recorded:

June-08

*P10. Survey Type:

Intensive



*P11. Report Citation:

Los Altos Historic Resources Inventory Update - Phase III (Circa: Historic Property Development, 2011).

*Attachments: ☐ NONE ☐ Location Map ☒ Continuation Sheet ☒ Building, Structure, and Object Record

☐ Archaeological Record ☐ District Record ☐ Linear Feature Record ☐ Milling Station Record ☐ Rock Art Record

☐ Artifact Record ☐ Photograph Record ☐ Other (List): _____

State of California The Resources Agency
DEPARTMENT OF PARKS AND RECREATION

Primary #
HRI#

BUILDING, STRUCTURE, AND OBJECT RECORD

*NRHP Status Code CA Reg. 5S3

Page 2 of 3

*Resource Name or # (Assigned by recorder) 81 Pepper Dr.

B1. Historic Name: _____

B2. Common Name: _____

B3. Original Use: Residence

B4. Present Use: Residence

*B5. Architectural Style: Colonial Revival Style

*B6. Construction History: (Construction date, alterations, and date of alterations)

Built 1933. Reroof, 1994 (Permit # 44466); W/H (#60954).

*B7. Moved? ☐ No ☐ Yes ☒ Unknown Date: _____ Original Location: _____

*B8. Related Features:

Detached garage.

B9a. Architect: Unknown

b. Builder: Unknown

*B10. Significance: Theme Residential Architecture/Early Development Area Los Altos

Period of Significance 1933-1961 (50-year mark) Property Type Residential Applicable Criteria CA/Local

(Discuss importance in terms of historical or architectural context as defined by theme, period, and geographic scope. Also address integrity.)

Present day Los Altos became part of Santa Clara County in 1851. Associated with the Fremont Township, the area remained largely rural through the latter half of the 19th century, with much of the land devoted to cultivation of wheat crops, orchards and vineyards. By the end of the century, the larger ranches began to give way to a number of smaller farms and orchards. The initial establishment of Los Altos is attributed to Paul Shoup, a Southern Pacific Railroad executive who proposed it as a stop on a commuter rail line between Palo Alto and Los Gatos. Shoup formed the Los Altos Land Company in 1907 and, with the help of his business partners, purchased and laid out the original townsite along the east side of what is now Foothill Expressway, then the future rail line. The Land Company began selling lots for development in 1907 and many of the early houses were used as summer homes for wealthy San Francisco families while others served as year-round residences for commuters. The first steam train service from Los Altos to San Francisco began in 1908 and by 1911, some fifty residences had been constructed and a number of commercial office buildings had been built in the small downtown core. The rail line brought prosperity and growth to Los Altos and existing farms and orchards gradually gave way to residential subdivisions. Better roads and the availability of the automobile continued this development through the 1920s and 1930s when a number of (See Continuation Sheet).

B11. Additional Resource Attributes: (List attributes and codes) _____

*B12. References:

Los Altos Historical Commission: Los Altos Historic Resources Inventory (9.28.1997); McAlester, Virginia and Lee. A Field Guide to American Houses. New York: Alfred A. Knopf, 2002; Building permit records; Chamber of Commerce website - http://www.losaltoschamber.org/history_two_cities.html.

B13. Remarks:

Sketch map created by Circa using Google Maps aerial photograph.

*B14. Evaluator: Circa: Historic Property Development

*Date of Evaluation: April 2011

(This space reserved for official comments.)



State of California — The Resources Agency
DEPARTMENT OF PARKS AND RECREATION

CONTINUATION SHEET

Primary # _____

HRI # _____

Trinomial _____

Page 3 of 3

*Resource Name or # (Assigned by recorder) 81 Pepper Drive

*Recorded by: Circa: Historic Property Development

*Date April 2011



Continuation



Update

B10. Significance (cont.)

automobile suburbs were developed. The post-World War II population boom led to increased residential and commercial development for the community and the city officially incorporated on December 1, 1952.

The residence at 81 Pepper Drive was constructed in the community's early period of development, prior to the city's incorporation in 1952, and is a good example of the Colonial Revival style in Los Altos. The Eclectic movement, characterized by the popularity of period revival style houses built in the Mediterranean, Italian Renaissance, Tudor, Chateausque or Colonial Revival styles, began in the last decades of the 19th century and came to dominate domestic building in the 1920s and 1930s.

Character Defining Features: Side gable roof with three gabled dormers; one-and-a-half story form, wood lap siding; dentiled cornice; eave returns; six-over-one wood windows with (and without) shutters; flat wood trim and simple moulding around windows; glazed, wood panel front door with sidelights and wood trim; chimney with brick coping.

Evaluation: 81 Pepper Drive is a good representative example of its style, and retains a good degree of integrity of location, workmanship, feeling, design and materials. Therefore, it is eligible for listing on the Los Altos Historic Resources Inventory and is assigned the California Register Status Code 5S3: "appears to be individually eligible for local listing or designation through survey evaluation."

Note: This finding is based on architectural merit alone and further research for association with historically significant events and/or people should be conducted.



JP ENGINEERING & CONSTRUCTION

81 Pepper Drive, Los Altos, CA 94022
Phone: (408) 438-1200 | Email: james@characo.com



Agenda Item 2.

Owners

James (Jamshid) Parivash

Effat Parivash

81 Pepper Drive / Los Altos, CA / 94022

408-438-1200

[James@characo.com](mailto:james@characo.com)

March 24, 2025

City of Los Altos

Community Development Department

1 N. San Antonio Road

Los Altos, CA 94022

RE: Request to Remove 81 Pepper Drive from the City of Los Altos Historic Resources Inventory

Dear City of Los Altos Planning Staff,

I am writing to formally request that the property located at 81 Pepper Drive, Los Altos, CA 94022 (APN: 170-41-006) be removed from the City of Los Altos Historic Resources Inventory (HRI).

This request is based on the findings of the Historic Resource Evaluation (HRE) prepared by Evans & De Shazo, Inc., dated March 4, 2025. The report concludes that the existing structures on the property — including the 1929 residence, the ca. 1933 detached garage, and surrounding landscape — do not meet the criteria for individual listing on the California Register of Historical Resources, nor do they appear eligible under the standards of the Secretary of the Interior. As such, the HRE recommends that the property be delisted from the local register.

It is important to note that the HRE was prepared by a licensed historic preservation firm selected from a list of consultants previously provided by the City of Los Altos.

In accordance with the application instructions, I am submitting this letter as part of the required documentation to initiate the City's evaluation and hearing process regarding this request. I understand that a peer review of the HRE may be conducted by an independent consultant selected by the City and that further steps may be required based on that review.

Thank you for your consideration, and I look forward to working with City staff throughout this process.

Sincerely,

Jamshid Parivash

James Parivash

JP Engineering & Construction



EVANS & DE SHAZO

ARCHAEOLOGY HISTORIC PRESERVATION

A HISTORIC RESOURCE EVALUATION AND UPDATED LOCAL ASSESSMENT OF THE PROPERTY AT 81 PEPPER DRIVE, LOS ALTOS, SANTA CLARA COUNTY, CALIFORNIA

SUBMITTED TO:

James Parivash

SUBMITTED BY:

Stacey De Shazo, M.A.
Principal Architectural Historian
and
Nicole Wyton, M.S.
Architectural Historian
with
Bee Thao, M.A.

March 4, 2025
(updated April 21, 2025)

Evans & De Shazo, Inc
1141 Gravenstein Highway South,
Sebastopol, CA 95472
707-823-7400
www.evans-deshazo.com



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INTRODUCTION

Evans & De Shazo, Inc. (EDS) completed a Historic Resource Evaluation (HRE) and updated local assessment for the 0.23-acre property at 81 Pepper Drive, Los Altos, Santa Clara County, California, within Assessor Parcel Number (APN) 107-41-007 (Property). The Property consists of the 1929 house, ca. 1933 detached garage, and landscape. The proposed project consists of rehabilitating or demolishing the 1929 house and demolishing the ca. 1933 detached garage (non-legalized Assessor Dwelling Unit),¹ allowing for the construction of a two-story addition or a new house (Project).² In 2011, as part of the Los Altos Historic Resources Inventory Update (Circa: Historic Property Development, March 2012), the 1929 house was documented on Department of Parks and Recreation (DPR) 523 forms and subsequently locally listed on the Los Altos Historic Resources Inventory (HRI).³ As such, the 1929 house is considered a Historical Resource as defined in Section 15064.5 of the California Environmental Quality Act (CEQA) Guidelines. However, the Property, including the 1929 house, ca. 1933 detached garage, and landscape, has not been previously evaluated for individual eligibility for listing on the California Register of Historical Resources (CRHR). As such, EDS completed an HRE to determine whether the Property is eligible for listing on the CRHR. Although the 1929 house is currently locally listed on the Los Altos HRI, the City has requested an “updated” local assessment, completed in accordance with Los Altos Municipal Code Section 12.44.040 to advise the city on the continued local listing of the Property, including the 1929 house.

The HRE follows specific guidelines and evaluation criteria of the California Register of Historical Resources (CRHR, 36 CFR 68; Code of California Regulations [CCR], Title 14, § 15064.5 and Public Resources Code [PRC] § 21084.1). The HRE was completed by EDS Principal Architectural Historian Stacey De Shazo, M.A., and Architectural Historian Nicole Wyton, M.S., both of whom exceed the Secretary of Interior’s qualification standards in Architectural History and History, and Researcher Bee Thao, M.A. The results of the HRE and local assessment are presented herein.

PROPERTY LOCATION

The Property is located at 81 Petter Drive, Los Altos, Santa Clara County, California within APN 107-41-007 (Figure 1). The Property is on the north side of Pepper Drive, approximately 47 feet east of South Antonio Road.

¹ Per the City of Los Altos Permit Search webpage, on 9/17/2024 an application was submitted to the City of Los Altos for the “Legalization of existing detached cottage to an ADU.”

² The Project is dependent on the outcome of the HRE and future decisions by the City of Los Altos for potential delisting of the 1929 house within the Property.

³ The 1929 house was not assigned a “California Register Historic Status Code.”

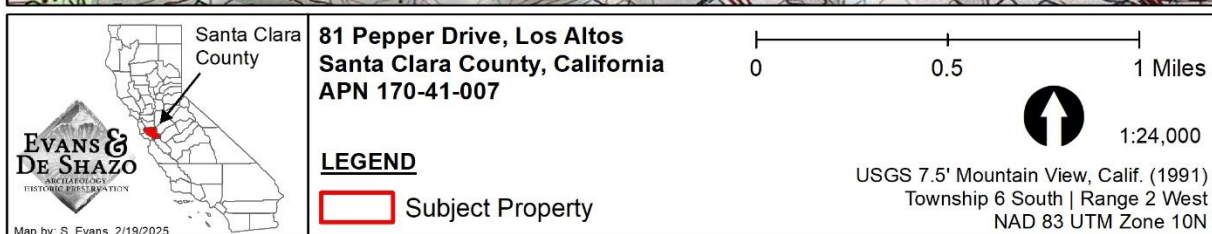
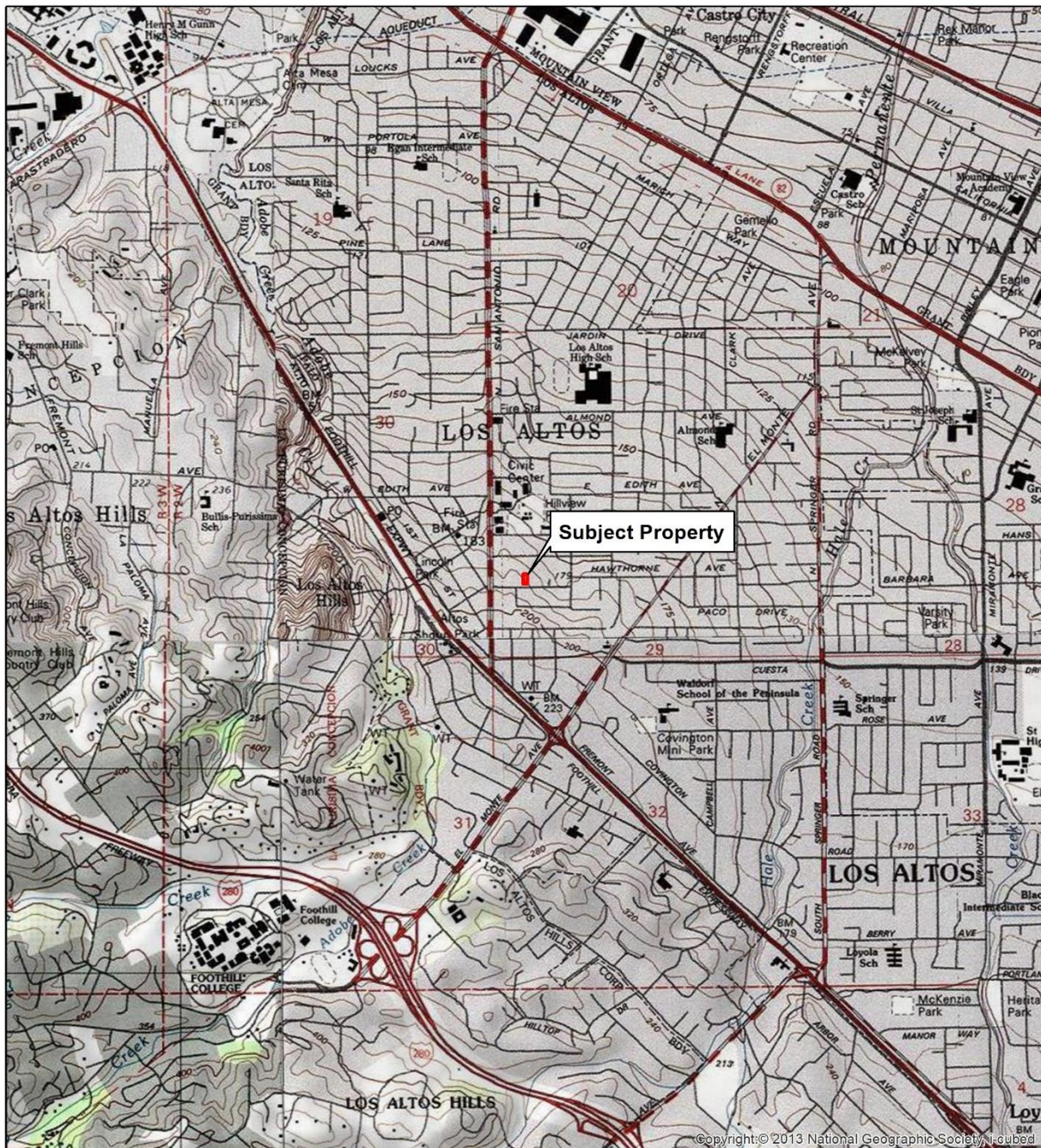


Figure 1. Location Map



REGULATORY SETTING

The CEQA regulations, and the City of Los Altos local historical resources pertaining to cultural resources are outlined below.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

CEQA and the Guidelines for Implementing CEQA (State CEQA Guidelines § 15064.5) give direction and guidance for evaluating properties and preparing Initial Studies, Categorical Exemptions, Negative Declarations, and Environmental Impact Reports. Under California State law, the City of Los Altos is legally responsible and accountable for determining the environmental impact of any land use proposal it approves. Cultural resources are aspects of the environment that require identification and assessment for potential significance under CEQA (14 CCR § 15064.5 and PRC § 21084.1).

There are five classes of cultural resources defined by the State OHP. These are:

- **Building:** A structure created principally to shelter or assist in carrying out any form of human activity. A “building” may also be used to refer to a historically and functionally related unit, such as a courthouse and jail or a house and barn.
- **Structure:** A construction made for a functional purpose rather than creating human shelter. Examples include mines, bridges, and tunnels.
- **Object:** Construction is primarily artistic in nature or relatively small in scale and simply constructed. It may be movable by nature or design or made for a specific setting or environment. Objects should be in a setting appropriate to their significant historic use or character. Examples include fountains, monuments, maritime resources, sculptures, and boundary markers.
- **Site:** The location of a significant event. A prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archaeological value regardless of the value of any existing building, structure, or object. A site need not be marked by physical remains if it is the location of a prehistoric or historic event and if no buildings, structures, or objects marked it at that time. Examples include trails, designed landscapes, battlefields, habitation sites, Native American ceremonial areas, petroglyphs, and pictographs.
- **Historic District:** Unified geographic entities which contain a concentration of historic buildings, structures, or sites united historically, culturally, or architecturally.

According to CCR § 15064.5, cultural resources are historically significant if they are:

- (1) A resource listed in or determined to be eligible by the State Historical Resources Commission for listing in the California Register of Historical Resources (PRC § 5024.1, 14 CCR § 4850 et seq.).
- (2) A resource included in a local register of historical resources, as defined in PRC § 5020.1(k) or identified as significant in a historical resource survey meeting the requirements PRC § 5024.1(g), shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of the evidence demonstrates that it is not



historically or culturally significant.

- (3) Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be a historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record. Generally, a resource shall be considered by the lead agency to be "historically significant" if the resource meets the criteria for listing on the California Register of Historical Resources (PRC § 5024.1, 14 CCR § 4852), including the following:
 - (1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
 - (2) Is associated with the lives of persons important in our past;
 - (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or
 - (4) Has yielded, or may be likely to yield, information important in prehistory or history.
- (4) The fact that a resource is not listed in or determined to be eligible for listing in the CRHR, not included in a local register of historical resources pursuant to PRC § 5020.1(k), or identified in a historical resources survey meeting the criteria in PRC § 5024.1(g) does not preclude a lead agency from determining that the resource may be a historical resource as defined in PRC § 5020.1(j) or § 5024.1.

LOCAL

Although the 1929 house is currently locally listed, the City of Los Altos has requested an "updated" local assessment in compliance with the following criterion.

12.44.040 - Criteria for designation.

A structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy each of the three criteria listed below:

- A. Age. A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).
- B. Determination of Integrity. A structure or property should retain sufficient historic integrity in most of the following areas:
 1. Design: The combination of elements that create the form, plan, space, structure and style of a property.
 2. Setting: The physical environment of a historic property.
 3. Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.
 4. Workmanship: The physical evidence of the crafts of a particular culture or people during any



given period in history or prehistory.

5. Feeling: A property's expression of the aesthetic or historic sense of a particular period of time.
- C. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:
1. Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;
 2. Person/People: Associated with the lives of persons important to the local, California or national history;
 3. Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or
 4. Archaeology: Yields important information about prehistory or history of the local area, California or the nation.

The city's historic resource evaluation methodology, which provides more details about the above listed criteria, is available from the planning division.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)

METHODS

The methods used to complete the HRE included a database search conducted by the Northwest Information Center (NWIC) of the California Historical Information Systems (CHRIS) to determine if the Property has been previously evaluated or documented. EDS also conducted in-person research, including at the Santa Clara County Assessor and Recorder offices, and the City of Los Altos. EDS also conducted extensive online research and reviewed digital documents on file with EDS, such as historical maps, Sanborn Fire Insurance maps, historical aerial photographs, and other primary source documents. EDS also received a copy of the Property's title report provided by the Property owners. The purpose of the research was to understand the Property history and the history of the surrounding area to assist in developing a historical context to evaluate the historical significance of the built environment within the Property. EDS Principal Architectural Historian Stacey De Shazo, M.A. also completed a historic architectural survey to identify the age, any known architectural style or form, character-defining features, materials, and alterations to the built environment resources, at least 45 years in age, within the Property. Updated DPR 523 forms were also completed (Appendix A), as well as a local assessment.

CULTURAL RESOURCE INVENTORIES

As part of the record search, the following inventories were reviewed:

- National Register of Historic Places (NRHP)
- California Register of Historical Resources (CRHR)
- California Historical Landmarks (CHL)



- California Points of Historical Interest (CPHI)
- California Inventory of Historic Resources
- California OHP BERD for Santa Clara County, California (2020)
- City of Los Altos HRI (2012) and Historic Landmarks

ONLINE RESEARCH

Online research was conducted utilizing the following sources:

- www.newspapers.com
- www.ancestry.com
- www.calisphere.org (University of California)
- <http://www.library.ca.gov/> (California State Library)
- <https://cdnc.ucr.edu/> (California Digital Newspaper Collection)
- <http://pcad.lib.washington.edu> (Pacific Coast Architecture Database [PCAD])
- <https://aiahistoricaldirectory.atlassian.net> (American Architects Directory)

REPOSITORIES

- NWIC Record Search
 - On January 9, 2024, EDS requested a database search from the NWIC (File #24-0987) for the Property. The record search found that the 2011DRP 523 forms (CIRCA) for the Property NWIC.
- Santa Clara County Assessor and Recorder Offices:
 - On January 3, 2025, EDS conducted research at the Santa Clara County Assessor and Recorder Office to gather information regarding the ownership history of the Property.
- City of Los Altos
 - On December 26, 2024, EDS obtained the DPR 523 forms prepared by CIRCA in 2011, and the permit history for the Property from the City of Los Altos.

The research and literature review results are included in the Historical Setting section below.

PREVIOUS DOCUMENTATION

In 2011-2012, the 1929 house within the Property was part of a city-wide historic inventory update (S-34502).⁴ As a result, the 1929 house was listed on the local City of Los Altos HRI in 2012. Due to its current listing, the 1929 house is considered a Historical Resource as defined in §15064.5 of the CEQA Guidelines. However, the documentation of the 1929 house by CIRCA only considered CRHR Criterion 3 (Architecture) and did not

⁴ Study number assigned by the NWIC to the 2012 city-wide HRI.



include an evaluation under criteria 1, 2 or 4; and did not include the ca. 1933 detached garage or landscape.

HISTORICAL SETTING

The following section provides a brief history of the City of Los Altos and a specific history of the Property. The purpose of this section is to provide an understanding of the development of the area and the specific context within which the built environment resources within the Property were evaluated for historical significance.

MEXICAN PERIOD (1822 – 1846)

In 1821, Mexico declared its independence from Spain and took possession of “Alta California,”⁵ marking the end of the Spanish period (1769 – 1821) and the beginning of the Mexican period, also referred to as the “rancho” period, in Alta California. In 1833, the Mexican government secularized the Spanish missions in California, and mission-owned land was dissolved. During this time, extraordinary changes occurred throughout Alta California, as the Mexican government lacked the strong oversight and military rule previously imposed by the Spanish, and as such, there were new trade opportunities when foreign ships that had previously been held off by Spanish guarded military ports could dock and provide a variety of provisions to local settlers throughout California. These new provisions, including tea, coffee, sugars, spices, spirits, and various manufactured goods, soon made their way into the region, and the taxes on these imported goods became the main source of revenue for the Mexican government in Alta California. Likewise, products produced in Alta California were exported, which bolstered the hide and tallow trade that became the primary business activity in Alta California during this time. During this time, the Mexican colonial authorities encouraged the settlement of Alta California by providing large land grants called ranchos to politically prominent persons loyal to the Mexican government and permitting foreigners to settle the land. As a result, the 20 ranchos in Alta California, during the Spanish period increased to roughly 800 ranchos that varied from 10,000 to 20,000 acres during the Mexican era.

In 1846, the Property was within unclaimed lands of the Mexican government.

EARLY AMERICAN PERIOD (1848 - 1851)

The beginning of the American Period in California is marked by the end of the Mexican American War (1846-1848), when the United States (U.S.) took possession of Mexican territories, including California, New Mexico, Texas, and Arizona, in the signing of the Treaty of Guadalupe Hidalgo on February 2, 1848. The Treaty of Guadalupe Hidalgo provided resident Mexicans their American citizenship and guaranteed title to ranchos obtained during the Mexican period. However, less than two weeks before the treaty's signing, on January 24, 1848, James Marshall discovered gold at Sutter's Mill, which marked the start of California's Gold Rush (1848 to 1855). Soon, the excitement of the Gold Rush and the promise of fertile and abundant land brought between 150,000 and 200,000 new settlers to California from all over the U.S. and Scotland, Ireland, England,

⁵ Alta California was a polity of New Spain founded in 1769 and became a territory of Mexico after the Mexican War of Independence in 1821.



Germany, and France.⁶ Many new settlers squatted on land during this time, including Mexican rancho and unclaimed land. To quickly resolve Mexican rancho land disputes, the U.S. Congress passed the California Land Act of 1851, establishing a three-member Public Land Commission (Commission) to determine the validity of prior Spanish and Mexican land grants.⁷ The act required landowners who claimed title under the former Mexican government to file a claim with the Commission within two years. Although the Commission eventually confirmed most of the original Mexican land grants, the burden was on landowners to prove their title. The cost of litigation forced many rancho owners to sell off their land to newly arriving settlers, including some who had illegally squatted on their land, as well as land speculators and the lawyers hired to defend their land claims in court.⁸

In 1850, the Property was within the Fremont township of Santa Clara County within 640 acres of public land surveyed under the Public Land Survey System (PLSS) in the 1850s and made available to new settlers.

HISTORY OF LOS ALTOS (1850 – 1960S)

In 1850, the present-day City of Los Altos comprised approximately 100 residents, mostly living on large parcels of land for wheat farming and cattle ranching. During this time, the Property was located within 640 acres of public land covered in dense chamisal,⁹ and it was surrounded by several Mexican era ranchos, including La Purísima Concepción to the west, San Antonio to the south, Rincon de San Francisquito to the north, and Pastoria de las Boregas to the north/northeast. At this time, the largest landowner within present-day Los Altos was Juana Briones de Miranda's (Figure 2), who purchased the 4,439-acre Rancho La Purísima Concepción in 1844 from José Gorgonio and his son José Ramon, Ohlone Indians who were granted the Rancho by then Mexican Governor Juan Alvarado in 1840.

Juana Briones de Miranda, a single mother with eight children, was a medical practitioner and a well-known San Francisco merchant. Juana moved to Rancho La Purísima Concepción in 1847 and built an adobe house within the northern portion of the land. Following the California Land Act of 1851, Juana filed a claim to the Commission for the rancho land, and with the help of her attorney, Henry Wager Halleck, she fought to retain her land.¹⁰ However, by the early 1860s, Juana had to sell portions of her land to support her family. In 1857, she sold approximately 2,000 acres to Martin Murphy, who had arrived in California in 1844 in the Stephens-Townsend-Murphy Party, the first wagon train to cross the Sierra Nevada into California.¹¹ Martin paid Juana

⁶ Karen Clay, *Property Rights and Institutions: Congress and the California Land Act 1851*, The Journal of Economic History, Cambridge University Press, 59(01):122-142, March 1999.

⁷ The Spanish government-controlled California land from approximately 1770 to 1821 and the Mexican government-controlled California land from 1821 to 1846.

⁸ Nancy Olmsted. *Vanished Waters: A History of San Francisco's Mission Bay*, Mission Creek Conservancy, San Francisco, 1986.

⁹ Chamisal is a Mexican word that means overgrowth of chamiso, an evergreen shrub.

¹⁰ CIRCA Preservation Consulting, "City of Los Altos Historic Resources Inventory", Prepared for the City of Los Altos, 2012.

¹¹ Gordon Richards, "Stephens-Townsend-Murphy Party", Truckee Donner Historical Society, <https://www.truckeehistory.org/the-first-pioneer-wagons-crossed-the-sierra-over-160-years-ago.html>, (accessed 7/22/2024).



\$7,000 for the land, adding to his approximately 4,800-acre land holdings in the present-day City of Sunnyvale, known then as Bay View Ranch.¹² In the early 1860s, Juana sold 2,000 acres to Joseph P. Hale, who established the largest cattle ranch and wheat farm in Los Altos. Along with four other families (names unknown), Hale lived within the ranch, known as Hale Ranch, located west of the Property. In 1862, John Snyder arrived in the Los Altos area, where he purchased land and planted grain within what became known as the Snyder Ranch, which comprised 700 acres, of which some acreage was purchased from Juana. When Juana's land claim was finally patented on August 15, 1871,¹³ most of the Rancho La Purísima Concepción had been sold to Euro-American settlers or granted to Juana's children.

In the 1850s and 1860s, Santa Clara Valley's primary crops were wheat and grain. During this time, farmers living in Los Altos loaded their crops onto wagons, hauling them to the Mountain View Station stage stop, located along the San Francisco-San Jose Stage Road, known today as El Camino Real. In 1864, the Southern Pacific (SP) Railroad established a rail line within present-day Mountain View, approximately one mile north of the Mountain View Station stage stop. In 1865, the City of Mountain View was officially laid out. Due to its proximity to the developing City of Mountain View and the new railroad stop, the small community of Los Altos began to grow. In the 1870s, Los Altos consisted of small and large farms planted with grain and fruit crops. By the 1880s, fruit crops began to replace wheat and grain as the dominant agricultural crop in Santa Clara Valley, and by 1890, many of the larger farms and cattle ranches were subdivided and sold as small farms. During this time, the small farms produced "much as 200 dollars per acre from prunes, apricots, peaches, cherries, pears, and other fruits."¹⁴

In the early 1900s, land development and transportation companies began buying land in Los Altos for future development. During this time, present-day Los Altos saw large tracts of undeveloped land, including where the Property is located (

¹² Los Altos Hills, "Lost Altos Hills History Anthology (1956-2016)", 2016.

¹³ Sacramento State Office, "Report of the Surveyor-General of the State of California from August 1, 1898 – August 1, 1898." 1886.

¹⁴ Jose Salameda, *Memories of Los Altos*, publisher Joe Salameda (January 1, 1982).

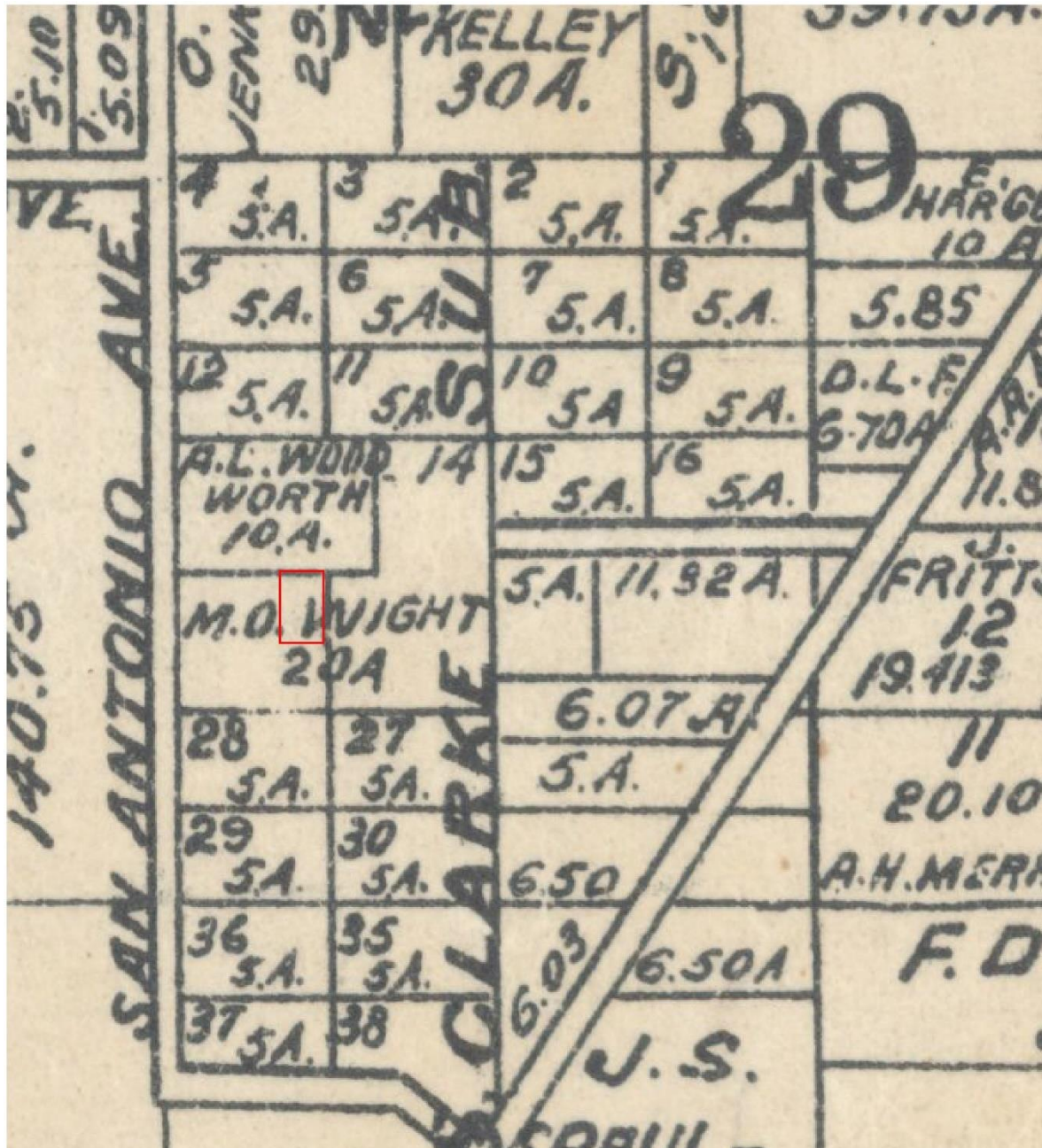


Figure 3), subdivided as part of planned development. In Los Altos, the SP railroad President Paul Shoup and his brother, Guy Shoup, an attorney for the SP, purchased a right-of-way from Palo Alto to Los Altos to run a connecting rail line through Los Gates and points south. This coincided with Paul Shoup's founding of the Altos Land Company in 1906. Paul, who is known as the "father of Los Altos," proposed to link the cities of Palo Alto and Los Gatos with a new rail line through present-day Los Altos; however, the route where the rail line was proposed to be located was within two adjoining parcels owned by rifle heiress Sarah Winchester, who did not want the rail line to split the two adjacent parcels. On October 19, 1907, the Altos Land Company was incorporated with Paul Shoup as its director. Soon after its incorporation, the SP railroad acquired the company as the newly formed subsidiary, Peninsular Railway. Although the Altos Land Company failed to



purchase the right-of-way through Sarah Winchester's property, they offered to buy both lots from her instead. She accepted the offer, which allowed the Altos Land Company to move ahead with its plan to develop the small community. The Altos Land Company kicked off its development plans by sponsoring outdoor land sale events, which coincided with the construction of the new SP route from Palo Alto to Los Altos to provide train service through Los Altos. On April 19, 1908, the SP train service opened in Los Altos, with five trains per day along the route of the present-day Foothill Expressway.

During the early 1900s, the Altos Land Company continued its marketing campaign to sell lots for development to support its new rail line by promoting Los Altos as "the loveliest place on the peninsula" (Figure 4 and Figure 5). As part of their marketing efforts, residents of San Francisco were offered free railroad excursions in the country for a day, with complimentary picnics alongside the tracks where lots were being sold. By 1911, fifty new houses had been constructed within Los Altos, and several office buildings and stores had been built along Main Street (Figure 6). The 10-acre lots were priced from \$400 to \$650, and homes could be built from \$2,000 to \$4,000. The 10-acre lots were also laid out to support small family-owned fruit farmers, including those along Hawthorne Avenue. Shoup then laid out the town of Los Altos, and the first business to open in downtown Los Altos was Eschenbruecher's Hardware Store at 316 Main Street, which also housed the post office. The Los Altos Water Company, Los Altos Building and Loan, University Land Company, and the railroad company also occupied offices in downtown Los Altos. In 1909, the two-story Shoup Building was constructed at Main and Second streets, which housed a grocery store downstairs, managed by Paul Shoup's brother-in-law, Al Robinson, while the second floor was used as a school, where one teacher taught first through eighth grade. In 1914, the SP constructed a new train depot in Los Altos (Figure 7). During this time, the railroad, particularly the electric streetcar, was vital in opening the suburbs to lower and middle-income residents. Between 1910 and 1930, Los Altos prospered as a small town supported by small family-owned orchards and working-class residents who commuted to areas such as San Jose and San Francisco. During this time, small subdivisions developed, and new roads were constructed; however, housing construction within the new subdivisions was slow.

During the early 1900s, Los Altos residents were mainly of European descent. According to the 1910 U.S. Federal Census, no African Americans lived in Los Altos, and there was only one Japanese family and three single Japanese men working as servants, gardeners, or cooks.¹⁵ By the 1920s, the number of Japanese residing in Los Altos had increased, making up approximately 22% of Los Altos' population; however, there were very few Chinese and only three African Americans residing in Los Altos. During the 1920s, many Japanese Americans and Japanese immigrants found work on the numerous fruit orchard farms throughout Santa Clara Valley, including Los Altos. Most Japanese leased land due to the restrictive and discriminatory land legislation under the California Alien Land Law of 1913, making it difficult for Japanese to own property. However, some Japanese Americans, such as George Furuichi and his family, found a way to purchase property. They moved to Los Altos in 1918 and bought five acres of land on Hawthorne Avenue, 0.2 miles southeast of the Property, where they planted fruit trees. During this time, the Furuichi family appeared to have been the only Japanese family that owned property within Los Altos. By the late 1920s, Los Altos had

¹⁵ CIRCA Preservation Consulting, "City of Los Altos Historic Resources Inventory", Prepared for the City of Los Altos, 2012.



remained a small town with 10-acre lots slowly being developed with housing.

In 1929, the U.S. entered into the Great Depression (1929 – 1933), which had created a surge of bank closures, resulting in decreased available capital that impacted agriculture and reduced market prices. In 1933, five days after taking the oath of office, Roosevelt called a conference with the Agriculture, Interior, War secretaries, and several others to discuss his ideas for recruiting 500,000 men to work in the nation's forests and eroded farmlands. Roosevelt's vision was to provide work opportunities, primarily for young men, to repair the land from decades of poor management and over-use, which became known as the "New Deal." As part of the New Deal, on March 31, 1933, the Emergency Conservation Work (ECW) Act was established under Executive Order No. 6101, which created the Civilian Conservation Corps (CCC) and the Works Progress Administration (WPA). The CCC and the WPA were established to create work opportunities that would not interfere with regular employment. As such, they were explicitly directed toward the conservation of natural resources. The Public Works Administration (PWA) was established six years later, in 1939, and was created by the National Industrial Recovery Act of 1933 (NIRA). The PWA projects included extensive improvements, and infrastructure, such as roads, allowing for the growth and recovery of the Santa Clara Valley and Los Altos.

The 1940s brought significant change to the U.S. when, on December 7, 1941, Japan bombed Pearl Harbor, Hawaii, and the U.S. declared war on Japan, marking the entrance of the U.S. into World War II (WWII). Suspecting potential spies within the Japanese American population, the U.S. government quickly enacted a series of measures to restrict the travel of Japanese Americans and Japanese immigrants to the U.S. and Hawaii. On February 19, 1942, President Roosevelt signed Executive Order 1066, which authorized the internment of 120,000 people of Japanese descent, including Nisei, who were Japanese Americans born to Japanese parents, and Issei, who were the first generation of Japanese to immigrate to the U.S., in 11 camps located across seven states. In March 1942, Japanese American communities throughout Santa Clara County, including Los Altos, were ordered to report to temporary Wartime Civil Control Administration (WCCA) camps (aka assembly centers), including the Tanforan Racetrack in San Bruno. Upon arrival, many lived in former horse stalls before being transferred to "relocation centers," such as Topaz in Central Utah. In 1942, well-known Los Altos Japanese American George Furuichi and his family were sent to the Heart Mountain Relocation Center in northwest Wyoming. In 1943, George was recruited by the U.S. Army during his internment, and he served as part of the famed U.S. Japanese "Go for Broke" 442 Regimental Combat Team. After WWII ended in 1945, towns and cities grew as they saw the return of U.S. soldiers and returning Japanese residents released from internment camps. The War Relocation Authority (WRA) gave each Japanese resident \$25 in cash and a train or bus ticket back to their hometowns. Some Japanese residents returning home found their belongings stored by churches or trusted neighbors. In contrast, others discovered their homes and businesses in disarray, and their things were often stolen or broken.¹⁶ Unlike many Japanese Americans who lost everything during their internment, George Furuichi and his family were able to retain their land, which was maintained and protected by close friends during their internment. In 1947, George, his sister Helen, and his cousin Tom, who were also interned during WWII, opened the Los Altos Nursery on Hawthorne Avenue, which the Furuichi family owned until 2018.

¹⁶ James C Williams, and Kent Seavey. "Gilroy Yamato Hot Springs National Register of Historic Places Nomination", (NR#95000996), Washington, DC: National Park Service, 1995.



During the late 1940s, Los Altos and Santa Clara County experienced tremendous job growth related to new industries, including the electronic and defense industries, resulting in a manufacturing boom (Figure 9). During this time, the town of Los Altos, like many other cities throughout the U.S., saw a housing boom with the return of soldiers after WWII. Between 1946 and 1952, Los Altos school enrollment increased nearly 400% during the influx of new residents. As the town grew, Los Altos residents worried that either Palo Alto or Mountain View would annex the growing town. In 1952, the citizens of Los Altos voted to incorporate the City of Los Altos, becoming the eleventh City in Santa Clara County.

By the 1960s, the economy was booming, and new residential housing construction continued. In 1960, the population of Los Altos reached 19,696. By this time, the automobile had replaced the train as the primary mode of transportation, and in 1964, the SP railroad ceased operations in Los Altos. During the 1970s, the technology industry was beginning to grow, and downtown Los Altos consisted of commercial buildings, restaurants, and a movie theater (Figure 10). In 1976, Apple co-founders Steve Jobs and Steve Wozniak built the first 50 “Apple I” computers in Jobs’ parents’ garage in Los Altos.



Figure 2. Undated photograph of Juana Briones de Miranda (courtesy of the NPS).

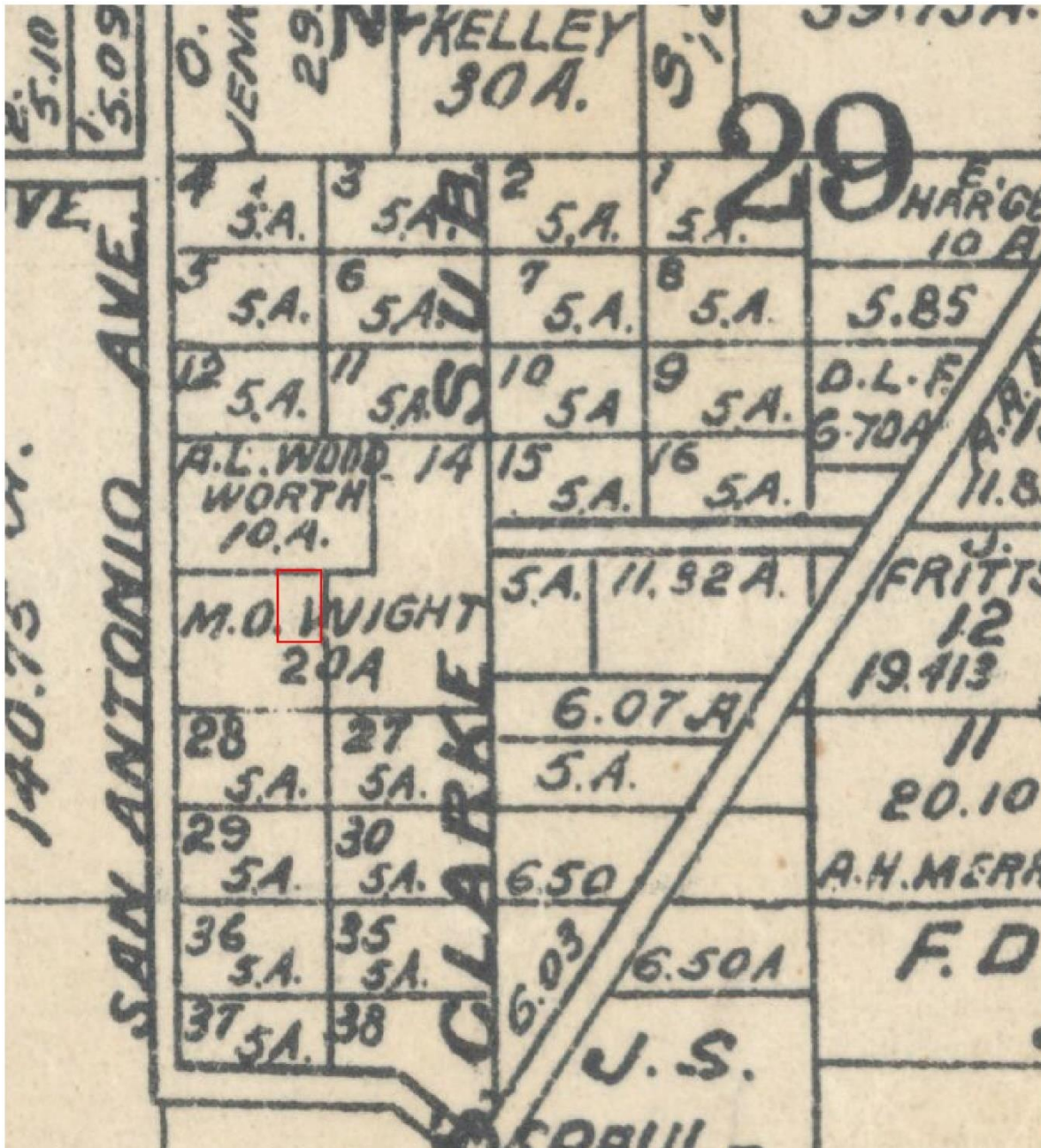


Figure 3. The 1910 Santa Clara County map shows the location of the Property (outlined in red) within M.O. Wight's 20-acre property in the L.S. Clark Subdivision, later subdivided as part of the Adams Subdivision (courtesy of the Stanford University Library).

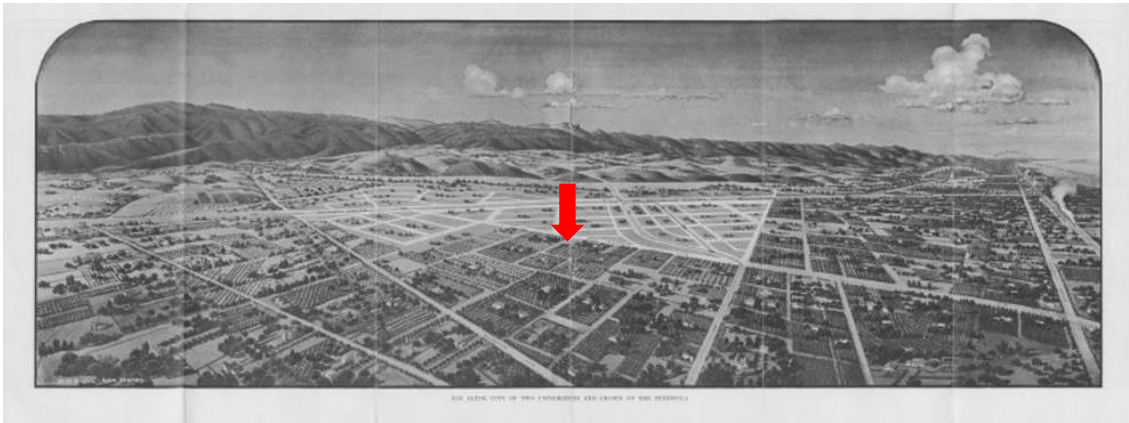


Figure 4. ca. 1907 bird's eye view drawing of the developing community of Los Altos; showing the approximate location of the Property – red arrow (courtesy of the Los Altos History House Museum Archives).

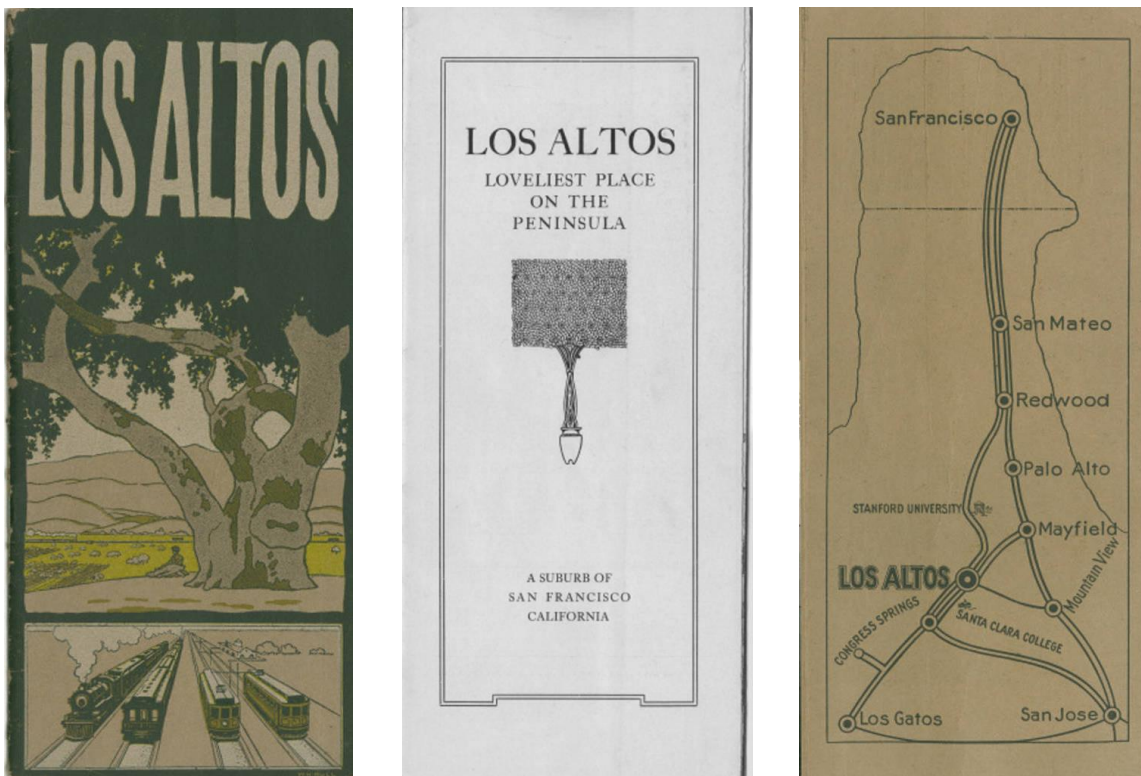


Figure 5. A marketing brochure from the Altos Land Company advertising Los Altos as the loveliest place on the peninsula (courtesy of the Los Altos History House Museum Archives).

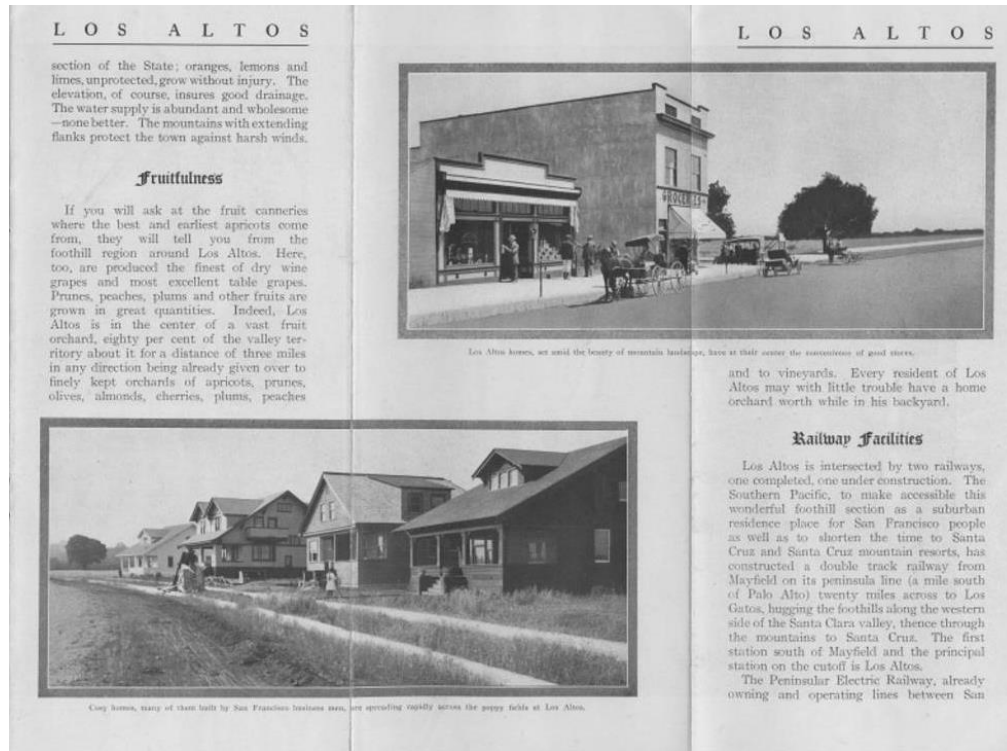


Figure 6. Advertisement from the Altos Land Company, advertising Los Altos as the loveliest place on the peninsula (courtesy of the Los Altos History House Museum Archives).



Figure 7. ca. 1920 photograph of the 1913 Southern Pacific Railroad depot in Los Altos (courtesy of the Los Altos History House Museum Archives).



Figure 8. ca. 1930 photograph of George Furuichi (third from the right) and other Japanese workers. The location may have been within his property on Hawthorne Avenue (courtesy of the Los Altos History House Museum Archives).



Figure 9. 1944 aerial photograph of downtown Los Altos (courtesy of Don McDonald).



Figure 10. 1970s photograph of downtown Los Altos (courtesy of the Los Altos History Museum).

PROPERTY HISTORY

In the late 1840s, the Property was part of unclaimed public land acquired by the U.S. government in 1848. By 1865, the Property was surveyed under the PLSS and became part of a 640-acre property covered with chamisal, a term for the overgrowth of chamiso, an evergreen shrub. By 1895, the Property was within Lot 20 of the L.S. Clarke subdivision (Figure 11) and by the 1920s, was part of the Adams Subdivision (Figure 12).

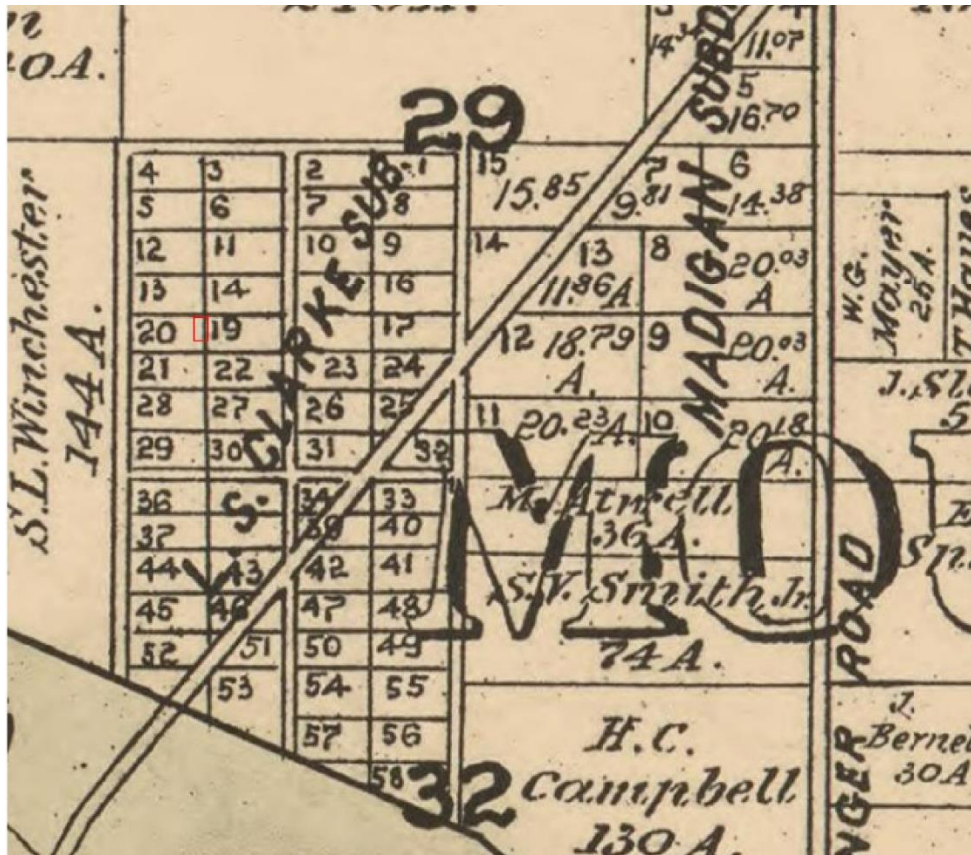


Figure 11. 1895 Hermann Bros., Official Map of Santa Clara County.

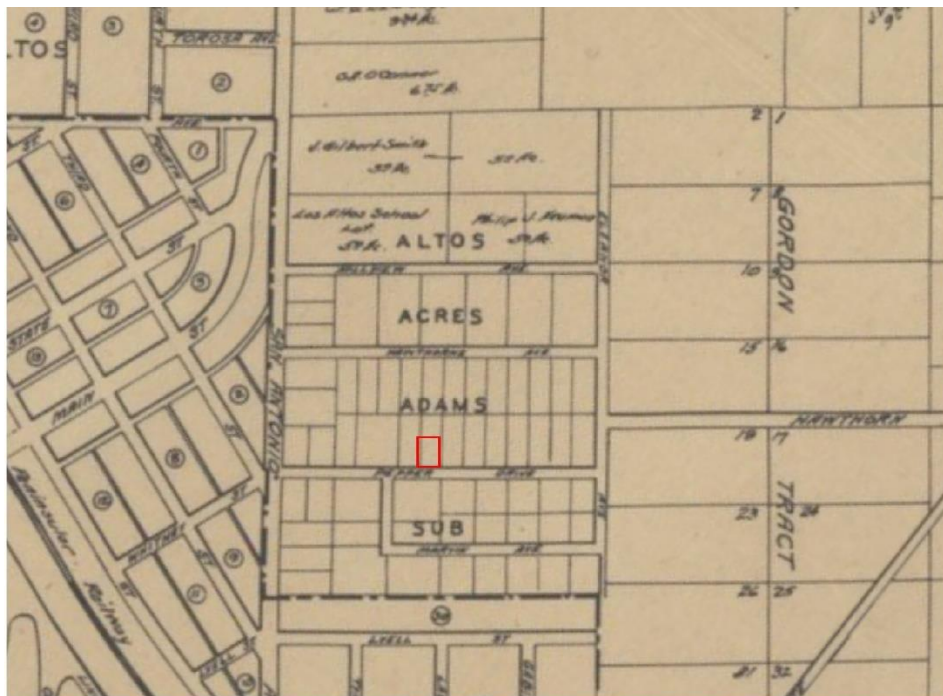


Figure 12. By 1920, the Property was part of the Adams subdivision (1926 Miller, Regional Map of the City of Palo Alto, California; courtesy of the Los Altos History House Museum Archives).



Table 1. Owners and Occupants History

1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
1928-1945	Owners: Harry Putnam Van Epps and Grace (née Lane) Van Epps	- The property's first owners were Harry P. and Grace Van Epps. - Harry Putnam was born May 22, 1884, in Turner, South Dakota to George and Elizabeth Van Epps.¹⁷ Grace Elizabeth was born April 27, 1891, in Independence, Iowa to George and Nettie Lane.¹⁸ They married on June 23, 1914, in Roundup, Montana.¹⁹ They had two daughters, Gwendolyn Irma and Alice Virginia.²⁰ - Per the 1920 Federal Census, the family lived in Hardin, Montana, where Harry was a farmer.²¹ George and Elizabeth Van Epps (Figure 13) moved to California in 1902.²² In 1928, they purchased the Property where they constructed the 1929 house, beginning construction in July, and moving into the house in December (Figure 14 and Figure 15).²³ Per the 1930 Federal Census, Harry worked as a carpenter, building houses, while Grace tutored students from their home.²⁴ In ca. 1933, the detached garage was constructed (Figure 16), likely by Harry. During this time, it appears the rear shed addition was added to the northeast corner of the house. - In 1945, Harry and Grace sold the Property and moved to 214 Lylle Street in Los Altos. - Grace died on December 22, 1958.²⁵ Harry died April 24, 1968, in Paradise, California.²⁶
1945-1947	Owners: Boyd G. Oliver and Anne Marie (née Cook) Oliver	- The subsequent owners of the Property were Boyd G. and Anne Marie Oliver. - Boyd Golden was born February 20, 1911, in Denver, Colorado to Neno G and Myrtle Oliver.²⁷ Boyd married Daunus Nolan on December 6,

¹⁷ Ancestry.com, "Harry Putnam Vanepps," *South Dakota, U.S., Birth Index, 1856-1918*.

¹⁸ Ancestry.com, "Grace Elizabeth Lane," *Iowa, U.S., Births and Christenings Index, 1800-1999*.

¹⁹ Ancestry.com, "Harry Putman Van Epps," *Montana, U.S., County Marriages, 1865-1987: Musselshell, Marriage Records, Vol 1-2 1911-1921*.

²⁰ Ancestry.com, "Harry P Van Epps," *1930 United States Federal Census: California, Santa Clara County, Fremont, District 0121*.

²¹ Ancestry.com, "Grace E Van Epps," *1920 United States Federal Census: Montana, Big Horn County, Hardin, District 0004*.

²² Newspapers.com, "George Van Epps Claimed by Death," *The Peninsula Times Tribune*, August 26, 1931.

²³ Newspapers.com, "To Occupy New Home," *The Peninsula Times Tribune*, December 5, 1929.

²⁴ Ancestry.com, "Harry P Van Epps," *1930 United States Federal Census: California, Santa Clara County, Fremont, District 0121*.

²⁵ Ancestry.com, "Grace Elizabeth Van Epps," *U.S., Find a Grave® Index, 1600s-Current*.

²⁶ Ancestry.com, "Harry Putnam Van Epps," *U.S., Find a Grave® Index, 1600s-Current*.

²⁷ Ancestry.com, "Boyd Golden Oliver," *U.S., Social Security Applications and Claims Index, 1936-2007*.



1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
		1932, in Walsenburg, Colorado.²⁸ They divorced on February 26, 1936.²⁹ • Anne Marie Cook was born May 1, 1911, in Los Angeles.³⁰ • In October 1936, the newspaper announced the future marriage of Boyd Oliver and Anne Marie Cook.³¹ At the time of the 1930 Federal Census, Boyd and Anne lived in Monrovia, California, where Boyd worked as a machine operator.³² They had two sons, Verlin and Kenneth.³³ By 1950, Boyd was a proprietor of a saddle shop, known as Oliver Saddle Shop.³⁴ By 1977, the business was renamed Oliver's Leather Goods and Saddles.³⁵ • Boyd died January 26, 1994.³⁶ Anne died December 20, 1996, in San Benito.³⁷
1947	Owners: Rudolf Hennes and Stephanie Hennes	• The subsequent owners of the Property were Rudolf Hennes and Stephanie Hennes. • Rudolf Fredrich Hennes was born October 3, 1896, in Auerbach, Germany.³⁸ Per the 1920 Federal Census, he immigrated to the U.S. in 1914, and worked at a creamery.³⁹ Rudolf was naturalized on July 20, 1928.⁴⁰ • Stephanie Hennes was born September 15, 1906, in Vienna, Austria.⁴¹ • Rudolf and Stephanie were married September 19, 1931.⁴² The couple

²⁸ Ancestry.com, "Boyd G Oliver," *Colorado, U.S., County Marriage Records and State Index, 1862-2006: Statewide Marriage Index, O-Os, All*.

²⁹ Ancestry.com, "Boyd G Oliver," *Colorado, Divorce Index, 1851-1985*.

³⁰ Ancestry.com, "Cook," *California Birth Index, 1905-1995*.

³¹ Newspapers.com, "Intend to Wed," *Progress-Bulletin*, October 9, 1936.

³² Ancestry.com, "Boyd Aliver," *1940 United States Federal Census: California, Los Angeles County, Monrovia, 19-372*.

³³ Ancestry.com, "Boyd G Oliver," *1950 United States Federal Census, California, Santa Clara County, San Jose, 73-123*.

³⁴ Ancestry.com, "Boyd G Oliver," *U.S., City Directories, 1822-1995: California, San Jose, 1963, San Jose, California, City Directory, 1963*.

³⁵ Ancestry.com, "Boyd G Anne M Oliver," *U.S., City Directories, 1822-1995: California, San Jose, 1977, San Jose, California, City Directory, 1977*.

³⁶ Ancestry.com, "Boyd G. Oliver," *U.S., Social Security Death Index, 1935-2014*.

³⁷ Ancestry.com, "Anne Marie Oliver," *California, U.S., Death Index, 1940-1997*.

³⁸ Ancestry.com, "Rudolf Fredrich Hennes," *U.S., World War II Draft Registration Cards, 1942: California, All, Burgess, Charles Dana - Masetti, Vincenzo*.

³⁹ Ancestry.com, "Rudolph Hennes," *1920 United States Federal Census: California, Stanislaus County, Newman, District 0176*.

⁴⁰ Ancestry.com, "Rudolf," *California, U.S., Federal Naturalization Records, 1888-1991: District Court, Northern District, California: San Francisco, Petition 29320 Andreas Peter Sofianopoulos 1933: Petition 29590 John McCarthy 1934*.

⁴¹ Ibid.

⁴² Ibid.



1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
		had four children, Doris, Joan, Leila and Louise.⁴³ Rudolf then worked as a painting contractor, which remained his career until he died in June 1961.⁴⁴ ⁴⁵ Stephanie died June 22, 1986.⁴⁶
1951-1959	Owners: Edwin J. Gates and Queen J.S. Gates	- The subsequent owners of the Property were Edwin J and Queen D. Gates. - Edwin James Gates was born March 18, 1881 in Illinois.⁴⁷ Edwin married Jessie H. Shoger in 1902 in Kendall, Illinois.⁴⁸ In 1910, Edwin and Jessie in Oswego, Illinois, where Edwin worked as a farmer.⁴⁹ By 1920, the couple moved to Litchfield, Minnesota, where Edwin worked as a Vulcanizer – strengthening the flexibility and durability of rubber.⁵⁰ By 1930, the they lived in Palo Alto, where Edwin worked as a salesman for a farm.⁵¹ In 1940, Edwin worked as a mechanic. Jessie is not shown as having an occupation.⁵² Jessie died September 19, 1943.⁵³ - Edwin then married Queen (Queenie) Antoinette Doris in the 1940s.⁵⁴ Queen was born in Chicago, Illinois on April 26, 1890 to Alfred and Augusta Dahlberg.⁵⁵ Per the 1920 Federal Census, Queen lived in Kansas City, Missouri, was a widow, and had a live-in maid.⁵⁶ Queen was married to a man with the surname Nye, and together, they had a son, William, who was born ca. 1913. During this time, Queen worked as a

⁴³ Newspapers.com, "Deaths: Hennes," *The Peninsula Times Tribune*, June 24, 1986.

⁴⁴ Ancestry.com, "Rudolph Hennes," *1940 United States Federal Census: California, San Francisco County, San Francisco*, 38-266.

⁴⁵ Newspapers.com, "Death Claims Rudolf Hennes of Mt. View," *The Peninsula Times Tribune*, June 12, 1961.

⁴⁶ Newspapers.com, "Deaths: Hennes," *The Peninsula Times Tribune*, June 24, 1986.

⁴⁷ Ancestry.com, "Edwin James Gates," *U.S., World War II Draft Registration Cards, 1942: California, All, Bacchi, Ray - Jones, Abner*.

⁴⁸ Ancestry.com, "Edwin J. Gates," *Illinois, U.S., County Marriage Records, 1800-1940*.

⁴⁹ Ancestry.com, "Edward J Gates," *1910 United States Federal Census: Illinois, Kendall County, Oswego, District 0071*.

⁵⁰ Ancestry.com, "Edwin J Gates," *1920 United States Federal Census: Minnesota, Meeker County, Litchfield, District 0128*.

⁵¹ Ancestry.com, "Edwin J Gates," *1930 United States Federal Census: California, Santa Clara County, Palo Alto, District 0019*.

⁵² Ancestry.com, "Edwin J Gates," *1940 United States Federal Census: California, San Mateo County, Other Places*, 41-65.

⁵³ Newspapers.com, "Deaths: Gates," *The Peninsula Times Tribune*, September 20, 1943.

⁵⁴ Ancestry.com, "Queen Gates," *1950 United States Federal Census: California, San Mateo County, Other Places*, 41-254.

⁵⁵ Ancestry.com, "Queen Antoinette Doris Gates," *U.S., Find a Grave® Index, 1600s-Current*.

⁵⁶ Ancestry.com, "Queenie Nye," *1920 United States Federal Census: Missouri, Jackson County, Kansas City Ward 13, District 0202*.



1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
		cashier.⁵⁷ Queen married Osborne Swan in ca. 1935.⁵⁸ Per the 1940 Federal Census, Queen and Osborne lived in Los Angeles, and Queen worked as a book clerk.⁵⁹ Osborne died in 1940.⁶⁰ • Edwin died October 14, 1961.⁶¹ Queen died on November 21, 1966, in Mountain View.⁶²
1959-1961	Owners: Frank M.L. Frankfurt and Grace M. Frankfurt	• The subsequent owners of the Property were Frank and Grace Frankfurt. • Frank and Grace owned and operated the Frankfurt Realty and Investment Co.⁶³ The company operated from 1955 to 1963.⁶⁴ • Frank and Grace were married in June 1945.⁶⁵ • No further information regarding either Frank or Grace was found.
1961-1962	Owners: Troy R. Mansker and Doris Mansker	• The subsequent owners of the Property were Troy R. and Doris Mansker. • Troy Roy was born May 8, 1923, in Pope County, Arkansas.⁶⁶ Doris E. Waudby was born September 7, 1925.⁶⁷ Troy was enlisted in the Army, serving as a Private in the Infantry from December 9, 1942 to December 22, 1945.⁶⁸ Troy and Grace were married on June 8, 1944, in Nashua, Iowa.⁶⁹ Together, they had three daughters, Janice, Patricia and JoAnn and a son, Phillip.⁷⁰ • After Troy was discharged from the Army, the family lived in Iowa, where Troy worked as a life insurance salesman.⁷¹ By 1951, the family

⁵⁷ Ancestry.com, "Queenie Nye," 1930 United States Federal Census: Missouri, Jackson County, Kansas City, District 0200.

⁵⁸ Ancestry.com, "Osborne Swan," U.S., Newspapers.com™ Marriage Index, 1800s-current.

⁵⁹ Ancestry.com, "Osborn Swan," 1940 United States Federal Census: California, Los Angeles County, Los Angeles, 60-936.

⁶⁰ Findagrave.com, "Osborne Sheffield Swan," accessed February 27, 2025, https://www.findagrave.com/memorial/228617776/osborne_sheffield-swan

⁶¹ Ancestry.com, "Edwin James Gates," U.S., Find a Grave® Index, 1600s-Current.

⁶² Newspapers.com, "Deaths: Gates," *The Peninsula Times Tribune*, November 23, 1966

⁶³ Newspapers.com, "2 Gunmen Clout Woman, Take \$16,000 in gems: Victim Lured to Holdup," *The Peninsula Times Tribune*, December 9, 1960.

⁶⁴ Newspapers.com, Search: "Frankfurt Realty and Investment, Santa Clara County, California."

⁶⁵ Newspapers.com, "2 Gunmen Clout Woman, Take \$16,000 in gems: Victim Lured to Holdup."

⁶⁶ Ancestry.com, "Troy Roy Mansker," U.S., Find a Grave® Index, 1600s-Current.

⁶⁷ Ancestry.com, "Doris Eveyn Mansker," U.S., Find a Grave® Index, 1600s-Current.

⁶⁸ Ancestry.com, "Troy Roy Mansker," U.S., Department of Veterans Affairs BIRLS Death File, 1850-2010.

⁶⁹ Ancestry.com, "Troy R Mansker," Iowa, U.S., Marriage Records, 1880-1948: 1944, 1 (Adair County-Dubuque County).

⁷⁰ Newspapers.com, "Funeral Notices: Mansker," *Santa Cruz Sentinel*, May 28, 1965.

⁷¹ Ancestry.com, "Troy Mansker," 1950 United States Federal Census: Iowa, Bremer County, Waverly, 9-25.



1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
		had relocated to Santa Clara County.⁷² Grace died on May 27, 1965.⁷³ Troy died April 28, 2006.⁷⁴
1962-1964	Owners: Edwin H. Feinberg and Emily W. Feinberg	- The subsequent owners of the Property were Edwin H. and Emily W. Feinberg. - Edwin was born on December 20, 1927, in Boston, Massachusetts.⁷⁵ - Edwin enlisted in the Army on annuary 11, 1946; however, he was never called to serve.⁷⁶ In 1962, Edwin graduated from Cornell University after completing his doctoral thesis, "The Evolutionary Adjustment of Two Dipteran Species, <i>Phaenicia</i> (-<i>Lucilia</i>) <i>Sericata</i>, (<i>Calliphoridae</i>) and <i>Musca Domestica</i>, (<i>Muscidae</i>), Competing for the Same Niche in a Laboratory Population Cage."⁷⁷ After graduation, Edwin registered in the American Institute of Biological Sciences, with a Ph.D., Ed.D, Sc.D in Biosciences.⁷⁸ He worked for the Literature Resources Department of BioSciences Information Services of Biological Abstracts.⁷⁹ - Edwin died on April 6, 2008, in Philadelphia.⁸⁰ - No information regarding Emily was found.
1964-1969	Owner: Roberta Ridley	- The subsequent owner of the Property was Roberta Ridley. - Roberta Jane Viborg was born February 10, 1916.⁸¹ - Roberta attended Salinas Junior College and finished at San Jose School of Business.⁸² Roberta married Paul Martin Ridley in February 1936.⁸³ Per the 1940 census, the couple lived in Redwood Township, where

⁷² Newspapers.com, "In Sequoia Hospital Redwood City, July 10, 1951," *The Peninsula Times Tribune*, July 11, 1951.

⁷³ Ancestry.com, "Doris Eveyn Mansker," *U.S., Find a Grave® Index, 1600s-Current*.

⁷⁴ Ancestry.com, "Troy Roy Mansker," *U.S., Find a Grave® Index, 1600s-Current*

⁷⁵ Ancestry.com, "Edward," *Massachusetts, U.S., State and Federal Naturalization Records, 1798-1950: District Court, Massachusetts, Petition No. 290011, Maria Grazia Cintrella-Petition No. 290629, Catherine Macmillan*.

⁷⁶ Ancestry.com, "Edwin H Feinberg," *U.S., World War II Army Enlistment Records, 1938-1946*.

⁷⁷ Edwin Harold Feinberg, "The Evolutionary Adjustment of Two Dipteran Species, *Phaenicia* (-*Lucilia*) *Sericata*, (*Calliphoridae*) and *Musca Domestica*, (*Muscidae*), Competing for the Same Niche in a Laboratory Population Cage," (Cornell University, 1962).

⁷⁸ Ancestry.com, "Edwin H Feinberg," *U.S., National Register of Scientific and Technical Personnel, 1921-1970*.

⁷⁹ Edwin H. Feinberg, "Foreign Journals," *BioScience*, Volume 23, Issue 2, (February 1973, Page 74): <https://doi.org/10.2307/1296565>.

⁸⁰ Legacy.com, "Edwin Feinberg Obituary," accessed February 27, 2025, <https://www.legacy.com/us/obituaries/inquirer/name/edwin-feinberg-obituary?id=10594912>

⁸¹ Ancestry.com, "Roberta J Viborg," *California Birth Index, 1905-1995*.

⁸² Newspapers.com, "Miss Roberta Jane Viborg and Paul Martin Ridley Wed in Methodist Church," *The Californian*, February 6, 1939.

⁸³ Ibid.



1929 House, ca. 1933 Detached Garage, and Landscape		
Year(s)	Owners/Occupants	Details
		Roberta worked as a stenographer.⁸⁴ After the couple had children, Albert and Mary, Roberta temporarily retired to remain at home.⁸⁵ • Roberta died on August 3, 1992.⁸⁶
1969-1973	Owners: Joseph A. Palma and Patricia Palma	• The subsequent Property owners were Joseph A. and Patricia Palma. • Joseph Andrew Palma was born February 12, 1939.⁸⁷ Patricia Jayne Wallace was born June 10, 1944.⁸⁸ • The couple were married November 16, 1963.⁸⁹ Joseph played baseball in the minor league between 1960 to 1965.⁹⁰ • No further information regarding the couple was found.
1973-1975	Owners: Charles F. Jerabek and Sydney Jerabek	• The subsequent owners of the Property were Charles and Sydney Jerabek. • Charles was born on July 18, 1945, in Queens, New York.⁹¹ • Charles and Sydney were married September 10, 1966, in New York City.⁹² Together, they had two children, Rodney and Molly.⁹³ • Charles died May 19, 2014.⁹⁴ • No further information regarding Charles and Sydney was found.
1975-1993	Owners: Kenneth Jones and Doris Jones	• The subsequent owners of the Property were Kenneth and Doris Jones. • No information could be confirmed regarding either Kenneth or Doris.

⁸⁴ Ancestry.com, "Roberts J Rudley," 1940 United States Federal Census: California, Santa Clara County, Redwood, 43-47

⁸⁵ Ancestry.com, "Roberta J Ridley," 1950 United States Federal Census: California, Santa Clara County, Redwood, 43-115A.

⁸⁶ Ancestry.com, "Roberta Jane Ridley," California, U.S., Death Index, 1940-1997.

⁸⁷ Ancestry.com, "Joseph Andrew Palma," California Birth Index, 1905-1995.

⁸⁸ Ancestry.com, "Patricia Jane Wallace," California, U.S., Newspapers.com™ Stories and Events Index.

⁸⁹ Newspapers.com, "Engagement is Told: Wallace-Palma," The Peninsula Times Tribune, October 14, 1963.

⁹⁰ Baseball Reference, "Joseph Palma," accessed February 27, 2025, <https://www.baseball-reference.com/register/player.fcgi?id=palma-001jos>

⁹¹ Newspapers.com, "Charles F. Jerabek," The Naples Daily News, May 23, 2014.

⁹² Ancestry.com, "Sydney R Parvin," New York State, Marriage Index, 1881-1967.

⁹³ Newspapers.com, "Charles F. Jerabek," The Naples Daily News, May 23, 2014.

⁹⁴ Ibid.



(Photo by Berton Crandall)

5 GENERATIONS CELEBRATE PALO ALTO'S 104TH BIRTHDAY

Mrs. Elizabeth Van Epps, a Palo Alto resident for more than half of her 104 years, poses with her son, Harry Van Epps of Los Altos, her granddaughter, Mrs. George Fanucci (standing) of Mountain View, great-granddaughter Mrs. Robert Bailey, also of Mountain View, and great-great-granddaughter Debbie Bailey. Mrs. Van Epps was born July 29, 1855, in Glenville, N.Y. She remembers President Abraham Lincoln and the pioneering movement across

the Western plains. She and her husband, the late George H. Van Epps, came to Palo Alto 54 years ago. Mr. Van Epps built a home at 627 Channing Ave. For the past 12 years she has been living with her son-in-law and daughter, Mr. and Mrs. Archie Crandall, at 2020 Bryant St. She has two other sons, David of Palo Alto and Howard of Columbus, Mont., six grandchildren, six great-grandchildren and one great-great-grandchild.

Figure 13. 1959 photograph of Harry P. Van Epps, with his mother, daughter, granddaughter and great-granddaughter (courtesy of Newspapers.com).



TO OCCUPY NEW HOME

Mrs. and Mrs. Harry Van Epps of Los Altos will move at the end of this week into the new home which they have just completed on Pepper drive. Since selling their former residence on Hawthorn street they have been occupying temporary quarters on

the new property.

Figure 14. Announcement of the completion of the 1929 house (courtesy of newspapers.com, *The Peninsula Times Tribune*, July 15, 1929).



Figure 15. 1930 aerial, showing the 1929 house within the Property (courtesy of University of Santa Barbara Library).



Figure 16. 1939 aerial, showing the 1929 house and ca. 1933 detached garage within the Property (courtesy of University of Santa Barbara Library).

PERMIT HISTORY (1994 – 2024)

The following section details the Property's available permit history from 1994 to 2024.

Permits Approved			
Date	Permit #	Item (as shown on the permit)	Approved
1994	44466	Re-roof	Yes
1999	635356	"W/H" (water heater)	Yes

Application Submitted			
Date	Permit #	Item (as shown on the permit)	Approved
9/17/2024	No permit issued	"Legalization of existing detached cottage to an ADU"	No



ARCHITECTURAL CONTEXT

The following section briefly describes the Colonial Revival architectural style associated with the 1929 house within the Property.

COLONIAL REVIVAL (1880 – CA. 1955)

The term "Colonial Revival" refers to a rebirth of interest in the early English and Dutch colonial houses of the Atlantic Seaboard. The style was reintroduced in America at the Philadelphia Exposition of 1876, which marked the centennial of the signing of the Declaration of Independence. Many of the buildings designed for the Exposition were based on historically significant colonial designs. At about the same time, several national organizations publicized a series of articles on eighteenth century American architecture, which appeared in the American Architect and Harper's magazines. The renewed interest in colonial architecture fueled by the centennial and the exposure of the Colonial Revival style received in national publications helped to make it popular throughout the country. According to McAlester, Colonial Revival buildings (aka American Colonial Revival) were extremely popular from the 1910s to the 1930s and unlike other period revival styles, and continued through the early 1960s, although it was utilized less frequently and less elaborately after WWII.⁹⁵

The Colonial Revival style typically includes the following:⁹⁶

- Symmetry in façade – although 10% of Colonial Revival were asymmetrical.
- Hipped or gabled roofs with boxed eaves
- Fanlights and/or sidelights around main door.
- Double-hung sash windows, often set in pairs.
- Clapboard and brick exterior cladding
- Classical detailing (sometimes exaggerated), including pediments, columns or pilasters leading to elaborate entries
- Subtypes include Asymmetrical, Hipped Roof with Full-Width Porch, Hipped Roof without Full-Width Porch, Side Gable Roof, Centered Gable, Gambrel Roof, Second-Story Overhang, One-Story, Three-Story and Built-In Garage.

HISTORIC ARCHITECTURAL SURVEY

On January 13, 2025, EDS Principal Architectural Historian Stacey De Shazo, M.A., completed a historic architectural survey of the Property, including the 1929 house, ca. 1933 detached garage, and landscape. The results of the survey are documented in the following section.

1929 HOUSE

The 1929 house is associated with Colonial Revival architecture (Figure 17). The building is a side-gabled one-

⁹⁵ Virginia, McAlester and Lee McAlester, *A Field Guide to American Houses*. New York, Alfred A. Knopf. Munro-Fraser, J.P. 2014.

⁹⁶ Ibid.



and-one-half-story form that rests on a board-formed concrete and post-and-pier foundation. The house consists of a steep-pitched roof clad in asphalt shingles. A chimney is located along the roof ridge, and it is clad in stucco. The building is clad in wood clapboard on three elevations, with the rear elevation (north elevation) consisting of no cladding due to a permit in process.



Figure 17. South elevation, facing north.

South Elevation (Primary Façade)

The south elevation is the primary façade is symmetrical (Figure 18). At the first story, there is a centered, wooden front door flanked by side lights, each with four lights with simple mutins and a lower wood panel. The door is a replacement wood-paneled door with two window lights. The front door is accessed via a paved driveway, with the entrance threshold resting at the ground level. Although the primary façade is on a raised foundation, it is not visible as the clapboard has been extended to the ground. There is a modern, arched arbor in front of the door, which serves as a “covered porch,” which is not original to the house. The front door is flanked by two pairs of six-over-one, divided light, wood windows with lugs (Figure 19). There are decorative wood shutters that flank the windows. The roof consists of three original, front-gable dormers with six-over-six, divided light, wood windows with lugs. The windows are trimmed in wood casing, with a slightly projecting windowsill. The dormers are clad in wood clapboard and the dormer roofs are clad in asphalt shingles (Figure 20). Below the eave of the roof there is a simple dentil that runs the length of the primary façade.



Figure 18. Primary façade, facing north.



Figure 19. Photograph showing a pair of windows along the primary façade.



Figure 20. Photograph showing the three roof dormers.

West Elevation

The west elevation consists of five windows (Figure 21). There are two, six-over-one, divided light, wood windows with lugs, and one smaller three-over-one, divided light, wood window located on the first story. Within the one-half-story gable there is one six-over-six light, wood window with lugs and a small, fixed wood window that appears to have been recently added. The windows are trimmed in wood casing, with a slightly projecting windowsill. There is also a gable vent that appears to be constructed of wood (Figure 22). The board-formed concrete foundation is only slightly exposed along this elevation.



Figure 21. West elevation, facing north.



Figure 22. West elevation gable.



North Elevation

The current north elevation shows what remains of the rear shed addition (likely added to the house in ca. 1933), removed in 2024 (Figure 23 and Figure 24), was likely a sun porch or utility room. The shed addition consisted of a pair of windows on the north elevation, and a door. What remains is the section of an east facing wall (detailed within the east elevation section below). The original north elevation wall from the construction of the 1929 house consisted of a pair of windows, a single window, and two doors, one leading to the basement and another leading into the house; removed in 2024.⁹⁷



Figure 23. North elevation, facing east.

⁹⁷ Based on information provided by the City of Los Altos, this works was unpermitted.



Figure 24. North elevation, facing south.

East Elevation

The east elevation consists of the section of a wall, which was part of a small shed addition, no longer extant, except for the wall that is visible in Figure 24 and Figure 25, as well as the original side gable form. The shed addition appears to have been clad in a combination of wood and aluminum clapboard and measured approximately 15 feet long by 6 feet wide. The walls that remain consisted of a pair of four-over and one single-hung, wood-clad vinyl windows. The original one-and-one-half-story portion of the east elevation consists of a pair of six-over-one, divided light, wood windows with lugs, and a smaller six-over-six, divided light, wood window (Figure 26). There is also a twelve-divided-light wood window near the southeast corner of the house, which appears to have been added later. The board-formed concrete foundation is exposed along this elevation (Figure 27).



Figure 25. Photograph showing a portion of an addition, no longer extant.



Figure 26. The east façade, facing south.



Figure 27. Photograph showing the board-formed concrete foundation is exposed along this elevation.

CA. 1933 DETACHED GARAGE

The ca. 1933 detached garage is not associated with any architectural style. The ca. 1933 detached garage is a simple side gable form with moderate pitched roof with “faux” gable returns on each gable end. The building is clad in wide wood boards and the roof is clad in asphalt shingles. There are what appear to be original wood and glazed hinged doors along the southern elevation (Figure 28); however, the doors are decorative, as the opening has been filled in – allowing for the use as a cottage. In 1994, the building was converted to a “cottage”; however, it may have been used for housing prior to 1994. Fenestrations include one six-light, wood, fixed window, a pair of six-light, wood, hopper windows, two single, six-light, hopper windows, one double-hung, wood window with lugs, one four-over-four-light, single-hung, wood-clad vinyl window, and a modern single entrance door (Figure 29). The building appears to rest on a concrete slab foundation. A modern deck extends the length of the north elevation.



Figure 28. South elevation, facing north.



Figure 29. Photograph showing the north and east elevations, facing southwest.



LANDSCAPE

The landscape consists of shrubs and trees, including pine and oak trees (Figure 30 and Figure 31). Approximately 75% of the front yard is covered in hardscape, including pavers and a concrete and brick driveway, and concrete block planter beds. There is wooden fencing along the north, west, and east perimeter of the Property, and wood and metal privacy fencing in the backyard along the southwest corner of the ca. 1933 detached garage.



Figure 30. Frontyard, facing northeast.



Figure 31. Backyard, facing northeast.

EVALUATION OF HISTORICAL SIGNIFICANCE

The Property, including the 1929 house, ca. 1933 detached garage, and landscape was evaluated to determine individual eligibility for listing on the CRHR. The 1929 house was evaluated for its association with Colonial Revival architecture with a period of significance of 1929, the year the house was constructed. The ca. 1933 detached garage, and landscape are not associated with any style architectural landscape design or landscape planning.

CALIFORNIA REGISTER OF HISTORICAL RESOURCES

The CRHR is an inventory of significant architectural, archaeological, and historical resources in California. Resources can be listed in the CRHR through several methods. State Historical Landmarks and NRHP listed properties are automatically listed in the CRHR. Properties can also be nominated to the CRHR by local governments, private organizations, or citizens. The CRHR follows *similar* guidelines to those used for the NRHP.⁹⁸ One difference is that the CRHR identifies the Criteria for Evaluation numerically instead of alphabetically. Another difference, according to the OHP is that “It is possible that historical resources may not retain sufficient integrity to meet the criteria for listing in the NRHP, but they may still be eligible for listing in the California Register. A resource that has lost its historical character or appearance may still have sufficient integrity for the California Register if it maintains the potential to yield significant scientific or historical information or specific data”.⁹⁹

⁹⁸ California Code of Regulations, Title 14, Chapter 11.5, Section 4850 et seq.

⁹⁹ California Office of Historic Preservation Technical Assistance Series #6 California Register and National Register: A Comparison (for purposes of determining eligibility for the California Register).



A property must possess significance under one of the four criteria and have historic integrity to qualify for listing in the CRHR. Determining integrity consists of evaluating seven variables or aspects that include location, design, setting, materials, workmanship, feeling, and association. According to the *National Register Bulletin: How to Apply the National Register Criteria for Evaluation*, these seven characteristics are defined as follows:

- **Location** is the place where the historic property was constructed.
- **Design** is the combination of elements that create the form, plans, space, structure, and style of the property.
- **Setting** addresses the physical environment of the historic property inclusive of the landscape and spatial relationships of the building(s).
- **Materials** refer to the physical elements that were combined or deposited during a particular period of time and in a particular pattern of configuration to form the historic property.
- **Workmanship** is the physical evidence of the crafts of a particular culture or people during any given period in history.
- **Feeling** is the property's expression of the aesthetic or historic sense of a particular period of time.
- **Association** is the direct link between an important historical event or person and a historic property.

The following section examines the CRHR eligibility of the Property containing the 1929 house, ca. 1933 detached garage, and landscape.

CRHR EVALUATION

1. **(Event): Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.**

The Property, including the 1929 house, ca. 1933 detached garage, and landscape, was not found to be associated with any event that made a significant contribution to California's history and cultural heritage.

Therefore, the Property, including the 1929 house, ca. 1933 detached garage, and landscape, is not individually eligible for listing in the CRHR under Criterion 1.

2. **(Person): Is associated with the lives of persons important in our past.**

A thorough literature search and review of the Property owners and occupants was completed; however, the research did not reveal any person associated with the Property that is important to our past who is eligible for listing on the CRHR.

Therefore, the Property does not appear individually eligible for listing in the CRHR under Criterion 2.

3. **(Construction/Architecture): Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values.**



Architecture: The 1929 house is associated with Colonial Revival architecture, with a period of significance of 1929. The 1929 house consists of elements of the Colonial Revival design, including the side-gabled one-and-one-half-story form, wood clapboard siding, divided light wood windows, and symmetrical primary façade. Although the building is constructed in the Colonial Revival style, it does not embody the distinctive characteristics of Colonial Revival architecture and is not representative of the design. In addition, it does not embody a method of construction and does not represent the work of an important creative individual or possess high artistic values.

The ca. 1933 detached garage, and landscape are not associated with any style architectural landscape design or landscape planning.

Therefore, the 1929 house, ca. 1933 detached garage, and landscape within the Property do not appear to be individually eligible for listing in the CRHR under Criterion 3.

4. (Information potential): Has yielded, or may be likely to yield, information important in prehistory or history.

Criterion 4 most commonly applies to resources that contain or are likely to contain information on an important archaeological research question. While most often applied to archaeological sites, Criterion 4 can also apply to built environment resources that contain important information. For a building to be eligible under Criterion 4, it must be a principal source of important information, such as exhibiting a local variation on a standard design or construction technique can be eligible if a study can yield important information, such as how local availability of materials or construction expertise affected the evolution of local building development.

The 1929 house does not appear to be able to convey important information about Colonial Revival architecture. As such, the 1929 house, ca. 1933 detached garage, and landscape within the Property are not eligible for listing in the CRHR under Criterion 4. The Property was not assessed for archaeology.

LOCAL ASSESSMENT AND RECOMMENDATION

Because local inventories, including the 2011 documentation of the 1929 house, often do not meet the documentation and evaluation requirements needed to assess impacts to historical resources under CEQA,¹⁰⁰ it is important to ensure that the documentation and evaluation of a historic property is complete following OHP and CEQA guidelines.¹⁰¹ Although the 1929 house is currently a locally listed historical resource, the City has requested an “updated” local assessment of all the built environment within the Property following the current Los Altos Municipal Code Section 12.44.040 to advise the city on continued local listing of the 1929 house, or listing of the ca. 1933 or landscape within the Property. Please note that the integrity analysis is

¹⁰⁰ Office of Historic Preservation, “Historic Resource Surveys,” (accessed 4/18/2025), https://ohp.parks.ca.gov/?page_id=23317.

¹⁰¹ The OHP suggests that although “an existing survey over five years old can provide valuable information, it is appropriate to update the survey to ensure that local planning and preservation decisions are based on the most current information available.”



part of the city's ordinance; and though similar in wording is different than what is required as part of the NPS and OHP guidelines that require a building, structure, site, object, or district to first have significance prior to completing an integrity analysis.

ASSESSMENT

12.44.040 - Criteria for Designation.

A structure, property or object may be eligible for designation as a historic (sic)¹⁰² resource or historic landmark, if it/they satisfy each of the three criteria listed below:

- A. Age. A structure or property should be more than fifty (50) years in age.¹⁰³ (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).

EDS Assessment: The Property, including the 1929 house and ca. 1933 detached garage, is over 50 years old. As such, the Property including the 1929 house and ca. 1933 detached garage retain integrity of Age.

- B. Determination of Integrity.¹⁰⁴ A structure (sic)¹⁰⁵ or property should retain sufficient historic integrity in most of the following areas:

- 1) Design: The combination of elements that create the form, plan, space, structure and style of a property.

EDS Assessment: The original side-gable form of the house from 1929 remains intact, and modest elements of Colonial Revival design are present including the wood clapboard siding, divided light wood windows, and symmetrical primary façade. However, having these design elements alone is not enough to consider a building to be representative of Colonial Revival architecture. The 1929 house lacks distinctive features including a prominent front entrance, including columns or pilasters, is a paired down version of the style, and lacks quality of design throughout to represent this style. As such, EDS recommends that the 1929 house lacks the integrity to convey significance for its association with Colonial Revival architecture.

The ca. 1933 detached garage is not associated with any architectural style or form.

- 2) Setting: The physical environment of a historic property.

EDS Assessment: The setting has changed since the construction of the 1929 house, but the setting remains a small neighborhood with modest-sized houses set back from the street and designed in

¹⁰² Historical resource.

¹⁰³ Just for reference, the NPS guidelines is at least 50 years old, and not more than 50 years in age.

¹⁰⁴ Integrity is an assessment tool devised by the NPS and utilized by the OHP to assess a historical resources ability to convey significance. An integrity analysis is only completed if a building, structure, object, site, or district is found to be significant. Although EDS did not find any of the buildings within the Property significant, the 1929 house is currently locally listed. As such, EDS utilized the City's "integrity" analysis to assess integrity for continued local listing.

¹⁰⁵ See the definition on page 5 detailing the OHP guidelines (take from the NPS) for the five classes of cultural resources.



various styles.

As such, the Property including the 1929 house and ca. 1933 detached garage retain integrity of setting.

- 3) Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.

EDS Assessment: The 1929 house retains the original wood clapboard siding on three of the four elevations; ten divided light wood windows; two paired, divided light windows; and wood shutters on the primary façade appear to be original from 1929. Although the intent of 'integrity of material' is to support or not support significance findings – in this case EDS did not find the 1929 house to be eligible under any significance criterion, the 1929 house does retain materiality from 1929.

EDS Assessment: The ca. 1933 garage has been significantly modified in materials; however, the exterior cladding and several windows may be original. As such, it retains a reduced amount of integrity of materials from ca. 1933.

- 4) Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.

Workmanship is "the evidence of artisans' labor and skill in constructing or altering a building, structure, object, or site. Workmanship can apply to the property as a whole or to its individual components. It can be expressed in vernacular methods of construction and plain finishes or in highly sophisticated configurations and ornamental detailing. It can be based on common traditions or innovative period techniques. Workmanship is important because it can furnish evidence of the technology of a craft, illustrate the aesthetic principles of a historic or prehistoric period, and reveal individual, local, regional, or national applications of both technological practices and aesthetic principles. Examples of workmanship in historic buildings include tooling, carving, painting, graining, turning, and joinery."¹⁰⁶

EDS Assessment: The workmanship evident on the 1929 house is very modest, as the house is a simple variation of the Colonial Revival style adapted to meet the lot size and the owner's budget. Though the wood windows with lugs show workmanship, these windows were not produced on-site, instead these windows were in mass production by this time, and most were purchased via millwork companies or lumber yards. In addition, the clapboard, shutters, and dentil were also likely purchased at a lumberyard or mill (unknown if the work is local or from nearby companies, which produced these standardized window and frame units). Furthermore, the workmanship evident on the house does not show any special skill in Colonial Revival design, as it does not include the Classical detailing (sometimes exaggerated), including pediments, columns or pilasters leading to elaborate entries, which is where workmanship is often showcased through hand-tooling, carving, painting, or joinery. Therefore, the integrity of workmanship in association with

¹⁰⁶ National Park Service, "How to Apply the National Register Criteria for Evaluation," 1990 (Revised 1995).



Colonial Revival design is not present. In addition, although there is some degree of skill required to construct a house, this is not the intent of the term “workmanship” to mean basic construction techniques, which are present within the 1929 house—though modest at best. As such, EDS recommends that the 1929 house does not meet the requirement for integrity of materials.

- 5) Feeling: A property's expression of the aesthetic or historic sense of a particular period of time.

EDS Assessment: Physical features, taken together, convey a property's historic character. However, 1929 is a modest example of Colonial Revival Architecture, which was popular in the U.S. from 1880 to ca. 1955. This house was not intended to meet the grander expectations of a Colonial Revival house—instead, the owner likely chose elements that they liked for the modest house. As such, the building fails to evoke the architectural details and spirit of the style. As such, EDS recommends that the 1929 house does not meet the requirement for integrity of feelings.

Although the significance finding should come before an integrity analysis for the following section, EDS completed this documentation in accordance with 12.44.040 and the order as laid out within the ordinance. This section was completed as an update to determine continued eligibility for local listing.

- C. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:¹⁰⁷

- 1) Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;¹⁰⁸

EDS Assessment: None of the current built environment resources within the Property are not currently listed on the NRHP, the CRHR, or locally for association with an event. The EDS HRE determined that the Property is not eligible for listing on the CRHR for association with any event. In addition, the Property was not found to be associated with any event that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the U.S. for local listing. As such, the Property, including the 1929 house, ca. 1933 detached garage, and landscape are not eligible for local listing under this criterion.

- 2) Person/People: Associated with the lives of persons important to the local, California or national history;

EDS Assessment: A thorough literature search and review of the Property owners and occupants was completed; however, the research did not reveal any person associated with the Property that is important to our past who is eligible for local listing under this criterion.

- 3) Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or

¹⁰⁷ https://ohp.parks.ca.gov/?page_id=21238

¹⁰⁸ NRHP Criterion: Is associated with events that have made a significant contribution to the broad patterns of our history (Criterion A); .



EDS Assessment: The 1929 house is associated with Colonial Revival architecture, with a period of significance of 1929. The 1929 house consists of modest elements of the Colonial Revival design, including the side-gable form, wood clapboard siding, divided light wood windows, and symmetrical primary façade. Although the building is constructed in the Colonial Revival style, it does not embody the distinctive characteristics of Colonial Revival architecture and is not representative of the design. In addition, it does not embody a method of construction and does not represent the work of a master or possess high artistic values. Therefore, the 1929 house does not appear eligible for continued listing on the local HRI.

The ca. 1933 detached garage, and landscape are not associated with any style architectural landscape design or landscape planning.

- 4) Archaeology: Yields important information about prehistory or history of the local area, California or the nation.

EDS Assessment: The Property was not assessed for archaeology.

RECOMMENDATIONS

Based on the findings in the HRE and local assessment, EDS recommends that the 1929 house within the Property is removed from the City of Los Altos HRI as it does not appear to meet the criteria of Section 12.44.040 due to loss of integrity and/or historic significance. In addition, the ca. 1933 detached garage and landscape are not eligible for local listing under any significance criterion.

CONCLUSION

In accordance with CEQA regulations and guidelines, EDS completed an HRE of the 0.23-acre property at 81 Pepper Drive, Los Altos, Santa Clara County, California including the 1929 house, ca. 1933 detached garage, and landscape. The HRE was completed to determine if any of the built environment resources within the Property are eligible for listing on the CRHR. The HRE was completed by EDS Principal Architectural Historian Stacey De Shazo, M.A., and Architectural Historian Nicole Wyton, M.S., who exceed the Secretary of the Interior's qualification standards in Architectural History and History, and Researcher Bee Thao, M.A. The HRE determined that the Property containing the 1929 house, ca. 1933 detached garage, and landscape does not appear individually eligible for listing on the CRHR under any criteria. However, the 1929 house is listed on the local Los Altos HRI.¹⁰⁹ As such, the 1929 house is considered a Historical Resource as defined in Section 15064.5 of the CEQA Guidelines. However, based on the updated local assessment, EDS recommends that it be removed (delisted) from the HRI. If removed, the 1929 house would not be a historical resource under CEQA.

¹⁰⁹ The 1929 house was not assigned a "California Register Historic Status Code."



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1939 Aerial

1965 Aerial



Appendix A: DPR Forms

State of California The Resources Agency
DEPARTMENT OF PARKS AND RECREATION
PRIMARY RECORD

Primary #
HRI #
Trinomial
NRHP Status Code

Other Listings
Review Code

Reviewer

Date

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*Resource Name or #: 81 Pepper Drive

P1. Other Identifier: _____

*P2. Location: ☐ Not for Publication ☒ Unrestricted

*a. County Santa Clara County and

*b. USGS 7.5' Quad Mountain View Date 1991 T 6S; R 2W; ☐ of ☐ of Sec un; MD B.M.

c. Address 81 Pepper Drive City Los Altos Zip 94022

d. UTM: Zone 10N, 578583 mE/ 4137124 mN

e. Other Locational Data: The resource is within the 0.23-acre Assessor Parcel Number (APN) 107-41-007. The Property is located on the north side of Pepper Drive, approximately 474 feet east of San Antonio Road.

*P3a. Description: The resource includes the 1929 house, ca. 1933 detached garage, and landscape. The 1929 house is associated with Colonial Revival architecture. The 1929 house is associated with Colonial Revival architecture. The building is a side-gabled, one-and-one-half-story form that rests on a board-formed concrete and post and pier foundation. The house consists of a steep-pitched roof clad in asphalt shingles. (Continued on Continuation Sheet, Page 2)

P5a.



*P3b. Resource Attributes: HP2.
Single family property (1929 house);
HP4. Ancillary building (ca. 1933
detached garage)

*P4. Resources Present: ☒ Building
☐ Structure ☐ Object ☐ Site ☐ District
☐ Element of District ☐ Other

P5b. Description of Photo: 1929
house, facing north

*P6. Date Constructed/Age and
Source: ☒ Historic ☐ Prehistoric
☐ Both 1929 house and ca. 1933
detached garage; various sources

*P7. Owner and Address: Withheld
by owners

*P8. Recorded by: Stacey De Shazo,
M.A., Evans & De Shazo, Inc. 1141
Gravenstein Highway S, Sebastopol,
California 95472

*P9. Date Recorded: 1/13/2025

*P10. Survey Type: Intensive

*P11. Report Citation: Stacey De Shazo and Nicole Wyton, with Bee Thao (2025): A Historic Resource Evaluation of the Property
at 81 Pepper Drive, Los Altos, Santa Clara County, California.

*Attachments: ☐ NONE ☒ Location Map ☒ Continuation Sheet ☐ Building, Structure, and Object Record
☐ Archaeological Record ☐ District Record ☐ Linear Feature Record ☐ Milling Station Record ☐ Rock Art Record
☐ Artifact Record ☐ Photograph Record ☐ Other (List): _____

CONTINUATION SHEET

Property Name: 81 Pepper Drive

Page 2 of 15

(Continued from Primary, page 1)

1929 House

The 1929 house is associated with Colonial Revival architecture (Figure 1). The building is a side-gabled one-and-one-half-story form that rests on a board-formed concrete and post-and-pier foundation. The house consists of a steep-pitched roof clad in asphalt shingles. A chimney is located along the roof ridge, and it is clad in stucco. The building is clad in wood clapboard on three elevations, with the rear elevation (north elevation) consisting of no cladding due to a permit in process.



Figure 1. South elevation, facing north.

South Elevation (Primary Facade)

The south elevation is the primary façade is symmetrical (Figure 2). At the first story, there is a centered, wooden front door flanked by side lights, each with four lights with simple mutins and a lower wood panel. The door is a replacement wood-paneled door with two window lights. The front door is accessed via a paved driveway, with the entrance threshold resting at the ground level. Although the primary façade is on a raised foundation, it is not visible as the clapboard has been extended to the ground. There is a modern, arched arbor in front of the door, which serves as a “covered porch,” which is not original to the house. The front door is flanked by two pairs of six-over-one, divided light, wood windows with lugs (Figure 3). There are decorative wood shutters that flank the windows. The roof consists of three original, front-gable dormers with six-over-six, divided light, wood windows with lugs. The windows are trimmed in wood casing, with a slightly projecting windowsill. The dormers are clad in wood clapboard and the dormer roofs are clad in asphalt shingles (Figure 4). Below the eave of the roof there is a simple dentil that runs the length of the

CONTINUATION SHEET

Property Name: 81 Pepper Drive

Page 3 of 15

primary façade.



Figure 2. Primary façade, facing north.



Figure 3. Photograph showing a pair of windows along the primary façade.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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Figure 4. Photograph showing the three roof dormers.

West Elevation

The west elevation consists of five windows (Figure 5). There are two, six-over-one, divided light, wood windows with lugs, and one smaller three-over-one, divided light, wood window located on the first story. Within the one-half-story gable there is one six-over-six light, wood window with lugs and a small, fixed wood window that appears to have been recently added. The windows are trimmed in wood casing, with a slightly projecting windowsill. There is also a gable vent that appears to be constructed of wood (Figure 6). The board-formed concrete foundation is only slightly exposed along this elevation.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

Page 5 of 15



Figure 5. West elevation, facing north.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

Page 6 of 15



Figure 6. West elevation gable.

North Elevation

The current north elevation shows what remains of the rear shed addition (likely added to the house in ca. 1933), removed in 2024 (Figure 7 and Figure 8), was likely a sun porch or utility room. The shed addition consisted of a pair of windows on the north elevation, and a door. What remains is the section of an east facing wall (detailed within the east elevation section below). The original north elevation wall from the construction of the 1929 house consisted of a pair of windows, a single window, and two doors, one leading to the basement and another leading into the house; removed in 2024.¹

¹ Based on information provided by the City of Los Altos, this works was unpermitted.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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Figure 7. North elevation, facing east.



Figure 8. North elevation, facing south.

East Elevation

The east elevation consists of the section of a wall, which was part of a small shed addition, no longer extant, except for the wall that is visible in Figure 8 and Figure 9, as well as the original side gable form. The

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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shed addition appears to have been clad in a combination of wood and aluminum clapboard and measured approximately 15 feet long by 6 feet wide. The walls that remain consisted of a pair of four-over and one single-hung, wood-clad vinyl windows. The original one-and-one-half-story portion of the east elevation consists of a pair of six-over-one, divided light, wood windows with lugs, and a smaller six-over-six, divided light, wood window (Figure 10). There is also a twelve-divided-light wood window near the southeast corner of the house, which appears to have been added later. The board-formed concrete foundation is exposed along this elevation (Figure 11).



Figure 9. Photograph showing a portion of an addition that was retained as part of a current project.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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Figure 10. The east façade, facing south.



Figure 11. Photograph showing the board-formed concrete foundation is exposed along this elevation.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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ca. 1933 Detached Garage

The ca. 1933 detached garage is not associated with any architectural style. The ca. 1933 detached garage is a simple side gable form with moderate pitched roof with “faux” gable returns on each gable end. The building is clad in wide wood boards and the roof is clad in asphalt shingles. There are what appear to be original wood and glazed hinged doors along the southern elevation (Figure 12); however, the doors are decorative, as the opening has been filled in – allowing for the use as a cottage. In 1994, the building was converted to a “cottage”; however, it may have been used for housing prior to 1994. Fenestrations include one six-light, wood, fixed window, a pair of six-light, wood, hopper windows, two single, six-light, hopper windows, one double-hung, wood window with lugs, one four-over-four-light, single-hung, wood-clad vinyl window, and a modern single entrance door (Figure 13). The building appears to rest on a concrete slab foundation. A modern deck extends the length of the north elevation.



Figure 12. South elevation, facing north.

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Property Name: 81 Pepper Drive

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Figure 13. Photograph showing the north and east elevations, facing southwest.

Landscape

The landscape consists of shrubs and trees, including pine and oak trees (Figure 14 and Figure 15). Approximately 75% of the front yard is covered in hardscape, including pavers and a concrete and brick driveway, and concrete block planter beds. There is wooden fencing along the north, west, and east perimeter of the property, and wood and metal privacy fencing in the backyard along the southwest corner of the ca. 1933 detached garage.

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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Figure 14. Frontyard, facing northeast.

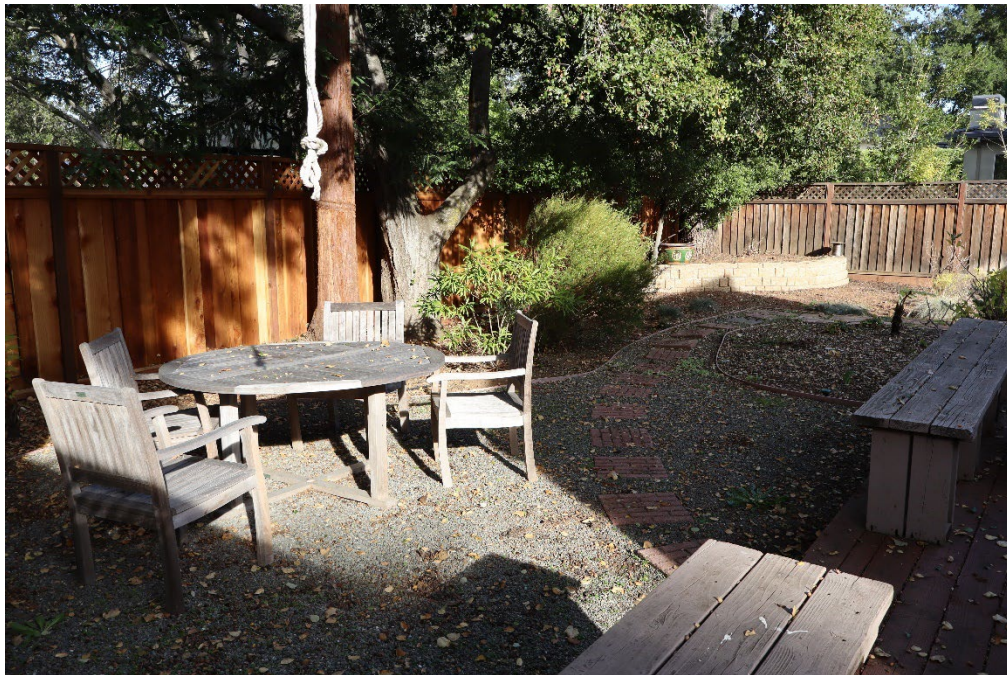


Figure 15. Backyard, facing northeast.

California Register of Historical Resources (CRHR) Evaluation

1. (Event): Is associated with events that have made a significant contribution to the broad

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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patterns of California's history and cultural heritage.

The property, including the 1929 house, ca. 1933 detached garage, and landscape, was not found to be associated with any event that made a significant contribution to California's history and cultural heritage.

Therefore, the property, including the 1929 house, ca. 1933 detached garage, and landscape, is not individually eligible for listing in the CRHR under Criterion 1.

2. (Person): Is associated with the lives of persons important in our past.

A thorough literature search and review of the property owners and occupants was completed; however, the research did not reveal any person associated with the Property that is important to our past who is eligible for listing on the CRHR.

Therefore, the property does not appear individually eligible for listing in the CRHR under Criterion 2.

3. (Construction/Architecture): Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values.

Architecture: The 1929 house is associated with Colonial Revival architecture, with a period of significance of 1929. The 1929 house consists of elements of the Colonial Revival design, including the side-gabled one-and-one-half-story form, wood clapboard siding, divided light wood windows, and symmetrical primary façade. Although the building is constructed in the Colonial Revival style, it does not embody the distinctive characteristics of Colonial Revival architecture and is not representative of the design. In addition, it does not embody a method of construction and does not represent the work of an important creative individual or possess high artistic values.

The ca. 1933 detached garage, and landscape are not associated with any style architectural landscape design or landscape planning.

Therefore, the 1929 house, ca. 1933 detached garage, and landscape within the Property do not appear to be individually eligible for listing in the CRHR under Criterion 3.

4. (Information potential): Has yielded, or may be likely to yield, information important in prehistory or history.

Criterion 4 most commonly applies to resources that contain or are likely to contain information on an important archaeological research question. While most often applied to archaeological sites, Criterion 4 can also apply to built environment resources that contain important information. For a building to be eligible under Criterion 4, it must be a principal source of important information, such as exhibiting a local variation on a standard design or construction

CONTINUATION SHEET

Property Name: 81 Pepper Drive

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technique can be eligible if a study can yield important information, such as how local availability of materials or construction expertise affected the evolution of local building development.

The 1929 house does not appear to be able to convey important information about Colonial Revival architecture. As such, the 1929 house, ca. 1933 detached garage, and landscape within the property are not eligible for listing in the CRHR under Criterion 4.

State of California Natural Resources Agency
DEPARTMENT OF PARKS AND RECREATION
LOCATION MAP

Primary #
HRI#
Trinomial

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*Resource Name or # 81 Pepper Drive

*Map Name: Mountain View

*Scale: 1:24,000

*Date of map: 1991

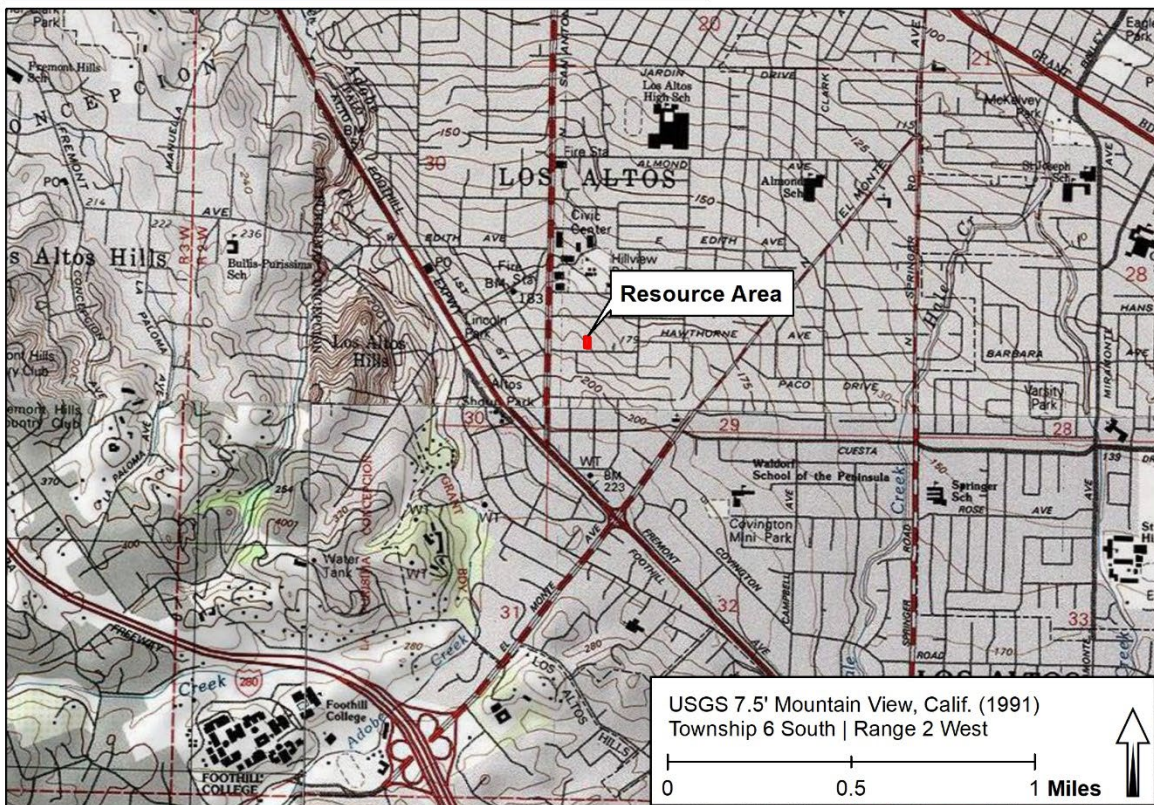


Resource Location Map

ca. 1933 House, ca. 1933 Detached
Garage, and Landscape
81 Pepper Drive, Los Altos
Santa Clara County, California
APN 170-41-007

Legend

Resource Area



MEMORANDUM

DATE	June 16, 2025	PROJECT NO.	25162
TO	Brittany Whitehill, AICP Senior Planner	PROJECT	City of Los Altos
OF	City of Los Altos	FROM	Jen Hembree, Cultural Resource Planner, Page & Turnbull; and Stacy Kozakavich, Project Manager, Page & Turnbull
CC	Christina Dikas Brobst, Principal, Page & Turnbull	VIA	Email

REGARDING 81 Pepper Drive HRE: Peer Review

INTRODUCTION

Page & Turnbull prepared this memorandum at the request of the City of Los Altos (City) regarding the property located at 81 Pepper Drive (APN 170-41-007) in Los Altos. The property is not currently listed in the most recent version available of the State of California Office of Historic Preservation (OHP) Built Environment Resources Directory (BERD) for Santa Clara County, issued in September 2022. It is not listed in the California Register of Historical Resources (California Register), or in the National Register of Historic Places (National Register). The property was found eligible for listing at the local level in 2011 as part of the Los Altos Historic Resources Inventory Update and was subsequently designated as a Historic Resource in the Los Altos Historic Resources Inventory (HRI). A Standards Compliance Review prepared in 2024 by Treanor identified character-defining features of the residence, but did not reevaluate the property's significance. In April 2025, historic preservation consultant Evans & De Shazo, Inc. evaluated the potential historic significance of 81 Pepper Drive and prepared a 2025 Historic Resource Evaluation (2025 HRE) along with State of California Department of Parks & Recreation (DPR) 523A (Primary Record) forms for the property (hereafter referred to as the 2025 DPR 523 Forms), which were appended to the 2025 HRE and include the same information as the 2025 HRE. The 2025 HRE evaluation found that the property was ineligible for listing at the state or local level and recommended its removal from the HRI. Page & Turnbull peer reviewed the 2025 HRE and prior materials to provide our professional opinion on the adequacy of the physical description, background research, historic context, and appropriateness of the finding. Additional information and Page & Turnbull's professional opinion regarding eligibility is also provided.

Imagining change in historic environments through
design, research, and technology

81 Pepper Drive is located just east of downtown Los Altos, on the north side of Pepper Drive between South San Antonio Road to the west and Eleanor Avenue to the east within the North Los Altos neighborhood (**Figure 1 through Figure 3**). The approximately 0.23-acre parcel includes a house built in 1929 and a ca. 1929 detached garage which has been renovated for use as a cottage.¹

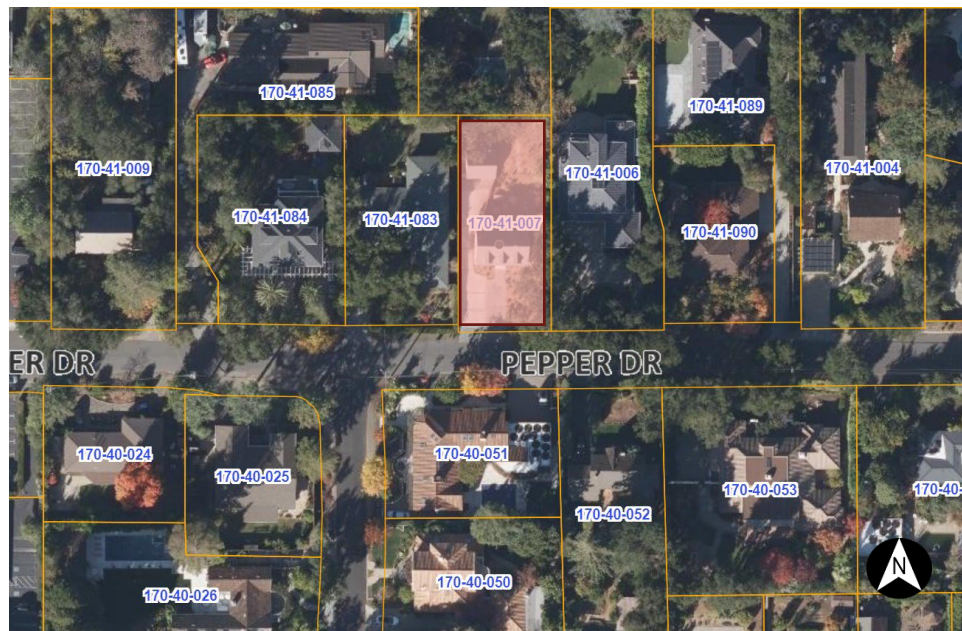


Figure 1. Aerial view of subject property, 2025. Parcel indicated in pink.
Source: County of Santa Clara

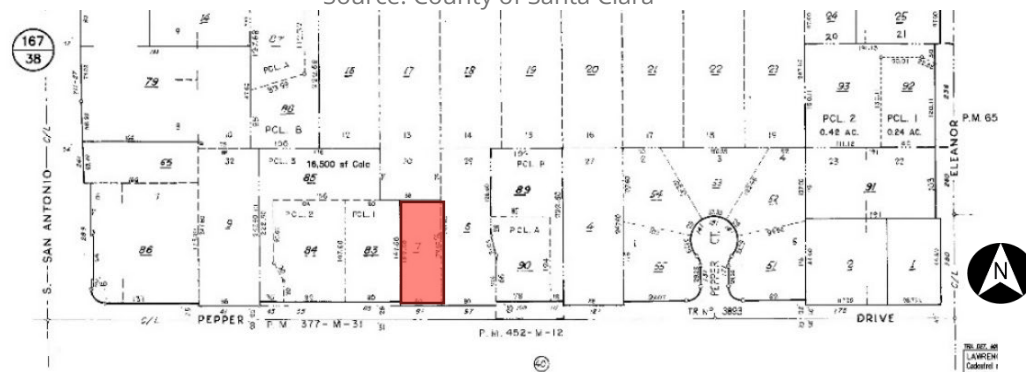


Figure 2.: 81 Pepper Drive Assessor's Map dated 2024-2025. Parcel boundary indicated in red.
Source: County of Santa Clara, edited by Page & Turnbull.

¹ Dates of construction are based on Page & Turnbull research, which indicates that it appears to be more accurate to state the house dates to 1929 and the detached garage/cottage dates to ca. 1929.

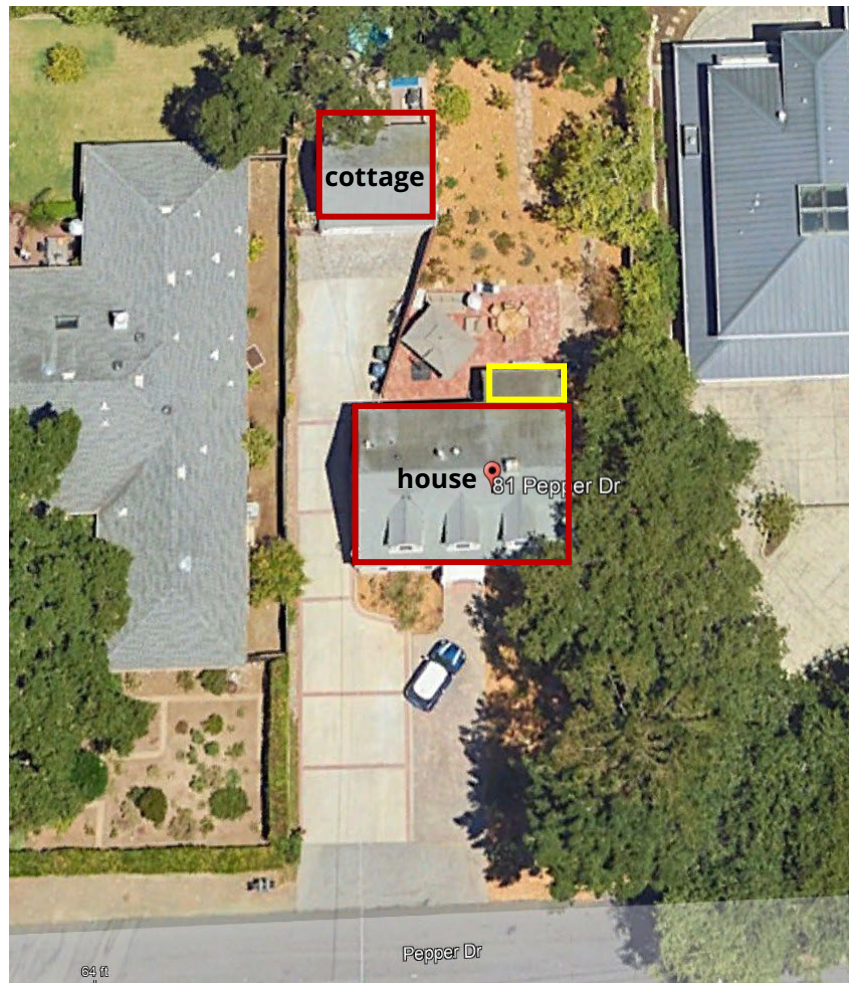


Figure 3. Site plan of 81 Pepper Drive, current footprint of house and cottage shaded red. Outline of shed addition (since mostly removed) in yellow. Source: GoogleEarth, 2022, edited by Page & Turnbull. 2022 imagery used due to clarity.

METHODOLOGY

Page & Turnbull reviewed the following documents in preparation of this memorandum:

- Circa: Historic Property Development, *State of California Department of Parks & Recreation (DPR) 523A and 523B forms*, dated June 8, 2011.
- Treanor, *81 Pepper Drive, Los Altos, CA Standards Compliance Review*, dated September 20, 2024.
- Evans & De Shazo, Inc., *A Historic Resource Evaluation and Updated Local Assessment of the Property Located at 81 Pepper Drive, Los Altos, Santa Clara County, California*, (Updated April 21, 2025) (**Attachment A**)

- DPR 523A Form for 81 Pepper Drive, Los Altos, Evans & De Shazo, Inc., recorded January 13, 2021 and attached as an appendix to the 2025 HRE. **(Attachment A)**

Page & Turnbull conducted a site visit of the subject property on May 19, 2025 to take photographs and observe existing conditions. As per the executed contract with the City of Los Altos dated May 13, 2025, where additional research or analysis needs were identified, as outlined in the Peer Review sections that follow, Page & Turnbull conducted supplemental research and has provided additional information. Research regarding the subject property was conducted using online databases including Newspapers.com, the UC Santa Barbara Library FrameFinder historic aerial photograph website, HistoricAerials.com, San Francisco Public Library's Fire Insurance Maps Online (FIMo) website and Ancestry.com. Site photographs in this report were taken by Page & Turnbull on May 19, 2025 unless otherwise noted.

BRIEF PROPERTY DESCRIPTION

The property at 81 Pepper Drive is a one-and-a-half story, Colonial Revival style residence, more commonly referred to as a 'Cape Cod cottage.' It has a side gable roof featuring three gabled dormers containing multi-light wood windows on the front facade along with a dentiled cornice and eave returns at its side gables. The roof is clad with contemporary composition shingles while the exterior walls are clad in wood clapboard siding. The front façade contains symmetrically balanced fenestration consisting of double-hung, multi-light wood windows with false shutters, paired at first floor and flanking a centered front door. The front door is paneled with sidelights, all of which are framed by simple wood trim and sheltered by a contemporary arbor/trellis. A stucco-clad chimney with brick coping pierces the eastern portion of the gable peak. A small rear shed addition at the northeast corner of the house has been partially removed, with only its east wall remaining. A side-gabled detached garage/cottage is set back and to the northwest corner of the property. **(Figure 4, Figure 5, Figure 6, Figure 7, and Figure 8.)**



Figure 4. South (front) façade, view north.



Figure 5. North façade, view southeast. Red arrow indicates east wall of partially removed shed addition



Figure 6. Long view of south façade of property from Pepper Drive. Roof of garage/cottage indicated by red arrow.



Figure 7. Garage/Cottage at northwest corner of property, south façade.



Figure 8. Garage/Cottage at northwest corner of property, east and north facades.

PEER REVIEW OF 2025 HISTORIC RESOURCE EVALUATION

The following sections provide Page & Turnbull's opinion on the adequacy and findings of the sections comprising the 2025 Historic Resource Evaluation. They are organized to match the organization of the 2025 HRE report and when appropriate, include recommendations and/or additional information and analysis.

Table of Contents and Report Organization

A table of contents is provided as is appropriate per industry standards.

DISCUSSION

The organizational structure of the contents differs from that which is outlined in the California Office of Historic Preservation's (OHP) online manual, *Instructions for Recording Historical Resources*.² This OHP guidance document outlines the level of documentation and information required for recording and evaluating sites and individual resources for eligibility or inclusion in, for example, the California Register. Based on this OHP published guidance and Page & Turnbull's professional experience, we recommend that an historic resource evaluation report begin with an introduction, methodology and a high-level summary of findings. This overarching introduction should be followed by brief discussion of the resource's existing historic status (if any), which is then best followed by the complete physical description of the resource. The discussion of any related historic context(s) as applicable is most suitable after having provided a full description of the existing conditions of the resource, supported by photographs. As per the *Instructions for Recording Historical Resources*, subsequently, a discussion of whether the resource being evaluated meets the criteria of significance in relation to the historic context(s) concludes the report. No further comments related to the organizational structure of the 2025 HRE will be provided.

Introduction

The introduction of the 2025 Historic Resource Evaluation provides a brief overview of the property and outlines its existing historic status. A proposed project at the property is referenced, which implies the context of the evaluation preparation. The introduction references the applicable California Code of Regulations and Public Resources Code sections and hence, framework that the evaluation was completed under and includes the professional qualifications of the preparer. The primary author of the 2025 HRE, Stacy De Shazo, Principal Architectural Historian at Evans & DeShazo, appears to be an appropriately qualified architectural historian to prepare this assessment. Per the Evans & De Shazo website, she has a master's degree in Historic Preservation from Savannah College of Art and Design and over 20 years of experience in the historic

² <https://ohp.parks.ca.gov/pages/1054/files/manual95.pdf>.

architectural and cultural resources survey, identification, and evaluation in California, Oregon, Washington, and Alaska.³

DISCUSSION

Page & Turnbull notes that the introduction does not explain why the title page of the 2025 HRE indicates that it was initially prepared on March 4, 2025, but “updated, April 21, 2025.” Page & Turnbull recommends an explanation or at least acknowledgement that the HRE was subsequently updated after initial preparation be included in the introduction.

Location

The location section of the 2025 HRE provides the street address, the Assessor Parcel Number (APN) of the property, the parcel size, linear distances from nearby streets, and provides the property location on a USGS 7.5 quadrangle map.

DISCUSSION

A more precise location map is not provided within the 2025 HRE, though one is included in the appended DPR 523A forms. Page & Turnbull recommends that a location map that provides more specific existing contextual information (e.g., the immediate surroundings), such as that seen in **Figure 1** and **Figure 2** (above) be provided, in addition to the USGS quadrangle map.

Regulatory Setting

The regulatory setting of the 2025 HRE explains the overall nature of California Environmental Quality Act (CEQA) as it applies to cultural resources, including those that may be classified as “buildings” as defined by Cal. Code Regs. Tit. 14, § 4852. California Code Regs. § 15064.5 is cited to outline the criteria for listing in the California Register and therefore when a cultural resource shall be considered “historically significant” by a lead agency, such as the City of Los Altos [Community Development Department]. The regulatory setting section of the 2025 HRE also describes from a local regulatory perspective why the 2025 HRE was prepared. This section indicates that the City of Los Altos requested an updated “local” evaluation of the property. Thus, the City of Los Altos Criteria for Designation as per Municipal Code Chapter 2. Historic Preservation Section 12.44.040 is outlined.

DISCUSSION

Although the regulatory setting section includes the applicable state regulatory language, Page & Turnbull recommends adding a statement explaining the need from the CEQA perspective for the preparation of this 2025 HRE. For example, Page & Turnbull understands that CEQA applies to

³ See: <https://www.evans-deshazo.com/#/owners>.

“projects” proposed to be undertaken or requiring approval from state or local government agencies. Historic and cultural resources are considered to be part of the environment. Because the property was designated as a Historic Resource in the Los Altos Historic Resources Inventory, the property would be considered a historical resource for the purposes of CEQA review of potential projects which are subject to this state legislation.

Methods

The methods section of the 2025 HRE explains the actions the preparer took to investigate and research the property, including how and from what sources or repositories or field surveys information was collected. The methods Evans & De Shazo, Inc. utilized are consistent with industry standards.

DISCUSSION

However, the date the architectural survey conducted by the preparer is not indicated in this section; it is indicated only later in the document on Page 31. Page & Turnbull recommends the date be provided in the methods section for temporal context between the date of the survey and the date the 2025 HRE was prepared. It is important to demonstrate that the existing conditions observed at the time of the site visit, including new or in-progress alterations, accurately reflect the conditions of a property at the time of the evaluation.

Historical Setting

The historic setting section of the 2025 Historic Resources Evaluation provides a brief history of the geographical area where the property is located. The section begins with the history of the general area that is now referred to as Los Altos specifically from the years 1822 (during Mexican rule) to the 1850s. The establishment of and subsequent history of the development of Los Altos from the 1870s, when it consisted of small and large farms, to 1890, when larger farms and cattle ranches were subdivided and sold as smaller farms, through the early 1900s, when land development and transportation companies began buying land in Los Altos and subdividing them as part of planned developments. A broad discussion of Los Altos through the decades spanning the 1930s, 1940s, 1950s, and 1960s through the 1970s then follows.

DISCUSSION

The history of the property’s more localized neighborhood is not discussed. Providing the history of the property’s ‘place’ from the broad (county, city, or town) to specific environs (neighborhood or development area) is industry standard as it thereby establishes an historic context for the property. The formalized establishment of Los Altos as a town is also not clarified. Understanding this relative to the subject property’s neighborhood’s establishment, if available/as applicable, and/or the

property's date of construction would assist in placing the property in appropriate developmental context. Page & Turnbull therefore recommends including specificity to the establishment of Los Altos as a town or city, as well as to the historical development of commercial and/or residential construction in the fledgling community and/or property's immediate neighborhood, as applicable. For example, according to the 2012 City of Los Altos Historic Resources Inventory:

Many believe that the real beginning of Los Altos start[ed] with the Altos Land Company and acquisition of Sarah Winchester's 100 acres in 1906. This land became what is known today as the downtown triangle...the creation of a new town-site to be called "Banks and Braes." Just when the name was changed to Los Altos is unknown, but we do know that the Altos Land Company and the University Land Company were formed in 1907...With the establishment of the town in 1907 came the beginnings of subdivisions (although a few earlier subdivisions were recorded prior to 1907)...By 1911, according to Eastman's history of the town, Los Altos had only fifty homes; by 1913, only thirty-two telephones had been connected. The majority of properties in the residential context are homes built in the 1920s and 30s, reflecting the growth of the area. By this period, the central business district had been established, roadways were more complete, and working-class families could afford to move to "the county" and grow a few apricot trees. The dominant house types in this category include: Bungalows, Mission, Period Revival (Tudor, Colonial, Provincial), Prairie, Italian Villa, Spanish Colonial Revival.⁴

The central business district is a six-block triangle bound by San Antonio Road to the east, Foothill Expressway to the west, and West Edith Avenue to the north. The subject property is situated on Pepper Drive on a block immediately east of San Antonio Road near to the southern portion of the central business district.

Property History

This section of the 2025 HRE describes the history of the subject property, beginning when it was acquired as part of a much larger expanse by the United States government in 1848, subsequently surveyed by 1865 and ultimately subdivided, first as part of the L.S. Clarke Subdivision (1895) and then as part of the Adams Subdivision (1920). Plat maps showing these subdivisions with the property's location within them are included. Early aerial imagery dating to 1930, appears to show the house, and a 1939 aerial photograph that appears to show both the house and the detached garage/cottage are included.

⁴https://www.losaltosca.gov/sites/default/files/fileattachments/historical_commission/page/36161/hri_section_ii_historic_context.pdf

The property history section also includes a table (referred to as Table 1) that lists the owners and occupants of the property beginning in 1928, upon the initial owner's acquisition of the parcel and construction of the current house, through to 1993. The table incorporates biographical information available regarding the owners as determined via historical newspaper articles and records on the genealogical site, Ancestry.com. The property history section also includes an image of a news article announcing the completion of the 1929 home, as well as a news article showing a portrait of the original owner's family. The Property History section subsequently includes tables outlining the property's available permit history, which spans from 1994 to 2024.

DISCUSSION

The historic aerial photographs provided in the 2025 HRE property history section are pixelated and difficult to discern. Page & Turnbull recommends only including imagery that is a high resolution and discernible. Page & Turnbull also recommends completing the owners/occupants table (Table 1) to include all transfers up to and including the current ownership.

Table 1 of the 2025 HRE states: "In ca. 1933, the detached garage was constructed (Figure 16), likely by Harry. During this time, it appears the rear shed addition was added to the northeast corner of the house." However, a historical source which supports this date of construction or further explanation of how the determination of the year ca. 1933 was made is not provided. Rather, the referenced Figure 16 is an aerial image dated to 1939. Page & Turnbull recommends, therefore, clarifying how the ca. 1933 date for construction of the detached garage/cottage was determined. Page & Turnbull acknowledges that Sanborn Fire Insurance Maps do not encompass the Pepper Drive block and that many historic aerials are often difficult to discern, regardless of resolution.

In contrast to the 2025 HRE's assumed date of construction for the garage, Treanor's 2024 Standards Compliance Report for the property states "the outbuilding appears on a 1948 aerial, but was likely constructed as a detached garage at the time the house was built."⁵ In addition, a 1929 newspaper article included in the 2025 HRE property historic section mentions that the original owners/occupants (the Van Epps) were "occupying temporary quarters on the property," while their new home was under construction.⁶ Based on a high resolution version of the 1930 historic aerial photograph (**Figure 9**), Page & Turnbull suggests that the existing detached garage/cottage was indeed already present and was the structure serving as the owner's temporary residence. In a clearer version of the 1939 historic aerial photograph (**Figure 10**), the detached garage/cottage at the northwest area of the property is also present. Page & Turnbull concurs with the 2025 HRE that

⁵ Treanor, "81 Pepper Drive, Los Altos, California Standards Compliance Report," dated September 20, 2024, 4.

⁶ *The Peninsula Times Tribune*, "To Occupy New Home," July 15, 1929.

the construction of the small rear addition attached to the northeast corner of the house, which does not appear to exist in the earlier image, likely dates to ca. 1939. Page & Turnbull would therefore clarify that the detached garage/cottage dates to ca. 1929 and the house dates definitively to 1929, while the rear addition to the house dates to ca. 1939.

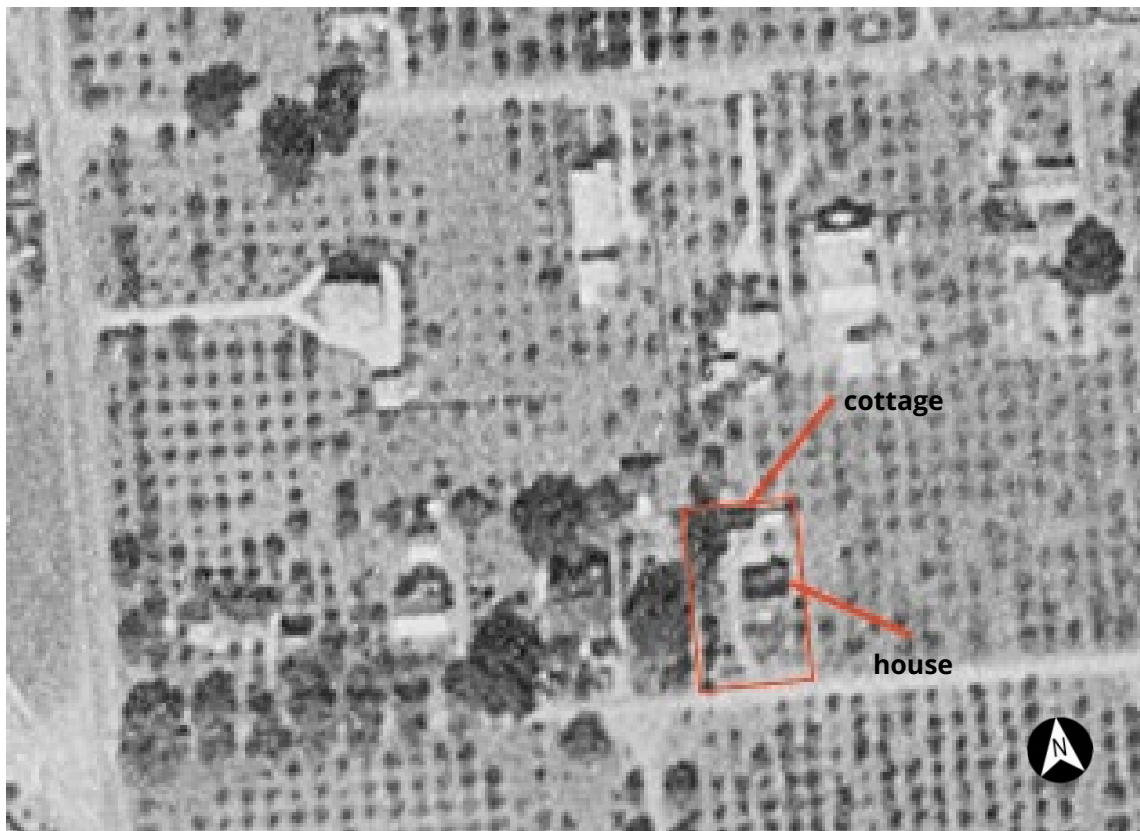


Figure 9. 81 Pepper Drive, 1930. Parcel outlined in red with house and what appears to be the detached 'garage' at rear. Source: University of California Santa Barabara Flight C_1180, Frame 9, 1930. Parcel boundary and notations added by Page & Turnbull.



Figure 10. 81 Pepper Drive, 1939. Parcel outlined in red with house, detached garage/cottage and rear addition. Source: University of California Santa Barbara Flight C_5750, Frame 286-9, 1939. Parcel boundary and notations added by Page & Turnbull.

Page & Turnbull also recommends indicating that the permit information has been compiled from written records held by the City of Los Altos and that permit records did not include the original date of construction nor the original builder or architect for the primary residential building, nor did they include information related to the construction of the detached garage/cottage. Page & Turnbull further recommends that the property history section include the entire chronology of the property to present, including information related to any ancillary structures built prior, later, or later removed from the site, such as the detached garage / cottage. In addition, other elements of the construction chronology that can be compiled through analysis of aerial photographs, maps, other

historic images, news articles, as well as visual inspection, as available, are recommended to be described. Page & Turnbull recommends indicating that apart from the approved permits, dated 1994 and 1999, no other changes were formally documented by permit or other available sources.

A visual analysis of the building's form and materiality by Page & Turnbull shows that the house's ca. 1939 shed addition at the northeast corner of the house has been partially removed, with only its east wall remaining. This shed addition appears to have been partially removed sometime between 2023-2024 based on aerial imagery. The north wall of the house has, as a result, also been stripped of its cladding and cornice. Extending from the north wall is a concrete slab on grade with unfinished wood decking, evidencing the initiation of construction of a new rear addition (since paused). Visual inspection of the house also indicates that exterior doors on the house appear to be non-original, including the paneled primary entry door on the front facade, as well as the sliding doors on the rear (north) façade. A contemporary arched arbor has been installed at the front entrance as well and has been present since at least 2007 based on available street-view imagery. Vinyl windows are located on the remaining east wall of the shed addition, likely having replaced earlier multi-lite wood windows.

A detailed construction chronology should also include a history of other site components, if extant. Thus, Page & Turnbull recommends that the following additional construction history of the detached garage/cottage and the overall site be included as well. No known formal documentation of changes to the garage/cottage exist; an application to convert the building to a legalized accessory dwelling unit in 2024 was not approved. However, visual inspection indicates the ancillary building has undergone changes over time. A contemporary entry door is located on the south façade, leading to a contemporary wood deck. Decorative, fixed paired doors are installed in a large, possibly former garage opening on the north façade. Although most windows are wood, they appear to vary in size and type from one-over-one hung window, six-light hopper windows, four-over-four hung window, evidencing the ad-hoc construction and/or alterations of the building. The garage/cottage has a replacement asphalt shingled roof, likely installed at the same time as the that of the house in the 1990s per a roofing permit.

Page & Turnbull research indicates the bounds of property have not changed since the residence's construction, and aerial imagery indicates the site has always included both a front and rear yard, with hardscape area or driveway along the western side leading to the detached garage/cottage. The driveway today is of concrete with brick accents, while immediately south of the garage/cottage the area has received contemporary cobblestone pavers. Wooden fencing is located along the north, west, and east perimeter of the Property, portions of which appear to have been installed along the west at an unknown date between 2007 and 2011, based on street imagery. Prior to 2015, too, a short picket fence also delineated the front yard from the street.

Architectural Context

The architecture section of the 2025 Historic Resource Evaluation discusses the history and identifying features associated with the Colonial Revival architectural style in America. The 2025 HRE indicates that the 1929 house on the property is reflective of this particular style and therefore, as is industry standard, the section establishes an historic architectural context for the property. The 2025 HRE appropriately references Virginia McAlester's, *A Field Guide to American Houses*, 2014 edition, which is considered the definitive guide to residential architecture in America.

The 2025 HRE states that residences designed in the Colonial Revival style typically include the following characteristics:

1. "Symmetry in façade – although 10% of Colonial Revival were asymmetrical.
2. Hipped or gabled roofs with boxed eaves.
3. Fanlights and/or sidelights around main door.
4. Double-hung sash windows, often set in pairs.
5. Clapboard and brick exterior cladding.
6. Classical detailing (sometimes exaggerated), including pediments, columns or pilasters leading to elaborate entries."

In addition, the 2025 HRE indicates there are subtypes of the style that include Asymmetrical, Hipped Roof with Full-Width Porch, Hipped Roof without Full-Width Porch, Side Gable Roof, Centered Gable, Gambrel Roof, Second-Story Overhang, One-Story, Three-Story and Built-In Garage.

DISCUSSION

The Colonial Revival context could be expanded to provide further description of certain detailing typically featured in Colonial Revival style. For instance, per the 2023 edition of *A Field Guide to American Houses*, typical of many Colonial Revival roof cornices is that they are almost always part of a boxed roof-wall junction with little overhang and are frequently decorated with dentils or modillions; some may have open eaves and rake. In addition, windows are usually rectangular and hold multi-pane glazing in one or both sashes.⁷ It is also noted that masonry predominates in high-style Colonial Revival examples whereas vernacular examples were generally of wood before about 1920, with masonry progressively becoming more common as veneering techniques became widespread in the 1920s.⁸

⁷ Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), 412.

⁸ Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), 412.

Page & Turnbull also recommends the architectural context section provide further clarification on the applicable subtype(s) to the property, particularly the one-story subtype, of which the property at 81 Pepper Drive most closely resembles, and which according to McAlester, are generally known as “Cape Cod cottages.”⁹

A Field Guide to American Houses defines the one-story subtype of Colonial Revival or Cape Cod cottage as follows:

One-Story Subtype – ...“one-story Colonial Revival houses are also common. These are generally Cape Cod cottages, loosely patterned after early wooden Cape Cod folk houses of eastern Massachusetts, usually with the addition of Georgian or Federal-inspired doorways. These were built throughout the Colonial Revival era but were particularly common in the 1940s...”¹⁰ McAlester also indicates, “The Cape Cod is the most common form of one-story Colonial Revival house. As a form, it originated in the early 18th century and continued with few changes through the 1950s.”¹¹

In addition, Page & Turnbull recommends that images of properties that exemplify the One-Story or Cape Cod cottage subtype, as shown in *A Field Guide to American Houses*, be provided to visually explain the property’s architectural context. As seen in figures below, despite these examples’ moniker of one-story, they are side-gabled and have dormers at an upper level or half-story, not unlike the property at 81 Pepper Drive (**Figure 11, Figure 12**).¹²

⁹ Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), pp. 411-12.

¹⁰ Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), 412.

¹¹ Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), 427.

¹² Virginia Savage McAlester, *A Field Guide to American Houses* (Revised Edition. New York: Knopf, 2013, reprinted 2023), 427.

Colonial Revival – One-story Subtype – Excellent Examples

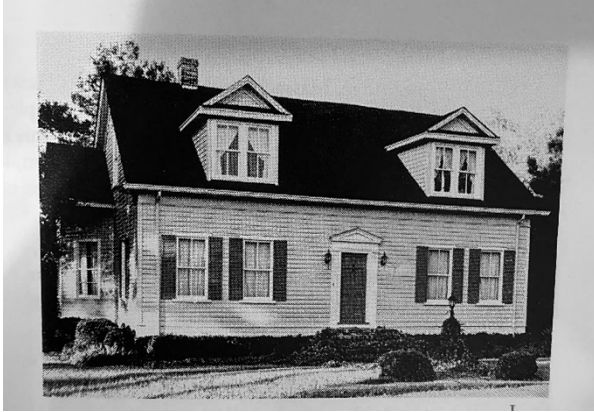


Figure 11. One-story subtype example, ca. 1920s.
Source: *A Field Guide to American Houses*, 2023 reprint edition, p. 427.



Figure 12. One-story subtype example, 1929.
Source: *A Field Guide to American Houses*, 2023 reprint edition, p. 427.

The 2025 HRE does not include a comparative analysis. It is typically industry standard to compare a property to comparable works of the relevant architectural style and era. In this case, comparable works of Colonial Revival style, single-family residential architecture built in the early 20th century, especially the one-story or ‘Cape Cod cottage,’ and typically within the general vicinity of the subject property would be compared. It is important to “compare the resource with others that belong to the same property type and relate to the same historic context” because “it will help establish the significance of the resource,” or will help provide a clear rationale to support an ineligible finding.¹³

Page & Turnbull provides herewith several examples of Colonial Revival style architecture residential homes constructed in the early 20th-century located within the general vicinity of the subject property, both of which have been designated as local historic resources or local historic landmarks by the City of Los Altos. These properties were determined by reviewing the list of Los Altos Historic Landmarks and the list of Los Altos Historic Resources in conjunction with the OHP Built Environment Resources Directory (BERD) for Santa Clara County, issued in September 2022 as well as through visual analysis using online street imagery.¹⁴

¹³ <https://ohp.parks.ca.gov/pages/1054/files/manual95.pdf>.

¹⁴ <https://www.losaltosca.gov/historicalcommission/page/historic-inventory>; and OHP BERD – County of Santa Clara, <https://ohp.parks.ca.gov/pages/1068/files/Santa%20Clara.csv>

Table 1: Single-Family Residential and Colonial Revival Style Homes			
Address	Style	Est. Year of Construction*	Designation
1448 Fowler Lane	Dutch Colonial Revival / Gambrel roof	1900	Los Altos Historic Landmark
1570 Kensington Circle	Colonial Revival / Side-Gabled	1922	Los Altos Historic Resource

**Year of Construction from State of California Office of Historic Preservation Built Environment Resource Directory or Santa Clara County assessor*

Page & Turnbull notes that per the National Register, an excellent example of an architectural style “must clearly contain enough of those characteristics to be considered a true representative of a particular type, period, or method of construction.”¹⁵ Based solely on visual analysis of current street view photography, Page & Turnbull thus augments the comparative analysis list with the following discussion of characteristics of the known Colonial Revival-style examples. It should be noted that Page & Turnbull has not conducted a comprehensive construction history of these properties.



Figure 13. 1448 Fowler Lane. Source: Google Streetview

¹⁵ National Register Bulletin No. 15: How to Apply the National Register Criteria of Evaluation, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf.



Figure 14. 1570 Kensington Circle Source: Google Streetview.

- 1448 Fowler Lane, **Figure 13**, expresses the gambrel roof subtype, also referred to as Dutch Colonial Revival-style, featuring steeply pitched gambrel, containing a nearly full second story and separate dormer windows flanking a shed dormer above and accentuated front entry with a decorative crown supported by slender columns which form an entry porch.
- 1570 Kensington Circle, **Figure 14**, expresses the side-gabled Colonial Revival style, featuring symmetrically-balanced windows, with the second floor hung windows containing multi-light panes in both sashes. Its front entry is accentuated and features a decorative crown supported by slender columns which form an entry porch.

In comparison to the comparable properties detailed above, both those in the surrounding area and those seen in *A Field Guide to American Houses* (all referenced above), Page & Turnbull finds that the design of 81 Pepper Drive, provides a modest example of the Colonial Revival style, in particular the one-story/'Cape Cod cottage' subtype **Figure 15**.

The house at 81 Pepper Drive is one story with half-story above and features a side-gabled roof and is clad in wood siding (clapboard). The material palette and form are consistent with that of Colonial Revival one-story Cape Cod cottages, in particular vernacular and pattern-book examples. Fenestration consisting of rectangular, double-hung multi-light windows, some with false shutters and set in pairs at the first floor, is symmetrically balanced. The wood windows have ogee lugs (**Figure 18**). The roof features gabled dormers and a cornice decorated with dentils and eave returns (**Figure 16**). The fenestration and roof detailing are typical of the Colonial Revival Cape Cod cottage.

The front door, however, does not contain the decorative crown (pediment) supported by pilasters or slender columns to form a front porch normally exhibited in Colonial Revival architecture. Rather, the central front door is set with a flat surround with sidelights only (**Figure 17**). (The arbor/trellis is a contemporary installation.)



Figure 15. Primary (south) façade, view north.



Figure 16. Primary façade, detail of cornice with dentils and eave return.



Figure 17. Detail of front entry.



Figure 18. Detail of ogee lug on double-hung wood window.

Historic Architectural Survey

This section of the 2025 HRE provides a physical description of the existing property. The property's existing components (at the time of the survey) including the house and detached garage/cottage, as well as the associated landscape or lawn are each described, as is their architectural style, if any. Physical descriptions of each of the house, garage/cottage and landscape are accompanied by photo(s), yet there is a lack of an aerial image or site plan indicating the location of each of the two buildings on the property. The physical description otherwise generally adheres to industry standards.

DISCUSSION

However, the *Instructions for Recording Historical Resources* state that, "Descriptions of buildings, structures, and objects should identify construction details, materials, workmanship, and alterations."¹⁶ Page & Turnbull typically therefore includes, *following* the physical description section, a detailed construction chronology specifically related to the building and, if applicable, other site components. This may include a building permit history, if available, and/or notations of alterations determined by field survey and/or analysis of historical maps, newspapers and/or photographs as available and/or some combination thereof. Page & Turnbull's observations related to this have already been discussed above.

Evaluation for Historical Significance

The evaluation for historical significance section of the 2025 HRE indicates the context in which the property at 81 Pepper Avenue was evaluated by the preparer: Colonial Revival style architecture for the year of construction, 1929. An explanation of the California Register is subsequently provided in this section along with its relationship to the National Register and the similarities and differences in the guidelines between the two registries. Qualifications required for a property to be listed in the California Register are provided. The section indicates a property must possess significance under one of the four California Register criteria and have historic integrity to qualify for listing. The definition of historic integrity is also provided, indicating it consists of evaluating seven aspects that include location, design, setting, materials, workmanship, feeling, and association.

The property is then evaluated under each of the four California Register criteria and judged in relation to its historic contexts.

The 2025 HRE found that the property appears to be ineligible for California Register under all criteria. Because the property was recommended as ineligible for California Register listing, an

¹⁶ <https://ohp.parks.ca.gov/pages/1054/files/manual95.pdf>.

integrity assessment and list of character-defining features was not included, per industry standards.

DISCUSSION

This section should also explain that the property was evaluated under the context of early 20th century development of the City of Los Altos (historical context). In addition, Page & Turnbull recommends explaining that the entire property was evaluated under the historical context and that only the house was evaluated under the architectural context, given the ancillary component (garage/cottage) of the property does not reflect any architectural style.

Page & Turnbull, however, concurs with the findings of the 2025 HRE that the property does not appear to be individually eligible for listing under California Register Criteria 1, 2, 3, and 4. Page & Turnbull summarizes the 2025 HRE findings below and provides supplemental information under the Criteria, as needed. The explicit definition of each Criteria, as provided by the California Register, is also included prior to the evaluation.

Criterion 1/ Events: *It is associated with events or patterns of events that have made a significant contribution to the broad patterns of local or regional history, or the cultural heritage of California or the United States.*¹⁷

2025 HRE Finding: The 2025 HRE finds that the property, 81 Pepper Avenue, does not appear to be individually eligible for listing in the California Register under Criterion 1, as the property has not contributed to the broad patterns of history in Los Altos, the state, or the nation.

Page & Turnbull Discussion: The current house and garage/cottage at 81 Pepper Drive was constructed during the time when most properties in Los Altos's residential context, as per the *Los Altos Historic Resource Inventory*, were constructed, that is, in the 1920s and 1930s, which was reflective of the growth of the area after its earlier (1907) establishment. By this time, the central business district had been established, roadways were more complete and families, including the working class, could afford to relocate to the town. The extant property at 81 Pepper Drive, was constructed at the end of the 1920s, later than other Colonial Revival-style residential buildings in the general vicinity (per Table 1 of this report). Although associated with the general trend of growth in the 1920s, the property is not specifically important and thus does not convey significance for its association with that particular growth period (Event). Furthermore, research did not identify that the property contributed to any other significant events or other patterns of local, state, or national cultural heritage.

¹⁷ Criterion definitions are provided by the California Register, https://ohp.parks.ca.gov/?page_id=21238.

Criterion 2/ Persons: *It is associated with the lives of persons important to local, California, or national history.*

2025 HRE Finding: As stated in the 2025 HRE, the property, 81 Pepper Drive, does not appear to be individually eligible for listing in the California Register under Criterion 2.

Page & Turnbull Discussion: The Harry P. Van Epps family owned the current property from its 1929 construction until 1945, however research did not identify that any family member having an association with the occupancy or ownership of 81 Pepper Drive was significant to the history of Los Altos, the state, or nation. According to the 1930 federal census, Van Epps was a carpenter in the “house building” industry. Given his trade, there is the possibility that Van Epps constructed the house and/or garage/cottage at 81 Pepper Drive, however, no documentary evidence was found to confirm this. The property subsequently changed ownership no less than ten times and research did not identify that persons important to local, California, or national history owned or occupied the property.

Criterion 3/Architecture: *It embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of a master, or possesses high artistic values.*

2025 HRE Finding: As stated in the 2025 HRE, 81 Pepper Drive does not appear to be individually eligible for listing in the California Register under Criterion 3.

Page & Turnbull Discussion: The 1929 house exhibits some elements of Colonial Revival style, and particularly the one-story or Cape Cod cottage subtype (due to its form and massing), a subtype built throughout the Colonial Revival era and that became especially common in the 1940s. The house contains such Colonial Revival characteristics as a side-gabled roof, symmetrically balanced fenestration consisting of double-hung, multi-light windows with false shutters and paired at first floor with a centered front door. The roof features gabled dormers and a cornice decorated with dentils and eave returns. However, the house does not express the accentuated front door normally character-defining of Colonial Revival style, featuring a decorative crown supported by pilasters or slender columns to form a front porch. Rather, as a modest representation of the style, evidenced also through its wood cladding in lieu of masonry and lack of elaborate front entry, the house thus does not fully exemplify the distinctive characteristics of the Colonial Revival style required to be individually eligible for listing in the California Register, nor does it exemplify a method of construction, nor does it possesses high artistic values. And, as no architect of record is known, the house does not represent the work of a master.

Criterion 4/Information potential: *Has yielded, or has the potential to yield, information important to the prehistory or history of the local area, California or the nation.*

2025 HRE Finding: As indicated in the 2025 HRE, the property at 81 Pepper Drive does not appear to be individually eligible for listing in the California Register under Criterion 4 as a building or property that has the potential to provide information important to the prehistory or history of the City of Los Altos, state, or nation.

The 2025 HRE clarifies that, “While most often applied to archaeological sites, Criterion 4 can also apply to built environment resources that contain important information. For a building to be eligible under Criterion 4, it must be a principal source of important information, such as exhibiting a local variation on a standard design or construction technique can be eligible if a study can yield important information, such as how local availability of materials or construction expertise affected the evolution of local building development.”

Page & Turnbull Discussion: Page & Turnbull concurs with the 2025 HRE finding, but recommends affirming that 81 Pepper Drive does not feature construction or material types, or embody engineering practices that would, with additional study, provide important information, and that evaluation of this property was limited to age-eligible resources above ground and did not involve survey or evaluation of the subject property for the purposes of archaeological information.

Local Assessment

The local assessment and recommendation section of the 2025 HRE indicates that the house is a local historic resource, and that an updated local assessment was requested to determine continued eligibility for local listing, inclusive of the house, garage/cottage and other site features. The 2025 HRE explains that Los Altos Municipal Code Section 12.44.040 outlines the three criteria for eligibility for local designation as a historic resource or historic landmark and that all three criteria must be met for a property to be eligible as a historic resource or historic landmark.

The 2025 HRE found that the property appears to be ineligible as a local historic resource or local landmark. Page & Turnbull concurs with the findings of the 2025 HRE that the property does not appear to be individually eligible for listing under the Los Altos Municipal Code Section 12.44.040. Page & Turnbull summarizes the 2025 HRE findings below and provides supplemental information under the criteria, as needed. The explicit definition of each criterion, as provided by the Municipal Code, is also included prior to the evaluation.

A. Age. *A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason - such as being associated with an outstanding architect, personage, usage or event).*

As stated in the 2025 HRE, the property, 81 Pepper Drive, including its house and detached garage/cottage are over 50 years old. As such, the property meets the required local Criterion A.

B. Determination of Integrity. *A structure or property should retain sufficient historic integrity in most of the following areas:*

- 1.Design: The combination of elements that create the form, plan, space, structure and style of a property.*
- 2.Setting: The physical environment of a historic property.*
- 3.Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.*
- 4.Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.*
- 5.Feeeling: A property's expression of the aesthetic or historic sense of a particular period of time.*

Page & Turnbull understands that, as the 2025 HRE points out, for the purposes of National Register or California Register evaluations, integrity analysis is only completed *if* a building, structure, object, site, or district is found to be significant. As stated by the National Register, "Integrity is ability of a property convey its significance."¹⁸ Therefore, if a property is not found significant under any area, then generally no integrity analysis is conducted.

However, in accordance with Los Altos Municipal Code Section 12.44.040 and thus, for the purposes of local evaluation, a determination of integrity as Criterion B for local eligibility is provided in the 2025 HRE prior to a finding of local significance. As stated in the *Los Altos Historic Resources Inventory*,

"The evaluation process consists of three steps which are summarized below. The first step is to determine whether or not the property is over fifty years of age [...] The next step is to determine whether the property retains enough original materials and features to convey its value as a historic resource [...] If a resource meets the age requirement (or demonstrates the potential for exceptional significance) and retains

¹⁸ National Register Bulletin 15; How to Apply the National Register Criteria for Evaluation, 44;
https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf

physical integrity, the next step is to determine if the resource has historic significance.”¹⁹

The following sections address each aspect of integrity included in Criterion B for the local inventory, with a summary of the 2025 HRE’s findings followed by Page & Turnbull’s discussion.

1. *Design:* The 2025 HRE finds that the 1929 house remains intact, and modest elements of Colonial Revival design are present, but it lacks distinctive features including a prominent front entrance, consisting of columns or pilasters and therefore lacks the integrity of Colonial Revival design.

Page & Turnbull does not concur with the 2025 HRE’s assessment of design integrity. As stated, the house appears to retain its original 1929 side-gable form, and design elements include symmetrical fenestration consisting of rectangular, double-hung multi-light windows, some with false shutters and set in pairs at the first floor. The roof also continues to feature gabled dormers, and a cornice decorated with dentils and eave returns. It is not documented to have had an accentuated front entrance including a decorative crown supported by pilasters or columns to form a front porch, thus the lack of such does not lessen its integrity of design.

In Page & Turnbull’s professional opinion, thus, the house retains the integrity of its design as a single-family home built in 1929 in a modest Colonial Revival style. In addition, in Page & Turnbull’s professional opinion, the overall property, that is, the house, its garage/cottage and landscape also retain integrity of design. The spatial relationship between the house and garage and the front and rear yards remains intact.

2. *Setting:* The 2025 HRE finds that the 1929 house and its garage/cottage and landscape retain integrity of setting because, despite growth to Los Altos overall, the immediate environment remains a small neighborhood with modest-sized houses set back from the street and designed in a variety of styles.

Page & Turnbull concurs with the assessment that the property retains integrity of setting.

3. *Materials:* The 2025 HRE finds that the 1929 house retains the original wood clapboard siding on three of the four elevations; ten divided light wood windows; two paired, divided light windows; and wood shutters on the primary façade appear to be original from 1929 and that therefore the house retains integrity of materials. The 2025 HRE

¹⁹ https://www.losaltosca.gov/sites/default/files/fileattachments/historical_commission/page/36161/hri_full_doc.pdf, Page I-1.

also finds that the ca. 1929 garage/cottage retains a reduced integrity of materials although its exterior cladding and some windows appear original.

Page & Turnbull concurs with the general assessment that the house and garage/cottage retain integrity of materials.

4. *Workmanship:* The 2025 HRE finds that the workmanship evident on the house does not show any special skill in Colonial Revival design, as it does not include the Classical detailing (sometimes exaggerated), including pediments, columns or pilasters leading to elaborate entries, which is where workmanship is often showcased through hand-tooling, carving, painting, or joinery.

Page & Turnbull does not concur with this assessment. As stated in the 2025 HRE, “the workmanship evident on the 1929 house is very modest,” and “...the wood windows with lugs show workmanship.” Page & Turnbull would argue that therefore the physical evidence of workmanship, as defined by the Municipal Code remains. Moreover, the National Register provides guidance on how to evaluate the integrity of a property and states that workmanship can be expressed in vernacular methods of construction and plain finishes or in highly sophisticated configurations and ornamental detailing.”²⁰ The lack of sophisticated configurations therefore does not indicate a lack of workmanship. The use of standardized window sash, dentils, shutters, and wood siding does reflect workmanship evidencing the “applications of both technological practices and aesthetic principles,”²¹ in this instance, the technological advance of mass milling production of the time. In Page & Turnbull’s professional opinion, the house therefore retains integrity of workmanship.

5. *Feeling:* The 2025 HRE finds that because the house was not intended to meet the grander expectations of a Colonial Revival house, it fails to evoke the architectural details and spirit of the style, it does not retain integrity of feeling.

Page & Turnbull does not concur with this assessment. The definition of *feeling* according to the Municipal Code is the expression of the aesthetic or historic sense of a particular period of time. As stated in the 2025 HRE and to which Page & Turnbull agrees, the 1929 house is a modest example of Colonial Revival architecture. As Page & Turnbull furthered, it is a modest example of a Colonial Revival one-story/“Cape Cod cottage” subtype. Although not an excellent example of the Colonial Revival style, given the lack of an accentuated and more elaborate front entry, the house does appear to express the aesthetic of a modest Cape Cod cottage of the 1920s and therefore retains integrity of feeling.

²⁰ National Register Bulletin 15; How to Apply the National Register Criteria for Evaluation, 45;
https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf

²¹ National Register Bulletin 15; How to Apply the National Register Criteria for Evaluation, 45;
https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf

As such, in Page & Turnbull's professional opinion, the Property's 1929 house meets all requirements of local Criterion B. In Page & Turnbull's professional opinion, the Property's ca. 1929 detached garage/cottage and landscape do not meet the required local Criterion B.

C. Historic Significance. *A structure or property should be clearly associated with one or more of the following areas of significance:*

- 1.Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;*
- 2.Person/People: Associated with the lives of persons important to the local, California or national history;*
- 3.Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or*
- 4.Archaeology: Yields important information about prehistory or history of the local area, California or the nation.*

1. Event: The 2025 HRE finds that the property does not appear to be clearly associated with any event that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the U.S. for local listing

Page & Turnbull concurs with the findings of the 2025 HRE that the property does not meet the required local Criterion C under Event but provides the following clarification. Although the 1929 house is associated with the general trend of growth in Los Altos during the 1920s, the property is not specifically important to this trend and thus does not convey significance for its association with that particular growth period.

2. Person/People: The 2025 HRE finds that the property does not appear to be clearly associated with the lives of persons important to the local, California or national history.

Page & Turnbull concurs with the findings of the 2025 HRE that the property does not meet the required local Criterion C under Person/People but provides the following clarification. Although, the original owner/occupant of the house, Harry Van Epps, was a carpenter in the "house building" industry, no documentary evidence was found to confirm his hand in the construction of the 1929 home. The property subsequently changed ownership no less than ten times and research did not identify that persons important to local, California, or national history owned or occupied the property.

3. The 2025 HRE acknowledges that the 1929 house is associated with Colonial Revival architecture but states it does not embody the distinctive characteristics of Colonial Revival architecture, does not embody a method of construction and does not represent the work of a master or possess high artistic values.

Page & Turnbull concurs with the findings of the 2025 HRE that the property does not meet the required local Criterion C under Architecture/Design but provides the following clarification. Page & Turnbull acknowledges that the 1929 house exhibits elements of Colonial Revival style and particularly exhibits the one-story or Cape Cod cottage subtype (due to its form and massing), a subtype built throughout the Colonial Revival decades and that became especially common in the 1940s. The house contains such Colonial Revival characteristics as a side-gabled roof, symmetrically balanced fenestration consisting of double-hung, multi-lite windows with false shutters and paired at first floor with a centered front door. The roof features gabled dormers and a cornice decorated with dentils and eave returns. However, the house does not express the accentuated front door which is typically character-defining of houses in the Colonial Revival style, featuring a decorative crown supported by pilasters or projecting slender columns to form a front porch. Rather, as a modest representation of the style, evidenced also through its wood cladding in lieu of masonry and lack of elaborate front entry, the house thus does not fully exemplify the distinctive characteristics of the Colonial Revival style required to be individually significant, nor does it exemplify a method of construction, nor does it possess high artistic values. And, as no architect of record is known, the house does not represent the work of a master.

4. Archeology: The 2025 HRE states the Property was not assessed for archaeology.

The evaluation of this property was limited to age-eligible resources above ground and did not involve survey or evaluation of the subject property for the purposes of archaeological information and thus, the property does not yield important information about prehistory or history of the local area, California or the nation. As such, Page & Turnbull concurs with the 2025 HRE that the Property, inclusive of the 1929 house, ca. 1929 detached garage/cottage and landscape do not meet the required local Criterion C under Archeology.

Recommendation

The 2025 HRE recommendation section indicates that because the house has lost integrity and/or historic significance, the house is recommended to be removed from the Los Altos Historic Resource Inventory. The 2025 HRE recommendation section indicates the Property's detached garage/cottage and landscape are not eligible for local listing.

DISCUSSION

Page & Turnbull concurs with the 2025 HRE recommendation that the house be removed from the Los Altos Historic Resource Inventory. However, Page & Turnbull clarifies the reasoning as to why it should be removed from the local inventory. The 2011 *State of California Department of Parks & Recreation (DPR) 523A and 523B forms*, dated June 8, 2011 and prepared by Circa found the 1929 house at 81 Pepper Drive to be, “a good representative example of its style” with a “good degree of integrity of location, workmanship, feeling, design and materials,” and “therefore...eligible for listing on the Los Altos Historic Resources Inventory.”

Page & Turnbull does not concur with the 2011 Circa assessment that the house is a good example of its style. In other words, the house has not demonstrably lost integrity and/or historic significance since the prior (2011) finding of eligibility as stated in the 2025 HRE. Rather, although the Property, inclusive of the 1929 house and ca. 1929 garage/cottage meets the local Criterion A as age eligible, and the house meets local Criterion B as it retains integrity relative to its 1929 date of construction, type, and architectural style, it does not meet local Criterion C as a historically significant resource. Therefore, 81 Pepper Drive is ineligible for inclusion on the Los Altos Historic Resource Inventory.

Bibliography

The 2025 Historic Resource Evaluation provides a bibliography which is the list of the sources used and referred to within and to prepare the evaluation. This bibliography meets industry standards.

Appendix

The appendix of the 2025 Historic Resource Evaluation provides the *California Department of Parks and Recreation (DPR) Form - Primary Record and Continuation Sheets* for the property. The information within the forms appears to provide the physical description of the property, photographs and an evaluation like that provided in the 2025 HRE. Page & Turnbull notes the DPR Form includes, however, an aerial image of the property and although not explicitly demarcated, the house and its ancillary component (garage/cottage), are legible. This type of image was lacking in the remainder of the document as previously discussed.

CONCLUSION

At the request of the City of Los Altos Community Development Department, Page & Turnbull has reviewed the 2025 Historic Resource Evaluation for 81 Pepper Drive (APN 170-41-007), Los Altos prepared by Evans & De Shazo, Inc. updated April 21, 2025. Page & Turnbull reviewed the 2025 HRE and other related materials and conducted a field survey and online research. Page & Turnbull has identified several areas for potential improvement of the 2025 HRE. However, Page & Turnbull does

not recommend that the 2025 HRE need be revised for the City of Los Altos to make a finding. With the combined contents of previous evaluations and Page & Turnbull's additional research and field survey, Page & Turnbull concurs with the finding of the 2025 Historic Resource Evaluation that the property does not appear eligible under any of the California Register criteria, nor does it meet the local Criteria for inclusion on the Los Altos Historic Resource Inventory.

From: Jennifer Jacobsen
To: Brittany Whitehill
Subject: 81 pepper drive
Date: Monday, July 21, 2025 8:36:17 PM

> Hi Brittany,
> I just wanted to write a quick note that I am not supportive of moving 81 Pepper off the historic registry as I feel it's very important to preserve historic homes and our history in Los Altos. While I know it's an investment in Los Altos from historic home owners, I do think it's important to preserve these homes.
>
> What is the process and next steps for this?
>
> Thanks!
> Jennifer Jacobsen

From:
To: [Brittany Whitehill](#)
Subject: 81 pepper drive
Date: Monday, June 9, 2025 7:20:32 PM

Brittany-I do not support removal of 81 Pepper Drive from the historic resources inventory. There is nothing that has changed its historic nature since it was originally listed more than 25 years ago. The house is historic, being an early example of housing that was built almost 100 years ago as part of the Adams subdivision. There are 5 houses in the immediate neighborhood that were originally built after the subdivision was approved circa 1910 and 4 are almost contiguous along Pepper Drive (41, 55, 81 and 121). The house adds to the historic integrity, context, and setting of all of those homes.

The current homeowners bought the property with full knowledge of the house being listed as a historic resource. If the homeowners want to expand the house, there is ample room in back to built onto the structure without adversely affecting its historic character.



comments regarding 81 pepper drive august 18th meeting agenda item 2

From baerjc@earthlink.net

Date Sat 8/16/2025 8:23 AM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>

📎 1 attachment (350 bytes)

adams subdivison map.pdf;

Below are my comments as regard removing 81 Pepper Drive from the Historic Resource Inventory. I would urge the Historical Commission to deny that removal.

Neither historic consultant did an adequate job in determining if 81 Pepper Drive should be kept on the Los Altos Historic Resource Inventory. While it is tempting to believe “an expert”, the fact is the first expert’s opinion was refuted, in part, by the second expert. So I would encourage the Historic Commissioners to use their input with care as experts rely on reaching conclusions based on the information they have. Neither expert appears to have had the below information in making their determinations. This omission was highlighted on page 96 of the Page and Turnbull report, which only discussed this issue in broad terms, lacking the specificity required to understand how the home actually fits with the development patterns in Los Altos and more generally in the region.

Both “experts” claimed 81 Pepper did not meet criteria 1-that the property was not associated with.....a significant contribution to broad patterns of local or regional history.....

In fact, the house is a prime example of the pattern of suburban development that occurred in Los Altos post 1910. Prior to that time, Los Altos was primarily populated by large orchards with modest-sized homes. Over time, large orchard properties were subdivided into small, single-family lots that were sold. The buyers were San Franciscans buying summer homes, wealthy individuals who built homes larger than the earlier modest-sized homes, or local residents who built modest-sized homes on the properties which had no orchard. The latter includes many who had migrated to California from around the US and around the world. They became part of the growing middle class of residents in Los Altos. Los Altos and the Bay area have, for the past 100 years been a destination for individuals and families. It has made this region both highly diverse and the entrepreneurial capital of the world.

The Van Epps, original owners of 81 Pepper, were born in Iowa and South Dakota, their parents from New York and Iowa. Their 81 Pepper house was one of the modest-sized homes with no orchard, part of the trend that was a departure from the prior housing model of Los Altos. It was designed and constructed to be the residence of the Van Epp’s, a middle-class family who moved from one home in Los Altos on Hawthorne to a new house on Pepper Drive, and later in life, moved to a single-story home on Lyell. This illustrates a pattern of development and a story that has long resonated with many in the Bay area.

Marvin Adams subdivided his 30-acre orchard in 1911 and the subdivided lots were offered for sale. This was the first significant subdivision of land in Los Altos after the Shoups first established the town in 1909. Some lots sold, most did not and remained as orchards. A small number of those original homes still stand and are on the HRI. There are a number of homes in the Adams subdivision that are of significance as they are examples of the various housing trends that contributed to the growth of suburbia. 55 Pepper is a larger home example, while 81 Pepper is an example of the more modest sized homes. 121 Pepper was a summer home while 41 Pepper and 70 Marvin were mid-sized primary residences. Together they help tell a story of the development of the town. Each

important, but as a group they are more significant in demonstrating the pattern of development and change in Los Altos as it evolved from a agricultural based community to a residential city.

Agenda Item 2.

Based upon the above, the Historical Commission should make a determination that 81 Pepper meets all three criteria for inclusion on the HRI and therefore the request to remove it from the inventory should be denied.

I have attached a copy of the Adams subdivision map for your reference and would be happy to answer any questions you may have. Thank you for your consideration.



Agenda Report

Meeting Date: August 18, 2025

Prepared By: Nick Zornes

Subject: Zoning Code Amendments – Historic Preservation, Mills Act

BACKGROUND

The Los Altos Municipal Code contains various regulations for items that include Historic Preservation. However, the Code does not include specific standards, processes or procedures for Mills Act Properties and the associated contracts for historic preservation.

The Historic Preservation Ordinance as a part of this Agenda Item aims to modernize and strengthen the process for identifying, designating, preserving, and regulating historic resources in the City of Los Altos. This update codifies existing best practices, integrates preservation into land use and development processes, and provides clear procedures and definitions for designations and alterations to historic properties. Much of the proposed ordinance language is consistent with existing standards within the Los Altos Municipal Code, however, are being relocated from Title 12 (Building and Safety Code) to Title 14 (Zoning Code) and reorganized in its ordinance structure.

The proposed Mills Act Chapter introduces an economic incentive program authorized by California Government Code §§50280–50290. It allows owners of qualified historic properties to enter into contracts with the City for reduced property tax assessments in exchange for commitments to restore and maintain those properties according to preservation standards. The proposed ordinance largely codifies existing practice, which is enabled by State law, however, is not contained within local ordinance. The integration of the proposed ordinance into the local code allows for consistency and integrity of the Mills Act program within the City.

ANALYSIS

Historic Preservation Ordinance:

The Ordinance establishes a comprehensive regulatory framework for designating properties as historic resources or landmarks based on criteria related to age, integrity, and significance. Introduces formalized procedures for applications, reports, Historical Commission review, and City Council action. Defines a new Historic Alteration Permit process for review and approval of proposed changes to designated properties, ensuring compliance with the Secretary of the Interior's Standards for the Treatment of Historic Properties. Identifies ordinary maintenance activities exempt from permit requirements and emphasizes the duty to maintain designated historic properties in good repair. Clarifies appeal rights, enforcement mechanisms, and the option for joint public hearings with other review authorities.

Mills Act Ordinance:

The draft Ordinance has been modeled after State law and incorporates all necessary provisions. The Ordinance establishes eligibility requirements for entering into historic property preservation

contracts, limiting participation to properties designated on local, state, or national registers. Sets out a robust application process including a 10-year maintenance plan, cost estimates, photographs, proof of eligibility, and property tax assessment projections. Requires formal contract review and execution by the City Council, subject to compliance with applicable codes and preservation standards. Mandates periodic inspections and documentation (every five years) to ensure ongoing compliance with preservation obligations. Includes provisions for nonrenewal, amendment, and cancellation of contracts, consistent with state law and local enforcement authority. As previously noted, the proposed Mills Act Ordinance is codification of existing practices which are enabled by State law. The proposed ordinance further provides process and procedures for review, approval, and enforcement of the Mills Act for the City of Los Altos. Unless otherwise amended, existing Mills Act Contracts remain intact and unaltered with adoption of the proposed ordinance.

DISCUSSION

The revised Historic Preservation Ordinance and the new Mills Act Chapter function in tandem to preserve the City's cultural and architectural heritage through both regulatory oversight and financial incentives. The operative framework provides the following:

- **Designation to Protection:** Properties must first be designated as Historic Resources (via the Historic Preservation Ordinance) to become eligible for Mills Act contracts. The preservation ordinance provides the process and criteria for such designation, ensuring resources meet thresholds of significance and integrity.
- **Alterations and Integrity:** Once designated, any significant changes to a property must go through the Historic Alteration Permit process to protect character-defining features. This ensures that physical modifications do not compromise historical integrity.
- **Financial Incentives and Long-Term Maintenance:** The Mills Act contract offers a property tax reduction in exchange for a binding 10-year plan (which renews annually) to rehabilitate and maintain the historic property. City inspections verify ongoing compliance, while cancellation provisions protect the public interest and further ensure that a reduction in the property tax levy is only commensurate with the need to upgrade or restore the historic property.
- **Enforcement and Oversight:** Both ordinances include clear roles for staff, the Historical Commission, and the City Council in reviewing, approving, and enforcing regulations or contracts. Joint hearing procedures further streamline multi-authority reviews where necessary.
- The synergy between the updated preservation regulations and the Mills Act program is essential for advancing Los Altos' historic preservation goals. Together, they reflect a comprehensive and balanced approach that recognizes the value of cultural resources while providing meaningful incentives for private stewardship.

Planning Commission June 5th Recommendation

On June 5, 2025, the Los Altos Planning Commission held a public hearing to consider the draft ordinances. During that meeting public testimony was received which identified concern over the

requirement for interior inspection in addition to a required exterior inspection of a historic property with Mills Act Contract. The Planning Commission considered the public testimony and requested a modification to clarify what the interior inspection would entail. Additionally, during the commissioner discussion, it was identified that pursuant to Government Code Section 50281 interior and exterior inspections of historic properties with Mills Act Contracts is statutorily required. The draft Mills Act Program Ordinance was drafted consistent with the Office of Historic Preservation (OHP) Technical Assistance document (Attachment #5).

Additionally, public testimony regarding the Historic Preservation Ordinance was received. Comments were concerned that too much of the ordinance was being modified without consideration of what was lost or what was retained in the drafted ordinance. A side-by-side comparison of red lines to the existing ordinance was requested by two members of the public. Staff explained that since the Ordinance was being relocated from Title 12 to Title 14, and the Ordinance has been reorganized for ease of application of the code which would result in the entire existing ordinance being strikethrough and underlined.

The proposed ordinances were passed by a vote of 4-1. It is important to note that the one dissenting vote was cast on the basis that the commissioner believed the ordinances should have been sent to the Historical Commission for consideration.

Historical Commission Review

As previously noted, a one dissenting vote by the Planning Commission gave staff the opportunity to re-evaluate the necessity for the proposed ordinances to be reviewed by the Historical Commission. Ordinances contained within the Zoning Code are not legally required to be reviewed by any commission with the exception of the Planning Commission prior to consideration of the City Council. Pursuant to Section 2.12.030 the Historical Commission Review and comment upon existing or proposed ordinances, plans or policies of the city as they relate to historic resources. Since the Historic Preservation Ordinance and Mills Act Ordinance contain regulations for historic resources staff have agendized this item for Review and Comment.

On August 6, 2025, City Manager, Gabe Engeland, and Assistant City Manager, Nick Zornes met with four (4) residents, three (3) of which are owners of Historic Properties within the City and each hold Mills Act Contracts. During this meeting dialogue received informed potential modifications to the draft ordinances. Following the meeting a Summary of Comments was received on August 7, 2025; appropriate comments received were integrated into the draft ordinances which can be seen in blue font in Attachment 2 and Attachment 4.

Following tonight's review of the draft ordinances, these will advance for review by the City Council.

ATTACHMENTS

- 1. Draft Ordinance – Historic Preservation**
- 2. Appendix A**
- 3. Draft Ordinance – Mills Act**
- 4. Appendix A**
- 5. Office of Historic Preservation – Mills Act Technical Assistance**
- 6. Draft Ordinance – Repeal Chapter 12.44**
- 7. Appendix A**

ORDINANCE NO. 2025-__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS ADDING CHAPTER 14.90 (HISTORIC PRESERVATION) TO THE LOS ALTOS MUNICIPAL CODE

WHEREAS, the City Council is empowered pursuant to Article XI, Section 7 of the California Constitution to make and enforce within the City all local, police, sanitary, and other ordinances, and regulations not in conflict with general laws; and

WHEREAS, the City Council held a duly noticed public hearing on **DATE TO BE INSERTED**, and **DATE TO BE INSERTED**; and

WHEREAS, the amendments was processed in accordance with the applicable provisions of the California Government Code and the Los Altos Municipal Code; and

WHEREAS, this Ordinance is exempt from environmental review pursuant to Section 15061(b)(3) of the State Guidelines implementing the California Environmental Quality Act of 1970, as amended; and

NOW, THEREFORE, the City Council of the City of Los Altos does hereby ordain as follows:

SECTION 1. AMENDMENT OF CHAPTER 14.90 OF THE MUNICIPAL CODE. Chapter 14.90 of the Los Altos Municipal Code is hereby amended as set forth in Appendix A to this Ordinance, underline indicating addition, strikethrough indicating deletion.

SECTION 2. CONSTITUTIONALITY; AMBIGUITIES. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions hereof. Any ambiguities in the Los Altos Municipal Code created by this Ordinance shall be resolved by the Development Services Director, in their reasonable discretion, after consulting the City Attorney.

SECTION 3. PUBLICATION. This Ordinance shall be published as provided in Government Code Section 36933.

SECTION 4. EFFECTIVE DATE. This Ordinance shall be effective upon the commencement of the thirty-first day following the adoption hereof.

I HEREBY CERTIFY that the foregoing Ordinance was duly and properly introduced at a regular meeting of the City Council of the City of Los Altos held on **DATE TO BE INSERTED**, and was thereafter, at a regular meeting held on **DATE TO BE INSERTED**, passed, and adopted by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Pete Dailey, MAYOR

Attest:

Melissa Thurman, MMC, CITY CLERK

**APPENDIX A
CHAPTER 14.90**

APPENDIX A

Chapter 14.90 – HISTORIC PRESERVATION

14.90.010 Purpose.

The purpose of this chapter is to:

- A. Safeguard the heritage of the city by providing for the protection of historic resources representing significant elements of its history;**
- B. Enhance the visual character of the city by encouraging the compatibility of architectural styles which reflect established architectural traditions on individual property and parcels of land;**
- C. Encourage public knowledge, understanding and appreciation of the city's past, and foster civic and neighborhood pride and sense of identity based upon the recognition and use of the city's historic resources;**
- D. Stabilize and improve property values within the city and increase the economic and financial benefits to the city and its inhabitants derived from the preservation, rehabilitation, and use of historic resources;**
- E. Integrate the conservation of historic resources into the public and private development process and identify as early as possible and resolve conflicts between the preservation of such resources as possible.**

14.90.020 Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them in this section, unless the context or the provision clearly requires otherwise:

"Alteration" means any act or process that changes any portion of the exterior architectural appearance of a structure or object, including, but not limited to, the erection, construction, reconstruction, removal of exterior architectural features or details, or the addition of new structures, but does not include painting, ordinary maintenance and landscaping.

"California Historical Building Code" applies to all qualified historic structures and sites, designated under federal, state and local authority. It provides alternative building regulations for the rehabilitation, preservation, restoration or relocation of structures designated as qualified historic buildings.

"California Office of Historic Preservation" means the governmental agency primarily responsible for the statewide administration of the historic preservation program in California.

"California Register of Historical Resources" is a comprehensive listing of California's historical resources, including those of local, state and national significance.

"Character defining features" means the defining elements, such as prominent architectural features, materials, craftsmanship or other elements, that, individually or in combination, identify a historic property, building or landscape.

"Commission staff" means the staff liaison assigned to the historical commission.

"DPR 523" means the California Department of Parks and Recreation Historic Resource Inventory Forms used for historic evaluations. The DPR 523A form provides descriptive information about a resource. The DPR 523B form provides an evaluation of the resources and includes a determination as to whether the resource is eligible for the National or State Register of Historic Places or listing on the Los Altos Historic Resources Inventory.

"Exterior architectural feature" means the architectural elements embodying style, design, general arrangement and components of all the outer surfaces of an improvement, including but not limited to, the kind, size, shape and texture of building materials, and the type and style of windows, doors, lights, signs and other fixtures appurtenant to such improvement.

"Historic landmark" means a building, improvement, structure, natural feature, site or area of land, under single or common ownership that has significant historical, architectural, cultural, and/or aesthetic interest or value, and is designated as a historic landmark by the city council.

"Historic resource" is a property or structure that has been determined to be over fifty (50) years old, or has been identified as eligible for listing in a local, state, or national historic register per CEQA Guidelines Section 15064.5, retains its physical integrity, has historical, architectural, cultural, and/or aesthetic value, and is listed on the historic resources inventory (HRI).

"Historic resources inventory" (HRI) means the city's official inventory of the historic resources, as adopted and amended from time to time by resolution of the city council. A property or structure must be designated as a historic landmark or a historic resource to be listed.

"Historical commission" is an advisory commission appointed by the city council that is tasked with maintaining the historic resources inventory, making recommendations on historic landmarks, working with property owners on preservation, maintenance and other development activities related to historic resources, and other activities as identified in the municipal code.

"Improvement" means any building, structure, parking facility, wall, work of art or other appurtenance or addition thereto constitute a physical betterment of real property or any part of such betterment.

"Integrity" is the authenticity of the characteristics, also referred to as character defining features, from which resources derive their significance. Integrity is the composite of seven qualities: location, design, setting, materials, workmanship, feeling and association.

"Mills Act" is an economic incentive program in California for the restoration and preservation of qualified historic structures. The Mills Act grants participating local governments the authority to enter into contracts with owners of qualified historic properties to reduce the property tax assessment in exchange for the restoration and maintenance of the historic resource.

"National Register of Historic Places" is the official inventory of districts, sites, buildings, structures and objects significant in American history, architectural, archeology and culture, maintained by the Secretary of Interior under the authority of the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966.

"Preservation" means the act of identification, study, protection, reconstruction, restoration, rehabilitation or enhancement of historic and/or cultural resources.

"Reconstruction" means the act or process of reproducing by new construction, the exact form and detail of a vanished building, structure or any part thereof, as it appeared at a specific period.

"Rehabilitation" means the act or process of returning a property to a state of utility through repair or alteration that makes possible an efficient contemporary use while preserving those portions or features of the property which are significant to its historical, architectural and cultural value.

"Restoration" means the act or process of accurately recovering the form and details of a property and its setting as it appeared at a particular period by means of the removal of later work or by the replacement of missing earlier work.

"Secretary of Interior's Standards for the Treatment of Historic Properties (36 CFR Part 68)" are the Federal Standards for the Treatment of Historic Properties that are utilized in the identification, evaluation, registration and treatment of historic properties. The list of ten (10) Rehabilitation Standards, published as the Secretary of the Interior's Standards, is aimed at retaining and preserving those features and materials that are important in defining the historic character of a resource.

14.90.030 Identification of Historic Resource.

For a property to be placed on the HRI following the adoption of this Chapter, an historic resource survey (DPR 523A) shall be prepared by a qualified consultant in compliance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation: Professional Qualifications Standards.

14.90.040 Historic Resource Designation

- A. Designation Criteria.** For the purposes of this Chapter, a structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy all three (3) criteria listed below:
1. Age. A structure or property shall be more than fifty (50) years in age.
 2. Determination of Integrity. A structure or property should retain sufficient historic integrity in most of the following areas:
 - a. Location. The place where the historic property was constructed or where the historic event occurred. Integrity of location is maintained when the property remains at its original site.
 - b. Design: The combination of elements that create the form, plan, space, structure and style of a property.
 - c. Materials: The physical elements that were combined or deposited during a particular period and in a particular pattern or configuration.
 - d. Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in prehistory or history.
 - e. Characteristic: A property's expression of the aesthetic or historic sense of a particular period.
 - f. Association: The direct connection between a property and the historic event, activity, or person for which it is significant.

3. Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:
 - a. Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States.
 - b. Person/People: Associated with the lives of people important to the local or regional, California or national history.
 - c. Architecture/Design: Embodies the distinctive characteristics of a design-type, period, region or method of construction, or represents the work of a master or possesses high artistic value.
 - d. Archaeology: Yields important information about prehistory or history of the local area, California or the nation.

B. Initiation for Designation.

1. Designation of a property proposed for inclusion on the HRI may be initiated by any of the following parties:
 - a. Owner(s) of the property proposed for inclusion or authorized representative of the owner(s);
 - b. Historical Commission and affirmed by the City Council;
 - c. City Council.
2. If designation is initiated by the owner(s), an application for designation shall be made to the Development Services Department through submittal of the prescribed application form accompanied by a nonrefundable filing fee as specified in the adopted Fee Schedule. The Development Services Department shall establish what supporting documentation shall accompany the application, including, but not limited to, State of California DPR 523 series forms or other HRI forms as may be approved by the State.
3. At the time of submission of an application for designation, the owner(s) or authorized representative of the owner(s) shall be notified of the proposed designation and given the opportunity to comment; however, owner consent is not required for designation to proceed.
4. The application shall indicate the parameters of the property proposed for inclusion, specifying any related structures or resources that are to be included for consideration and an evaluation of the property's conformance with the applicable criteria.
5. If designation is initiated by the Historical Commission or the City Council, the Development Services Department shall notify the owner(s) of the property by certified mail within ninety (90) days of the initiation and request written consent from the owner. The notice shall inform the owner(s) of the proposed designation and provide an opportunity to

comment during the public hearing process. Owner consent shall not be required for the designation to proceed.

C. Approval of Permits When Designation is Pending. Except as provided by this chapter no Building Permit, Demolition Permit, or other permit that would result in a major alteration of the property shall be issued for any property when an HRI designation application has been initiated with the Development Services Department until all hearings on the matter are concluded.

D. Historical Commission Hearing.

1. The Historical Commission shall conduct a hearing on the application for designation at its next regularly scheduled meeting following the application being deemed complete by the Development Services Department.
2. A staff report, including the supporting documentation concerning the property proposed for inclusion shall be provided to the Historical Commission. The report shall address the significance and integrity of the property proposed for inclusion as it relates to the designation criteria, provide other relevant information, and include a recommendation concerning the application and the basis therefor.
3. The Historical Commission shall consider the evidence provided by a licensed design professional specializing in historic preservation or qualified historic preservation professional who meet the Secretary of Interior's Professional Qualification Standards, as established by the National Park Service. The Historical Commission shall recommend to the City Council approval, modification, or denial of the designation proposal, including the reasons for such recommendation.

E. City Council Review. Following the recommendation of the Historical Commission, the City Council shall take final action on the request for designation by resolution approving or denying the recommendation.

F. Notice of Designation.

1. Following action by the City Council, a copy of the findings shall be sent by first class mail to the owner(s) of the newly designated HRI property, and a notice of the designation, along with a legal description of the property, shall be recorded in the records of the County Recorder.
 - a. Failure to record with the County Recorder shall not invalidate a designation or any of the requirements of this Chapter.
2. The City Council also shall send notice of the designation to California State Parks, Office of Historic Preservation.

G. Designation Repeal or Amendment.

1. Designation may be repealed or amended in the same manner and procedure as was followed to designate the property initially. This action shall result from new information, the discovery of earlier misinformation or change of original circumstances, conditions, or factors that justified the designation.
2. If a repeal of designation is approved by the City Council, a notice shall be sent by first class mail to the owner(s) of the property.

14.090.050 Historic Alteration Permit.

- A. Historic Alteration Permit(s) are required in order to alter, demolish, remove, relocate or change any exterior architectural features of an HRI listed property, or remove or relocate any improvements, structures that contribute to the integrity or the historic significance of the resource.**
- B. For non-residential properties that are on the HRI, non-permanent improvements such as signage, fences/walls, minor accessory structures and landscaping that do not adversely affect the physical integrity or the historic significance of the resource may be exempted from Historical Commission review by the Zoning Administrator.**
- C. For residential properties that are on the HRI, improvements such as swimming pools, fences/walls, minor accessory structures and landscaping that do not adversely affect the physical integrity or the historic significance of the resource may be exempted from Historical Commission review by the Zoning Administrator.**
- D. Where applicable, applicants shall use the California Historic Building Code (CHBC) to accommodate necessary code compliance in a manner that retains character-defining features and ensures life-safety without compromising historic integrity. Any condition deemed unsafe or warranting removal of historic features shall first be evaluated for compliance under the CHBC prior to initiating demolition or alteration.**

14.90.060 Review of Historic Alteration Permit.

- A. For projects that require a historical alteration permit, the historical commission shall complete its review and issue a recommendation at its next available scheduled meeting. The commission shall determine if:**
 - 1. The project complies with all provisions of this chapter; and**
 - 2. The project does not adversely affect the physical integrity or the historic significance of the subject property.**
 - 3. The project is in compliance with the Secretary of the Interior's Standards for the Treatment of Historic Properties.**
- B. The Historical Commission recommendation on the historical alteration permit, shall be forwarded to the Zoning Administrator for consideration. The Zoning Administrator may approve or deny the recommendation of the Historical Commission based on the applicable provisions of this code.**

14.90.070 Application for Historic Alteration Permit.

- A. Applications for historical alteration permits shall be submitted to the Development Services Department. Applications shall at minimum include the following information:**
- 1. A clear statement of the proposed work;**
 - 2. A site plan and boundary survey showing all existing buildings, structures, trees over six inches in diameter, property lines, easements and the proposed work;**
 - a. A boundary and topographical survey may be required when additions to existing structures and/or the relocation of a historic structure is proposed at the discretion of the Zoning Administrator;**
 - 3. Detailed plans showing both the existing and proposed exterior elevations, including a street elevation, photographs of windows and/or special features, materials and grading;**
 - 4. Specifications describing all materials to be used and all processes that would affect the appearance or nature of the materials;**
 - 5. Notes indicating any deviation from the Secretary of the Interior's Standards for Historic Rehabilitation; and**
 - 6. Such other information or documents as may be requested by the Zoning Administrator.**

14.90.080 Joint Meeting Procedures.

When a project requires multiple discretionary approvals from multiple review authorities, the project shall may be reviewed at a Joint Meeting of the respective review authorities when practical. Procedures for Joint Meetings shall be as follows:

- A. The Historical Commission will attend a regularly scheduled or special meeting of the Zoning Administrator, Planning Commission, and/or City Council.**
- B. One (1) public meeting notice, agenda, and meeting minutes shall be prepared for the item being reviewed at the Joint Meeting.**
- C. The Historical Commission shall conduct its review first and render its recommendation followed by the Zoning Administrator, Planning Commission, and/or City Council.**

14.90.090 Appeal Procedures.

Any decisions rendered under regulations contained within this Chapter are appealable pursuant to Section 14.01.100 of the Los Altos Municipal Code.

14.90.100 Notice of Public Meetings.

Any decisions rendered under regulations contained within this Chapter are subject to public meeting notice requirements pursuant to Section 14.01.130 of the Los Altos Municipal Code.

14.90.110 Ordinary Maintenance and Repair.

- A. Nothing in this chapter shall be construed to prevent the ordinary maintenance, painting, landscaping or repair of any exterior feature in or upon any historic resource or historic landmark that does not involve a change in design, material or the external appearance thereof, nor does this chapter prevent the construction, reconstruction, alteration, restoration, demolition or removal of any historic resource or historic landmark which has been certified in writing by the city building inspector, or fire chief, or other code enforcement officer as being in unsafe or dangerous condition as contained within the California Building Code and/or Property Maintenance Code which cannot be rectified through the use of the California State Historic Building Code.**
- B. Ordinary Maintenance and Repair as described in this Section shall be exempt from the requirements of obtaining a Historic Alteration Permit.**

14.90.120 Duty to keep in good repair.

- A. The owner, occupant or the person in actual charge of a historic resource or a historic landmark shall keep and maintain in good condition and repair all exterior portions of the improvement or structure, and all interior portions thereof whose maintenance is necessary to prevent deterioration and decay of any exterior architectural feature or natural feature.**
- B. It shall be the duty of the development services director or their designee to enforce this section.**

14.90.130 Enforcement.

The violation of any provision contained in this chapter is hereby declared to be unlawful and shall constitute a misdemeanor, subject to the penalties as prescribed in Title 1, Chapter 1.20 of this code.

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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.



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Mills Act Property Tax Abatement Program

Purpose of the Mills Act Program

Economic incentives foster the preservation of residential neighborhoods and the revitalization of downtown commercial districts. The Mills Act is the single most important economic incentive program in California for the restoration and preservation of qualified historic buildings by private property owners.

Enacted in 1972, the Mills Act legislation grants participating local governments (cities and counties) authority to enter into contracts with owners of qualified historic properties who actively participate in the restoration and maintenance of their historic properties while receiving property tax relief.

Benefits to Local Governments

The Mills Act allows local governments to design preservation programs to accommodate specific community needs and priorities for rehabilitating entire neighborhoods, encouraging seismic safety programs, contributing to affordable housing, promoting heritage tourism, or fostering pride of ownership. Local governments have adopted the Mills Act because they recognize the economic benefits of conserving resources and reinvestment as well as the important role historic preservation can play in revitalizing older areas, creating cultural tourism, building civic pride, and retaining the sense of place and continuity with the community's past.

A formal agreement, generally known as a Mills Act or Historical Property Contract, is executed between the local government and the property owner for a minimum ten-year term. Contracts are automatically renewed each year and are transferred to new owners when the property is sold. Property owners agree to restore, maintain, and protect the property in accordance with specific historic preservation standards and conditions identified in the contract. Periodic inspections by city or county officials ensure proper maintenance of the property. Local authorities may impose penalties for breach of contract or failure to protect the historic property. The contract is binding to all owners during the contract period.

Benefits to Owners

Owners of historic buildings may qualify for property tax relief if they pledge to rehabilitate and maintain the historical and architectural character of their properties for at least a ten-year period. The Mills Act program is especially beneficial for recent buyers of historic properties and for current owners of historic buildings who have made major improvements to their properties.

Mills Act participants may realize substantial property tax savings of between 40% and 60% each year for newly improved or purchased older properties because valuations of Mills Act properties are determined by the Income Approach to Value rather than by the standard Market Approach to Value. The income approach, divided by a capitalization rate, determines the assessed value of the property. In general, the income of an owner-occupied property is based on comparable rents for similar properties in the area, while the income amount on a commercial property is based on actual rent received. Because rental values vary from area to area, actual property savings vary from county to county. In addition, as County Assessors are required to assess all properties annually, Mills Act properties may realize slight increases in property taxes each year.

Qualified Historic Property

A qualified historic property is a property listed on any federal, state, county, or city register, including the *National Register of Historic Places*, *California Register of Historical Resources*, California Historical Landmarks, State Points of Historical Interest, and locally designated landmarks. Owner-occupied family residences and income-producing commercial properties may qualify for the Mills Act program.

OHP's Role

OHP provides technical assistance and guidance to local governments and property owners. OHP maintains a current list of communities participating in the Mills Act program and copies of Mills Act ordinances, resolutions, and contracts that have been adopted. OHP does not participate in the negotiations of the agreement and is not a signatory to the contract.

For Additional Information

Contact the planning department of the city or county within which the historic property is located.

California's four largest cities (Los Angeles, San Diego, San Francisco, and San Jose) as well as more than 75 other city and county governments have instituted Mills Act programs. A list of communities participating in the Mills Act Program is available online at http://www.ohp.parks.ca.gov/default.asp?page_id=21412.

For additional information on the Mills Act, please contact MaryIn Lortie in the Office of Historic Preservation, PO Box 942896, Sacramento CA 94296-0001, (916) 653-8911, mlort@ohp.parks.ca.gov.

California State Codes Relating to Mills Act Program

California Government Code, Article 12, Sections 50280 - 50290

50280. Restriction of property use.

Upon the application of an owner or the agent of an owner of any qualified historical property, as defined in Section 50280.1, the legislative body of a city, county, or city and county may contract with the owner or agent to restrict the use of the property in a manner which the legislative body deems reasonable to carry out the purposes of this article and of Article 1.9 (commencing with Section 439) of Chapter 3 of Part 2 of Division 1 of the Revenue and Taxation Code. The contract shall meet the requirements of Sections 50281 and 50282.

50280.1. Qualified historic property.

"Qualified historical property" for purposes of this article, means privately owned property which is not exempt from property taxation and which meets either of the following:

(a) Listed in the National Register of Historic Places or located in a registered historic district, as defined in Section 1.191-2(b) of Title 26 of the Code of Federal Regulations.

(b) Listed in any state, city, county, or city and county official register of historical or architecturally significant sites, places, or landmarks.

50281. Required contract provision.

Any contract entered into under this article shall contain the following provisions:

(a) The term of the contract shall be for a minimum period of 10 years.

(b) Where applicable, the contract shall provide the following:

(1) For the preservation of the qualified historical property and, when necessary, to restore and rehabilitate the property to conform to the rules and regulations of the Office of Historic Preservation of the Department of Parks and Recreation, the United States Secretary of the Interior's Standards for Rehabilitation, and the State Historical Building Code.

(2) For the periodic examinations of the interior and exterior of the premises by the assessor, the Department of Parks and Recreation, and the State Board of Equalization as may be necessary to determine the owner's compliance with the contract.

(3) For it to be binding upon, and inure to the benefit of, all successors in interest of the owner. A successor in interest shall have the same rights and obligations under the contract as the original owner who entered into the contract.

(c) The owner or agent of an owner shall provide written notice of the contract to the Office of Historic Preservation within six months of entering into the contract.

50281.1. Fees.

The legislative body entering into a contract described in this article may require that the property owner, as a condition to entering into the contract, pay a fee not to exceed the reasonable cost of administering this program.

50282. Renewal.

(a) Each contract shall provide that on the anniversary date of the contract or such other annual date as is specified in the contract, a year shall be added automatically to the initial term of the contract unless notice of nonrenewal is given as provided in this section. If the property owner or the legislative body desires in any year not to renew the contract, that party shall serve written notice of nonrenewal of the contract on the other party in advance of the annual renewal date of the contract. Unless the notice is served by the owner at least 90 days prior to the renewal date or by the legislative body at least 60 days prior to the renewal date, one year shall automatically be added to the term of the contract.

(b) Upon receipt by the owner of a notice from the legislative body of nonrenewal, the owner may make a written protest of the notice of nonrenewal. The legislative body may, at any time prior to the renewal date, withdraw the notice of nonrenewal.

(c) If the legislative body or the owner serves notice of intent in any year not to renew the contract, the existing contract shall remain in effect for the balance of the period remaining since the original execution or the last renewal of the contract, as the case may be.

(d) The owner shall furnish the legislative body with any information the legislative body shall require in order to enable it to determine the eligibility of the property involved.

(e) No later than 20 days after a city or county enters into a contract with an owner pursuant to this article, the clerk of the legislative body shall record with the county recorder a copy of the contract, which shall describe the property subject thereto. From and after the time of the recordation, this contract shall impart a notice thereof to all persons as is afforded by the recording laws of this state.

50284. Cancellation.

The legislative body may cancel a contract if it determines that the owner has breached any of the conditions of the contract provided for in this article or has allowed the property to deteriorate to the point that it no longer meets the standards for a qualified historical property. The legislative body may also cancel a contract if it determines that the owner has failed to restore or rehabilitate the property in the manner specified in the contract.

50285. Consultation with state commission.

No contract shall be canceled under Section 50284 until after the legislative body has given notice of, and has held, a public hearing on the matter. Notice of the hearing shall be mailed to the last known address of each owner of property within the historic zone and shall be published pursuant to Section 6061.

50286. Cancellation.

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(a) If a contract is canceled under Section 50284, the owner shall pay a cancellation fee equal to 121/2 percent of the current fair market value of the property, as determined by the county assessor as though the property were free of the contractual restriction.

(b) The cancellation fee shall be paid to the county auditor, at the time and in the manner that the county auditor shall prescribe, and shall be allocated by the county auditor to each jurisdiction in the tax rate area in which the property is located in the same manner as the auditor allocates the annual tax increment in that tax rate area in that fiscal year.

(c) Notwithstanding any other provision of law, revenue received by a school district pursuant to this section shall be considered property tax revenue for the purposes of Section 42238 of the Education Code, and revenue received by a county superintendent of schools pursuant to this section shall be considered property tax revenue for the purposes of Article 3 (commencing with Section 2550) of Chapter 12 of Part 2 of Division 1 of Title 1 of the Education Code.

50287. Action to enforce contract.

As an alternative to cancellation of the contract for breach of any condition, the county, city, or any landowner may bring any action in court necessary to enforce a contract including, but not limited to, an action to enforce the contract by specific performance or injunction.

50288. Eminent domain.

In the event that property subject to contract under this article is acquired in whole or in part by eminent domain or other acquisition by any entity authorized to exercise the power of eminent domain, and the acquisition is determined by the legislative body to frustrate the purpose of the contract, such contract shall be canceled and no fee shall be imposed under Section 50286. Such contract shall be deemed null and void for all purposes of determining the value of the property so acquired.

50289. Annexation by city.

In the event that property restricted by a contract with a county under this article is annexed to a city, the city shall succeed to all rights, duties, and powers of the county under such contract.

50290. Consultation with state commission.

Local agencies and owners of qualified historical properties may consult with the State Historical Resources Commission for its advice and counsel on matters relevant to historical property contracts.

California Revenue and Taxation Code, Article 1.9, Sections 439 – 439.4

439. Historical Property Restrictions; enforceably restricted property.
For the purposes of this article and within the meaning of Section 8 of Article XIII of the Constitution, property is "enforceably restricted" if it is subject to an historical property contract executed pursuant to Article 12 (commencing with Section 50280) of Chapter 1 of Part 1 of Division 1 of Title 5 of the Government Code.

439.1. Historical Property; definitions.
For purposes of this article "restricted historical property" means qualified historical property, as defined in Section 50280.1 of the Government Code, that is subject to a historical property contract executed pursuant to Article 12 (commencing with Section 50280) of Chapter 1 of Part 1 of Division 1 of Title 5 of the Government Code. For purposes of this section, "qualified historical property" includes qualified historical improvements and any land on which the qualified historical improvements are situated, as specified in the historical property contract. If the historical property contract does not specify the land that is to be included, "qualified historical property" includes only that area of reasonable size that is used as a site for the historical improvements.

439.2. Historical Property; valuation.
When valuing enforceably restricted historical property, the county assessor shall not consider sales data on similar property, whether or not enforceably restricted, and shall value that restricted historical property by the capitalization of income method in the following manner:

- (a) The annual income to be capitalized shall be determined as follows:
 - (1) Where sufficient rental information is available, the income shall be the fair rent that can be imputed to the restricted historical property being valued based upon rent actually received for the property by the owner and upon typical rentals received in the area for similar property in similar use where the owner pays the property tax. When the restricted historical property being valued is actually encumbered by a lease, any cash rent or its equivalent considered in determining the fair rent of the property shall be the amount for which the property would be expected to rent were the rental payment to be renegotiated in the light of current conditions, including applicable provisions under which the property is enforceably restricted.
 - (2) Where sufficient rental information is not available, the income shall be that which the restricted historical property being valued reasonably can be expected to yield under prudent management and subject to applicable provisions under which the property is enforceably restricted.
 - (3) If the parties to an instrument that enforceably restricts the property stipulate therein an amount that constitutes the minimum annual income to be capitalized, then the income to be capitalized shall not be less than the amount so stipulated. For purposes of this section, income shall be determined in accordance with rules and

regulations issued by the board and with this section and shall be the difference between revenue and expenditures. Revenue shall be the amount of money or money's worth, including any cash rent or its equivalent, that the property can be expected to yield to an owner-operator annually on the average from any use of the property permitted under the terms by which the property is enforceably restricted. Expenditures shall be any outlay or average annual allocation of money or money's worth that can be fairly charged against the revenue expected to be received during the period used in computing the revenue. Those expenditures to be charged against revenue shall be only those which are ordinary and necessary in the production and maintenance of the revenue for that period. Expenditures shall not include depletion charges, debt retirement, interest on funds invested in the property, property taxes, corporation income taxes, or corporation franchise taxes based on income.

(b) The capitalization rate to be used in valuing owner-occupied single family dwellings pursuant to this article shall not be derived from sales data and shall be the sum of the following components:

(1) An interest component to be determined by the board and announced no later than September 1 of the year preceding the assessment year and that was the yield rate equal to the effective rate on conventional mortgages as determined by the Federal Housing Finance Board, rounded to the nearest 1/4 percent.

(2) A historical property risk component of 4 percent.

(3) A component for property taxes that shall be a percentage equal to the estimated total tax rate applicable to the property for the assessment year times the assessment ratio.

(4) A component for amortization of the improvements that shall be a percentage equivalent to the reciprocal of the remaining life.

(c) The capitalization rate to be used in valuing all other restricted historical property pursuant to this article shall not be derived from sales data and shall be the sum of the following components:

(1) An interest component to be determined by the board and announced no later than September 1 of the year preceding the assessment year and that was the yield rate equal to the effective rate on conventional mortgages as determined by the Federal Housing Finance Board, rounded to the nearest 1/4 percent.

(2) A historical property risk component of 2 percent.

(3) A component for property taxes that shall be a percentage equal to the estimated total tax rate applicable to the property for the assessment year times the assessment ratio.

(4) A component for amortization of the improvements that shall be a percentage equivalent to the reciprocal of the remaining life.

(d) Unless a party to an instrument that creates an enforceable restriction expressly prohibits the valuation, the valuation resulting from the capitalization of income method described in this section shall not exceed the lesser of either the valuation that would have resulted by calculation under Section 110, or the valuation that would have resulted by calculation under Section 110.1, as though the property was not subject to an enforceable restriction in the base year.

(e) The value of the restricted historical property shall be the quotient of the income determined as provided in subdivision (a) divided by the capitalization rate determined as provided in subdivision (b) or (c).

(f) The ratio prescribed in Section 401 shall be applied to the value of the property determined in subdivision (d) to obtain its assessed value.

439.3. Historical Property; notice of nonrenewal.

Notwithstanding any provision of Section 439.2 to the contrary, if either the county or city or the owner of restricted historical property subject to contract has served notice of nonrenewal as provided in Section 50282 of the Government Code, the county assessor shall value that restricted historical property as provided in this section.

(a) Following the hearing conducted pursuant to Section 50285 of the Government Code, subdivision (b) shall apply until the termination of the period for which the restricted historical property is enforceably restricted.

(b) The board or assessor in each year until the termination of the period for which the property is enforceably restricted shall do all of the following:

(1) Determine the full cash value of the property pursuant to Section 110.1. If the property is not subject to Section 110.1 when the restriction expires, the value shall be determined pursuant to Section 110 as if the property were free of contractual restriction. If the property will be subject to a use for which this chapter provides a special restricted assessment, the value of the property shall be determined as if it were subject to the new restriction.

(2) Determine the value of the property by the capitalization of income method as provided in Section 439.2 and without regard to the fact that a notice of nonrenewal or cancellation has occurred.

(3) Subtract the value determined in paragraph (2) of this subdivision by capitalization of income from the full cash value determined in paragraph (1).

(4) Using the rate announced by the board pursuant to paragraph (1) of subdivision (b) of Section 439.2, discount the amount obtained in paragraph (3) for the number of years remaining until the termination of the period for which the property is enforceably restricted.

(5) Determine the value of the property by adding the value determined by the capitalization of income method as provided in paragraph (2) and the value obtained in paragraph (4).

(6) Apply the ratios prescribed in Section 401 to the value of the property determined in paragraph (5) to obtain its assessed value.

439.4. Historical Property; recordation.

No property shall be valued pursuant to this article unless an enforceable restriction meeting the requirements of Section 439 is signed, accepted and recorded on or before the lien date for the fiscal year in which the valuation would apply.

APPENDIX A

Chapter 14.91 - MILLS ACT PROGRAM

14.91.010 - Authority for Adoption.

This Chapter is adopted pursuant to California Government Code Sections 50280 through 50290, commonly known as the "Mills Act."

14.91.020 - Purpose and applicability.

State law provides that the City Council may contract with the owner of any qualified historical property in a manner which they deem as reasonable to carry out the purposes of the Mills Act. The Mills Act enables the City Council, in its discretion, to enter into historic property preservation contracts with the owner(s) of qualified historical properties within the City of Los Altos. The historic property contract allows the owner of a qualified historical property to obtain preferential property tax assessment in exchange for restrictions on the property to help preserve, restore, and maintain the historic property. The applicability of this chapter shall apply to all new historic property preservation contracts.

14.91.030 - Definitions.

The following definitions shall apply for the purposes of this Chapter:

"Anniversary date" means the date of final execution by all parties of the historic property contract and the same date each subsequent year that the historic property contract is in effect.

"Historic property preservation contract" means a contract between the owner(s) of a qualified historic property and the City of Los Altos, meeting all requirements of State law and this Chapter. The "historic property preservation contract" may also be referred to in this Chapter as "historic contract."

"Owner" means all persons and entities that have a right, title, or interest in the property which is the subject of the historic property contract. The term "owner" includes agents authorized in writing by the owner to act on owner's behalf. The term "owner" also includes owner's successors-in-interest.

"Qualified historical property" means a privately owned property, inclusive of the qualified historical improvements and any land on which the qualified historical improvements are located, which is not exempt from property taxation and which meets any one of the following criteria:

1. A property or structure listed individually in the National Register of Historic Places;

2. A property or structure listed individually in the California Register of Historical Resources;
3. A property or structure listed individually in the City of Los Altos' adopted Historical Resource Inventory;

14.91.040 - Limitations on historic property contracts.

- A. The City Council may, in its sole discretion and pursuant to the terms of this Chapter, enter into historic contracts with the owners of qualified historical properties that are located within the City of Los Altos.
- B. Only qualified historical properties shall be eligible to enter into historical contracts.
- C. Applications for historic contracts must be received prior to July 1 of any calendar year to be processed during that calendar year. Historic property contracts must be approved, signed, and recorded in the Office of the Recorder of the County of Santa Clara on or before December 31 of a calendar year to be eligible for property tax reassessment for the following fiscal year.
- D. The intent of this Chapter is to establish procedures whereby property subject to a historic property contract approved, executed, and recorded pursuant to this Chapter will be eligible for property tax valuation as an enforceable restricted historical property pursuant to state law (Sections 439 through 439.4 of the California Revenue and Taxation Code, as may be periodically amended). In the event that only a portion of a property or structure is the subject of a historic contract, only that portion of the property or structure covered by the historic property contract shall be considered for preferential property tax assessment treatment under state law. The rest of the property or structure shall be subject to standard property tax assessment, and the total assessed value shall be a combination of the two methods as determined by the County Assessor. This section shall not be construed to circumvent or diminish any requirements of the Subdivision Map Act.
- E. Properties with recorded historic contracts must comply with all applicable City of Los Altos rules, regulations, policies, permit requirements, and associated fees, including those needed to carry out the provisions of the historic contract. Entry into a historic contract does not relieve the property which is the subject of the contract from compliance with any and all applicable federal and state laws and local regulations.
- F. Applications for historic contracts on properties on which a notice of violation has been recorded will not be accepted under this Chapter until the violation has been cleared.

14.91.050 - Required provisions of historic property contracts.

- A. The historic contract shall be in a form acceptable to City Attorney and the City Manager or their designee and shall be retained in the records of the City of Los Altos, City Clerk's Office. The Development Services Department may develop and maintain a historic contract template.
- B. Each historic property contract shall at a minimum include, without limitation, the following terms, conditions, restrictions, and requirements:

 1. The contract shall contain a legal description of the property which is the subject of the contract.
 2. The contract shall have a minimum term of ten (10) years. Each year, on the anniversary date of the contract or such other annual date as is specified in the contract, a year shall be added automatically to the initial term of the contract unless the owner or the City of Los Altos has given timely written notice of non-renewal.

 - a. The agreement is automatically renewed each year for an additional one (1) year and changes the expiration date so that ten (10) years are still left in the term of the agreement.
 3. The contract shall run with the land and be binding upon, and inure to the benefit of, all successors in interest of the owner(s). A successor in interest shall have the same rights and obligations under the contract as the original owner(s) who entered into the contract.
 4. The contract shall include a written ten (10) year maintenance/rehabilitation work program to confirm a commitment to restore, rehabilitate, and/or preserve the subject property in conformance with all of the following as applicable:

 - a. The rules and regulations of the Office of Historic Preservation of the California State Parks Department;
 - b. The United States Secretary of the Interior's Standards for the Treatment of Historic Properties;
 - c. The California Building Standards Code (Title 24 of the California Code of Regulations), including the California Historical Building Code (Part 8 of Title 24) where applicable; and
 - d. The requirements, provisions, and conditions set forth in the historic property contract.
 5. The contract shall provide for an inspection of the interior and exterior of the premises as required by Government Code Section 50281 and 50282 by the City of Los Altos five (5) years after entry into the contract and every five (5) years thereafter to determine the owner's continued compliance with the contract. Photographs of the interior and exterior shall not substitute the requirement for an onsite inspection of the property by city staff.

- a. Interior and exterior inspection(s) of a property will review the integrity of the property to ensure the continued maintenance and rehabilitation of the property in compliance with the contract.
- 6. The contract shall provide that the City of Los Altos may cancel the contract, subject to the terms of this Chapter, if the City determines that any of the following have occurred:
 - a. The owner has breached any of the conditions of the contract including any agreed upon improvements to the property; or
 - b. The owner has allowed the property to deteriorate to the point that it no longer meets the definition of a qualified historical property.
- 7. The contract shall provide that the owner shall furnish the City with any information the City requires in order to enable it to determine the eligibility of the property for contract renewal, including the documentation required for the annual review for compliance with the historic property contract's work program.
- 8. The contract shall contain a clause in a form acceptable to City Attorney that requires the owner to defend, indemnify, and hold harmless the City, its agents, officers, and employees from any claim, action or proceeding against the City or its agents, officers, and employees arising in connection with the historic property contract.
- C. At the time rehabilitation or restoration of the subject property is achieved and so long as the contract is in effect, the owner shall commit to and be responsible for appropriate maintenance and preservation of the subject property in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

14.91.060 - Application for historic property contracts.

- A. Only qualified historical properties, as defined by this Chapter, are eligible for historic contracts under this Chapter. The owner of a qualified historical property may file an application to enter into a historic contract. Only the owner(s) or agent of the owner(s) may file the application. If the application is made by an agent of the owner(s), the agent must provide written documentation as part of the application of the owner's authorization of the agent to act on the owner's behalf.
- B. All applications for historic property contracts shall be filed with the Development Services Department on the form and in the manner prescribed by the Zoning Administrator. The application shall contain, without limitation, the following information and documentation:
 - 1. The name and address of the owner(s) and signature of the applicant and the names and addresses of all persons and entities having any right, title,

- or interest in the property which is the subject of the proposed historic property contract;
2. Written consent to make the application from all persons and entities having a right, title, or interest in the real property which is the subject of the proposed historic property contract;
 3. A nonrefundable application fee as set by resolution of the City Council;
 4. A legal description of the real property and a listing of the Assessor's parcel number(s) for the property;
 5. Color photos of the property and each elevation of the subject structure(s);
 6. Site plans drawn to scale (the number of site plans required shall be as determined by the Zoning Administrator based on the specific property characteristics);
 7. An itemized ten-year maintenance/rehabilitation work program containing, at a minimum, the following information:
 - a. A description of the improvements to be done. The proposed improvements must be appropriate to restore, preserve, and/or maintain the historic structure in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties.
 - b. Schedule of improvements;
 - c. Verifiable cost estimates associated with the proposed improvements;
 - d. Preliminary plans, elevations, or any appropriate documentation needed to substantiate and illustrate proposed improvements.
 8. Proof that the property is a "qualified historical property." Such proof shall be in the form of the property already listed on the City's adopted HRI, or as part of a dual application for historical designation of the property with the City of Los Altos, or on the State of California or National Register of Historic Places.
 9. A property tax adjustment worksheet, on a form acceptable to the Zoning Administrator providing the owner's calculated estimate of the property tax reassessment that would result from the contract. The property tax adjustment worksheet should be completed in consultation with the County of Santa Clara Assessors Office.
 - a. If the property owner(s) are unable to obtain confirmation or data from the County Assessor's Office after documented reasonable attempts, the worksheet may be submitted based on publicly available information and clearly state assumptions.
 10. A copy of the most recent real property tax bill for the property.
 - a. In the event that the property has recently transacted or transferred ownership the application shall be accompanied by supplemental

documentation which reflects the anticipated real property tax bill for the property.

11. An appraisal of the fair market value of the property (land plus improvement value), prepared by an independent certified appraiser no more than one (1) year prior to the application for the contract and as determined prior to the improvements proposed in the application for the contract.
 12. Such other information as the Zoning Administrator may request to evaluate and process the application.
- C. A separate application shall be filed for each property on which a historic property contract is requested.
- D. The owner shall allow for an inspection of the interior and exterior of the premises by the City of Los Altos Development Services Department staff prior to entry into the contract. Inspection shall verify exiting conditions of the property and cannot be substituted by photographs.

14.91.070 - Fees.

The applicant for a historic property contract shall pay such application fees as have been adopted by resolution of the City Council. The fees include an initial fee for processing the application, and any deposit to pay the full cost recovery of any City consultants such as an independent historian, and/or environmental review as applicable. Any fees required shall be paid upon submittal of application.

14.91.080 - Eligibility criteria.

- A. To be eligible for a historic property contract, the application must meet all of the following criteria:
1. The property that is the subject of the application is a qualified historical property as defined by this Chapter.
 2. The application is consistent with the City's historic preservation goals and policies, as set forth in any adopted policies and ordinances.
 3. The application is consistent with the applicable Secretary of the Interior's Standards for the Treatment of Historic Properties, the rules and regulations of the Office of Historic Preservation of the California State Parks Department, and the California Historical Building Code.
 4. The application is consistent with the requirements of this Chapter.

14.91.090 - Review of applications.

- A. The Zoning Administrator shall review the applications for completeness and accuracy and may require such additional information from the applicant as is needed to make the application complete. Only applications filed on or before

June July 1 of a calendar year shall be eligible for consideration for a historic property contract for the subsequent fiscal year.

- B. All applications deemed complete by the Zoning Administrator shall be referred to the Historical Commission for recommendation to the City Council on eligibility of the property for a historic property contract.
- C. The Historical Commission shall make a recommendation on the eligibility of the property for a historic property contract for consideration by the City Council.
- D. If the Historical Commission finds that the application meets the criteria for eligibility for a historic property contract, the Historical Commission shall recommend approval to the City Council. If the Historical Commission finds that the application does not meet the criteria for eligibility, the Historical Commission shall recommend to the City Council that the application be denied for a historic property contract.
- E. The historic property contract shall be consistent with the requirements of this Chapter and state law and in a form acceptable to the City Attorney. The contract shall be approved as to form by City Attorney prior to submission of the contract to the City Council for its consideration.
- F. Final action on the contract shall be considered by the City Council at a noticed public hearing. The City of Los Altos shall not execute any contract until authorized by the City Council and until all persons and entities having any right, title, or interest in the property which is the subject of the contract have signed the contract or provided written authorization for an agent to execute the contract on their behalf and until the owner(s) have submitted to the city the appropriate fee for recordation of the contract.

14.91.100 - Recordation of approved historic property contracts.

No later than twenty (20) calendar days after execution by all parties of the historic property contract, the City Clerk shall cause a copy of the executed historic property contract to be recorded in the Office of the Recorder of the County of Santa Clara accompanied by the fee paid by owner for recordation of the contract.

14.91.110 - Review of approved historic property contracts.

- A. The owner shall allow for inspection of the interior and exterior of the premises by the City of Los Altos Development Services Department staff after five (5) years from entry into the contract and every five (5) years thereafter to determine the owner's continuing compliance with the historic property contract. Photographs of the interior and exterior shall not substitute the requirement for an onsite inspection of the property by city staff.
- B. No later than ninety (90) days prior to each five (5) year inspection date, the owner shall submit documentation to the Development Services Department in

sufficient detail to demonstrate compliance with the historic property contract's work program, including but not limited to the following documentation:

1. Color photos of actual work done in conformance with the contract;
 2. Receipts and copies of financial transactions related to work carried out in conformance with the recorded contract;
 3. Copies of building permits, planning entitlements, and/or historic alteration permits for work carried out in conformance with the recorded historic property contract; and
 4. Such other information as may be required by the Zoning Administrator.
- C. The Zoning Administrator shall review the documentation to determine compliance with the recorded historic property contract. If documentation is not submitted within the required timeframe or the documentation submitted demonstrates in the determination of the Zoning Administrator that the owner has breached any of the conditions of the historic property contract or has allowed the property to deteriorate to the point that it no longer meets the standards for a qualified historical property, the Zoning Administrator shall begin the process for cancellation of the contract pursuant to this Chapter.
- D. At least sixty (60) days prior to the tenth anniversary date of the historic property contract, the owner shall submit a report from a qualified historian to the Development Services Department. The report shall describe the work carried out pursuant to the contract and shall recommend any appropriate improvements needed to achieve rehabilitation, restoration, or preservation of the property. Based on the recommendations, the City of Los Altos may require an amendment to the contract to update the maintenance/rehabilitation program. If the Zoning Administrator determines, as part of the tenth year review, that rehabilitation or restoration for the subject property has been achieved, the owner shall commit to and be responsible for appropriate maintenance and preservation of the subject property in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties so long as the contract remains in effect.

14.91.120 - Nonrenewal of historic property contracts.

- A. Each year on the anniversary date of the contract or such other date as is specified in the contract, a year shall be added automatically to the initial term of the contract, unless the owner or the City has given timely written notice of nonrenewal in accordance with the requirements of state law and this Chapter. If the owner desires in any year not to renew the contract, the owner shall serve written notice of nonrenewal of the contract to the Zoning Administrator at least ninety (90) days in advance of the annual renewal date of the contract. If the City Council determines in any year not to renew the contract, the City Council or their

authorized designee shall serve written notice of nonrenewal of the contract on the owner at least sixty (60) days in advance of the annual renewal date of the contract. The City of Los Altos shall serve a notice of nonrenewal only after the City Council has conducted a noticed public hearing to consider the nonrenewal. Unless the notice of nonrenewal is served by the owner(s) or the City in accordance with these requirements, one year shall automatically be added to the term of the contract.

- B.** Upon receipt by the owner of a notice from the City for nonrenewal of the contract, the owner may make a written protest of the notice to the City Council. Such protest must be in writing and filed with the City Clerk within ~~ten (10)~~ fourteen (14) days after the written notice of nonrenewal was mailed to the owner. If a written notice of protest is timely filed, the City Clerk shall schedule the protest for a noticed public hearing before the City Council within sixty (60) days of the filing of the protest and notify the owner of the hearing date. The City Council may, at any time prior to the renewal date, withdraw the notice of non-renewal. Following the hearing, the City Council may withdraw or affirm the notice of non-renewal. If the City Council affirms the notice of nonrenewal, the existing contract shall remain in effect for the balance of the period remaining since the original execution or the last renewal of the contract.
- C.** Following the nonrenewal of the contract, the property shall be assessed in accordance with state law (Section 439.3 of the Revenue and Taxation Code, as may be periodically amended).

14.91.130 - Amendment of historic property contracts.

- A.** A historic property contract may be amended, in whole or in part, in accordance with the provisions of this Chapter.
- B.** For owner-initiated amendments to a historic property contract, the owner must file an application for an amendment with the Development Services Department on the form and in the manner prescribed by the Zoning Administrator. The owner shall pay such application fees as have been set by resolution of the City Council. The Zoning Administrator shall review the amendment application for completeness and adequacy. The Zoning Administrator may request additional information as necessary to evaluate the amendment.
- C.** For City of Los Altos-initiated amendments to a historic property contract, the Zoning Administrator shall inform existing owner(s) of intended amendments. ~~City initiated amendments shall be in conformance with the provisions of this Chapter and are to ensure the continued preservation of historic resources with historic property contracts.~~

1. City-initiated amendments shall be considered during the annual review of historic property contracts in order to ensure each existing contract adheres to the provisions of this Chapter as amended from time to time.
- D. At such time that the Zoning Administrator has determined the amendment to be complete, the Zoning Administrator shall refer the amendment to the Historical Commission for a recommendation to the City Council.
- E. Following receipt of the Historical Commission recommendation and following all applicable environmental review, the City Council shall render a decision on the proposed amendment.
- F. No later than twenty (20) calendar days after City of Los Altos execution of the amendment to the historic property contract, the City Clerk shall cause a copy of the executed amendment to be recorded in the Office of the Recorder of the County of Santa Clara accompanied by the fee paid by owner for recordation of the contract amendment.

14.91.140 - Cancellation of historic property contracts.

- A. The City of Los Altos may cancel a historic property contract, subject to the process described in this section, if the City finds that one of the following conditions has occurred:
 1. The owner has breached any of the conditions of the historic property contract; or
 2. The owner has allowed the property to deteriorate to the point that it no longer meets the definition of a qualified historical property.
- B. The following process shall be followed for cancellation of a historic property contract:
 1. If the Zoning Administrator determines at any time that the owner has breached any of the conditions of the historic property contract or has allowed the property to deteriorate to the point that it no longer meets the definition of a qualified historical property, the Zoning Administrator shall notify the owner in writing describing the deficiencies. If the owner has not corrected the deficiencies to the satisfaction of the Zoning Administrator within sixty (60) days of the issuance of the notification, the Zoning Administrator may refer the cancellation of the contract to the Historical Commission for a recommendation to the City Council on the cancellation.
 2. The Historical Commission shall, at a noticed public hearing, evaluate the evidence in the record and provide a written recommendation to the City Council as to whether one of the conditions for cancellation has occurred.
 3. Following receipt of the Historical Commission recommendation, the City Council shall, at a noticed public hearing, consider whether to cancel the

contract. No contract shall be cancelled until after the City Council has given notice of and has held a public hearing on the cancellation.

- C.** To cancel the contract, the City Council must make a finding, based on substantial evidence that one of the following conditions has occurred:
1. The owner has breached a condition of the historic property contract; or
 2. The owner has allowed the property to deteriorate to the point that it no longer meets the definition of a qualified historical property.
- D.** If a historic property contract is cancelled under this section, the owner shall, in accordance with Government Code Sections 50284 and 50286, pay a cancellation fee equal to twelve and one-half (12½) percent of the property's current fair market value, as determined by the County Assessor as though the property were free of the contractual restriction.

14.91.150 - Notice of hearing.

Any decisions rendered under regulations contained within this Chapter are subject to public meeting notice requirements pursuant to Section 14.01.130 of the Los Altos Municipal Code.

ORDINANCE NO. 2025-__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS ADDING CHAPTER 14.91 (MILLS ACT PROGRAM) TO THE LOS ALTOS MUNICIPAL CODE

WHEREAS, the City Council is empowered pursuant to Article XI, Section 7 of the California Constitution to make and enforce within the City all local, police, sanitary, and other ordinances, and regulations not in conflict with general laws; and

WHEREAS, the City Council held a duly noticed public hearing on **DATE TO BE INSERTED**, and **DATE TO BE INSERTED**; and

WHEREAS, the amendments was processed in accordance with the applicable provisions of the California Government Code and the Los Altos Municipal Code; and

WHEREAS, this Ordinance is exempt from environmental review pursuant to Section 15061(b)(3) of the State Guidelines implementing the California Environmental Quality Act of 1970, as amended; and

NOW, THEREFORE, the City Council of the City of Los Altos does hereby ordain as follows:

SECTION 1. AMENDMENT OF CHAPTER 14.91 OF THE MUNICIPAL CODE. Chapter 14.91 of the Los Altos Municipal Code is hereby amended as set forth in Appendix A to this Ordinance, underline indicating addition, strikethrough indicating deletion.

SECTION 2. CONSTITUTIONALITY; AMBIGUITIES. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions hereof. Any ambiguities in the Los Altos Municipal Code created by this Ordinance shall be resolved by the Development Services Director, in their reasonable discretion, after consulting the City Attorney.

SECTION 3. PUBLICATION. This Ordinance shall be published as provided in Government Code Section 36933.

SECTION 4. EFFECTIVE DATE. This Ordinance shall be effective upon the commencement of the thirty-first day following the adoption hereof.

I HEREBY CERTIFY that the foregoing Ordinance was duly and properly introduced at a regular meeting of the City Council of the City of Los Altos held on **DATE TO BE INSERTED**, and was thereafter, at a regular meeting held on **DATE TO BE INSERTED**, passed, and adopted by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Pete Dailey, MAYOR

Attest:

Melissa Thurman, MMC, CITY CLERK

**APPENDIX A
CHAPTER 14.91**

ORDINANCE NO. 2025-__

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS
REPEALING IN ITS ENTIRETY CHAPTER 12.44 FOR EXISTING HISTORIC
PRESERVATION REGULATIONS**

WHEREAS, the City Council is empowered pursuant to Article XI, Section 7 of the California Constitution to make and enforce within the City all local, police, sanitary, and other ordinances, and regulations not in conflict with general laws; and

WHEREAS, the City Council held a duly noticed public hearing on **DATE TO BE INSERTED**, and **DATE TO BE INSERTED**; and

WHEREAS, the amendments were processed in accordance with the applicable provisions of the California Government Code and the Los Altos Municipal Code; and

WHEREAS, the City Council repeals in its entirety Chapter 12.44 of the Los Altos Municipal Code; and

WHEREAS, this Ordinance is exempt from environmental review pursuant to Section 15061(b)(3) of the State Guidelines implementing the California Environmental Quality Act of 1970, as amended; and

NOW, THEREFORE, the City Council of the City of Los Altos does hereby ordain as follows:

SECTION 1. REPEAL CHAPTER 12.44 OF THE LOS ALTOS MUNICIPAL CODE. Chapter 12.44 of the Los Altos Municipal Code is hereby amended as set forth in Appendix A to this Ordinance, underline indicating addition, strikethrough indicating deletion.

SECTION 2. CONSTITUTIONALITY; AMBIGUITIES. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions hereof. Any ambiguities in the Los Altos Municipal Code created by this Ordinance shall be resolved by the Development Services Director, in their reasonable discretion, after consulting the City Attorney.

SECTION 3. PUBLICATION. This Ordinance shall be published as provided in Government Code Section 36933.

SECTION 4. EFFECTIVE DATE. This Ordinance shall be effective upon the commencement of the thirty-first day following the adoption hereof.

I HEREBY CERTIFY that the foregoing Ordinance was duly and properly introduced at a regular meeting of the City Council of the City of Los Altos held on **DATE TO BE INSERTED**, and was thereafter, at a regular meeting held on **DATE TO BE INSERTED**, passed, and adopted by the following vote:

AYES:

NOES:

ABSENT:
ABSTAIN:

Pete Dailey, MAYOR

Attest:

Melissa Thurman, MMC, CITY CLERK

~~Chapter 12.44 HISTORIC PRESERVATION¹~~

~~Sections:~~

~~Article 1. General Provisions~~

~~12.44.010 Purpose.~~

~~It is hereby declared as a matter of public policy that the recognition, preservation, enhancement and use of historic resources within the City of Los Altos is required in the interest of health, economic prosperity, cultural enrichment and general welfare of the people. The purpose of this chapter is to:~~

- ~~A. —Safeguard the heritage of the city by providing for the protection of irreplaceable historic resources representing significant elements of its history;~~
- ~~B. —Enhance the visual character of the city by encouraging the compatibility of architectural styles which reflect established architectural traditions;~~
- ~~C. —Encourage public knowledge, understanding and appreciation of the city's past, and foster civic and neighborhood pride and sense of identity based upon the recognition and use of the city's historic resources;~~
- ~~D. —Stabilize and improve property values within the city and increase the economic and financial benefits to the city and its inhabitants derived from the preservation, rehabilitation, and use of historic resources;~~
- ~~E. —Integrate the conservation of historic resources into the public and private development process and identify as early as possible and resolve conflicts between the preservation of such resources and alternative land uses; and~~
- ~~F. —Fulfill the city's responsibilities for Federal Section 106 reviews and for the California Environmental Quality Act.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011)~~

~~12.44.020 Area of application.~~

~~This chapter shall apply to all historic resources listed in the historic resources inventory, historic landmarks and properties, and structures.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

~~12.44.030 Definitions.~~

~~For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them in this section, unless the context or the provision clearly requires otherwise:~~

"Alteration" means any act or process that changes any portion of the exterior architectural appearance of a structure or object, including, but not limited to, the erection, construction, reconstruction, removal of exterior architectural features or details, or the addition of new structures, but does not include painting, ordinary maintenance and landscaping.

"California Historical Building Code" is Part 8 of Title 24 (State Building Standards Code) and applies to all qualified historic structures and sites, designated under federal, state and local authority. It provides alternative building regulations for the rehabilitation, preservation, restoration or relocation of structures designated as qualified historic buildings.

"California Office of Historic Preservation" means the governmental agency primarily responsible for the statewide administration of the historic preservation program in California.

"California Register of Historical Resources" is a comprehensive listing of California's historical resources, including those of local, state and national significance.

"Character defining features" means the defining elements, such as prominent architectural features, materials, craftsmanship or other elements, that, individually or in combination, identify a historic property, building or landscape.

"Commission staff" means the staff liaison assigned to the historical commission.

"DPR 523" means the California Department of Parks and Recreation Historic Resource Inventory Forms used for historic evaluations. The DPR 523A form provides descriptive information about a resource. The DPR 523B form provides an evaluation of the resources and includes a determination as to whether the resource is eligible for the National or State Register of Historic Places or listing on the Los Altos Historic Resources Inventory.

"Exterior architectural feature" means the architectural elements embodying style, design, general arrangement and components of all the outer surfaces of an improvement, including but not limited to, the kind, size, shape and texture of building materials, and the type and style of windows, doors, lights, signs and other fixtures appurtenant to such improvement.

"Historic landmark" means a building, improvement, structure, natural feature, site or area of land, under single or common ownership that has significant historical, architectural, cultural, and/or aesthetic interest or value, and is designated as a historic landmark by the city council.

"Historic resource" is a property or structure that has been determined to be over fifty (50) years old, retains its physical integrity, has historical, architectural, cultural, and/or aesthetic value, and is listed on the historic resources inventory.

"Historic resources inventory" means the city's official inventory of the historic resources, as adopted and amended from time to time by resolution of the historical commission and/or the city council. A property or structure must be designated as a historic landmark or a historic resource in order to be listed.

"Historical commission" is a seven-member advisory commission appointed by the city council that is tasked with maintaining the historic resources inventory, making recommendations on historic landmarks, working with property owners on preservation, maintenance and other development activities related to historic resources, and other activities as identified in the municipal code.

"Improvement" means any building, structure, parking facility, wall, work of art or other appurtenance or addition thereto constituting a physical betterment of real property or any part of such betterment.

"Integrity" is the authenticity of the characteristics, also referred to as character defining features, from which resources derive their significance. Integrity is the composite of seven qualities: location, design, setting, materials, workmanship, feeling and association.

"Mills Act" is an economic incentive program in California for the restoration and preservation of qualified historic structures. Enacted in 1972, the Mills Act grants participating local governments the authority to enter into

contracts with owners of qualified historic properties to reduce the property tax assessment in exchange for the restoration and maintenance of the historic resource.

"National Register of Historic Places" is the official inventory of districts, sites, buildings, structures and objects significant in American history, architectural, archeology and culture, maintained by the Secretary of Interior under the authority of the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966.

"Preservation" means the act of identification, study, protection, reconstruction, restoration, rehabilitation or enhancement of historic and/or cultural resources.

"Reconstruction" means the act or process of reproducing by new construction, the exact form and detail of a vanished building, structure or any part thereof, as it appeared at a specific period of time.

"Rehabilitation" means the act or process of returning a property to a state of utility through repair or alteration that makes possible an efficient contemporary use while preserving those portions or features of the property which are significant to its historical, architectural and cultural value.

"Restoration" means the act or process of accurately recovering the form and details of a property and its setting as it appeared at a particular period of time by means of the removal of later work or by the replacement of missing earlier work.

"Secretary of Interior's Standards" are the Federal Standards for the Treatment of Historic Properties that are utilized in the identification, evaluation, registration and treatment of historic properties. The list of ten (10) Rehabilitation Standards, published as the Secretary of the Interior's Standards, is aimed at retaining and preserving those features and materials that are important in defining the historic character of a resource.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)

Article 2. Designation of Historic Resources

12.44.040 Criteria for designation.

A structure, property or object may be eligible for designation as a historic resource or historic landmark, if it/they satisfy each of the three criteria listed below:

- A. ~~Age. A structure or property should be more than fifty (50) years in age. (Exceptions can be made to this rule if the building(s) or site(s) is/are truly remarkable for some reason—such as being associated with an outstanding architect, personage, usage or event).~~
- B. ~~Determination of Integrity. A structure or property should retain sufficient historic integrity in most of the following areas:~~
 1. ~~Design: The combination of elements that create the form, plan, space, structure and style of a property.~~
 2. ~~Setting: The physical environment of a historic property.~~
 3. ~~Materials: The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.~~
 4. ~~Workmanship: The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.~~
 5. ~~Feeling: A property's expression of the aesthetic or historic sense of a particular period of time.~~
- C. ~~Historic Significance. A structure or property should be clearly associated with one or more of the following areas of significance:~~

1. ~~Event: Associated with a single significant event or a pattern of events that have made a significant contribution to broad patterns of local or regional history, or cultural heritage of California or the United States;~~
2. ~~Person/People: Associated with the lives of persons important to the local, California or national history;~~
3. ~~Architecture/Design: Embodies the distinctive characteristics of a design type, period, region or method of construction, or represents the work of a master or possesses high artistic value; or~~
4. ~~Archaeology: Yields important information about prehistory or history of the local area, California or the nation.~~

The city's historic resource evaluation methodology, which provides more details about the above listed criteria, is available from the planning division.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)

12.44.050 Applications for designation.

- A. ~~Applications for designation as a historic landmark, or listing a historic resource on the historic resources inventory may be initiated by the owner or owners of a building, improvement, structure, natural feature, site or area of land, requesting designation of their property as a historic resource or historic landmark.~~
- B. ~~The city council or the planning commission may, by resolution or motion, refer a proposed designation to the historical commission. The historical commission may also consider a proposed designation upon its own initiative or by referral by the development services director.~~
- C. ~~Applications for designation as a historic landmark, or listing a historic resource on the historic resources inventory shall be made to the historical commission. Applications must be accompanied by such historical and architectural information as is required by the historical commission in order to make an informed recommendation concerning the request.~~

Applications for designation shall be acted on as set forth in sections 12.44.050, 12.44.060 and 12.44.070 of this chapter.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)

12.44.060 Historic resource listing.

- A. ~~Once the application for designating a property as a historic resource and listing it on the historic resources inventory has been received, the historical commission shall consider the request at its next available scheduled meeting.~~
- B. ~~The commission shall conduct a public hearing to consider the proposed listing. Notice of the hearing shall be given at least ten (10) days prior to the date of the hearing by mail to the applicant, to the owner or owners of the property and to the owners of abutting properties, and by posting a notice on the property near the front property line in accordance with the standards set by commission staff.~~
- C. ~~The commission shall consider the proposed historic resource and determine whether or not the property satisfies the three criteria outlined in Section 12.44.040. The commission shall by motion either approve or disapprove the designation of the property as a historic resource and listing it in the historic resources inventory.~~

- ~~D. — If the commission approves the historic resource for listing on the historic resources inventory, the listing shall become effective immediately and the designated property shall be subject to the regulations set forth in this chapter.~~
- ~~E. — Until final action has been taken by the commission on the request to list a property, no building, alteration, grading, demolition or tree removal permit(s) shall be issued for any work to be performed upon or within the subject property, unless approved by the historical commission or the development services director. This restriction shall become effective as of the time the application is submitted, and shall extend until the commission has taken action.~~
- ~~F. — Within fifteen (15) days of the action taken by the historical commission, the decision may be appealed to the city council. The appeal may be filed by the applicant or any interested party.~~
- ~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2023-490, § 2(App. A), 3-28-2023)~~

~~12.44.070 Historic landmark designation.~~

- ~~A. — Once the application for the proposed designation has been received, the historical commission shall consider the request at its next available scheduled meeting.~~
- ~~B. — The commission shall conduct a public hearing to consider the proposed designation. Notice of the hearing shall be given at least ten (10) days prior to the date of the hearing by publication in at least one newspaper of general circulation within the city, by mail to the applicant, to the owner or owners of the property, and to the owners of abutting properties, and by posting a notice on the property near the front property line in accordance with the standards set by commission staff.~~
- ~~C. — The commission shall make a recommendation to the city council on the proposed designation. In order to make a positive recommendation, the commission shall make the following findings:~~
- ~~1. — That the proposed historic landmark satisfies the three criteria outlined in Section 12.44.040; and~~
 - ~~2. — That the proposed landmark has special historical, cultural, archeological, scientific, architectural or aesthetic interest or value as part of the heritage or history of the city, the county, the state or the nation.~~
- ~~D. — The city council shall consider the proposed designation at its next available regular meeting and determine whether or not to accept the historical commission's recommendation. The city council shall by resolution either approve the proposed designation, in whole or in part or as modified, or shall, by motion, disapprove the proposal in its entirety.~~
- ~~E. — If the city council approves the landmark designation, the resolution shall become effective immediately and the designated property shall be subject to the regulations set forth in this chapter and to such further restrictions or controls as may be specified in the designating resolution.~~
- ~~F. — Adoption of a designating resolution by the city council shall be based upon the findings outlined in subsection (C) of this section.~~
- ~~G. — Until final action has been taken by the city council on the proposed landmark, no building, alteration, grading, demolition or tree removal permit(s) shall be issued for any work to be performed upon or within the subject property, unless approved by the historical commission or the city council. This restriction shall become effective as of the time the application is submitted, and shall extend until the designating resolution becomes effective.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011)~~

12.44.080 Notice of designation.

A. ~~Following adoption by the city council of a resolution designating a historic landmark, the commission staff shall send notice of the designation, together with a copy of the resolution or ordinance, to the owner or owners of the designated historic landmark. The city council also shall send notice of the designation to:~~

- ~~1. The Santa Clara County Historical Heritage Commission; and~~
- ~~2. The California State Historic Preservation Officer.~~

B. ~~The designating resolution or ordinance shall be recorded with the county clerk recorder.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

Editor's note(s) ~~—Ord. No. 2017-437, § 1, adopted March 13, 2018, repealed § 12.44.080, which pertained to historic district designation, and derived from Ord. No. 2011-363, § 1, adopted March 8, 2011, and subsequently renumbered the remaining sections 12.44.090—12.44.220 as 12.44.080—12.44.210. Historical notations for former sections have been retained for reference.~~

12.44.090 Termination of designation.

~~The only legitimate reason for terminating the designation of a historic resource or historic landmark is when clear evidence is presented that shows the resource no longer meets the criteria of Section 12.44.040 due to loss of integrity and/or historic significance.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

Editor's note(s) ~~—Former § 12.44.100, see editor's note § 12.44.080.~~

Article 3. Permits

12.44.100 Applicability.

A. ~~For historic landmark properties, a historical alteration permit (Section 12.44.150) is required in order to alter, demolish, remove, relocate or change any exterior architectural features of the designated landmark structure(s), or remove or relocate any improvements, structures or natural features that contribute to the integrity or the historic significance of the historic landmark.~~

B. ~~For historic resources listed on the historic resources inventory, an advisory review (Section 12.44.140) is required in order to alter, demolish, remove, relocate or otherwise change in any manner any exterior architectural feature or natural feature that contributes to the integrity or the historic significance of a historic resource.~~

C. ~~For subsection (B) of this section, the historical commission's review will take into account whether or not the proposed work adversely affects the physical integrity or the historic significance of the resource. The historical commission's recommendation to the development services director, planning commission, or city council, shall be advisory only.~~

D. ~~For non-residential properties that are historic landmarks or historic resources, non-permanent improvements such as signage, awnings and landscaping that do not adversely affect the physical integrity or the historic significance of the resource may be exempted from historical commission review by the development services director.~~

~~E. — For residential properties that are historic landmarks or historic resources, improvements such as swimming pools, fences, minor accessory structures such as trellises or barbecues, and landscaping that do not adversely affect the physical integrity or the historic significance of the resource may be exempted from historical commission review by the development services director.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)~~

~~Editor's note(s) — Former § 12.44.110, see editor's note § 12.44.080.~~

~~12.44.110 Applications.~~

~~Applications for historical alteration permits or advisory review shall be submitted to the development services director. Applications shall include the following information:~~

- ~~A. — A clear statement of the proposed work;~~
- ~~B. — A site plan showing all existing buildings, structures, trees over six inches in diameter, property lines, easements and the proposed work;~~
- ~~C. — Detailed plans showing both the existing and proposed exterior elevations, including a street elevation, photographs of windows and/or special features, materials and grading;~~
- ~~D. — Specifications describing all materials to be used and all processes that would affect the appearance or nature of the materials;~~
- ~~E. — Notes indicating any deviation from the Secretary of the Interior's Standards for Historic Rehabilitation; and~~
- ~~F. — Such other information or documents as may be requested by the development services director or the historical commission.~~

~~Applications shall be noticed as set forth in Section 12.44.120 and shall be acted on as set forth in Section 12.44.130 and 12.44.140 of this chapter.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)~~

~~Editor's note(s) — Former § 12.44.120, see editor's note § 12.44.080.~~

~~12.44.120 Notice of public meetings.~~

- ~~A. — Notification shall be provided when an application for a historical alteration permit is required for a historic landmark. Applicants shall be responsible for providing notification via first class mail to the adjoining property owners, in the manner set forth by the commission staff, at least ten (10) days prior to the meeting at which the application is to be reviewed. The property owners who shall be mailed notice include, but are not limited to, the following:~~
 - ~~1. — The two adjoining property owners on each side;~~
 - ~~2. — The three adjoining rear property owners; and~~
 - ~~3. — The five adjoining front property owners across the street.~~
 - ~~4. — As deemed appropriate or necessary, the commission staff may require that notification be mailed to a greater or lesser number of property owner(s) than are identified above based on the configuration of the properties adjoining the site of the application.~~

5. — Notice shall also be posted on the project site near the front property line in accordance with the standards set by the commission staff.

B. — Notice shall be provided when an application for an advisory review is required for a historic resource. Applicants shall be responsible for posting a notice on the project site near the front property line in accordance with the standards set by the commission staff.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)

Editor's note(s) — Former § 12.44.130, see editor's note § 12.44.080.

~~12.44.130 Advisory review.~~

A. — For projects that require an advisory review, the historical commission shall complete its review and issue a recommendation at its next available scheduled meeting. In order to recommend approval, the commission shall find that:

1. — The project complies with all provisions of this chapter; and
2. — The project does not adversely affect the physical integrity or the historic significance of the subject property.

B. — The historical commission recommendation shall be forwarded to the development services director, the planning commission, or the city council to be considered as part of their decision.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)

Editor's note(s) — Former § 12.44.140, see editor's note § 12.44.080.

~~12.44.140 Historical alteration permit.~~

A. — For projects that require a historical alteration permit, the historical commission shall complete its review and issue a decision at its next available scheduled meeting. In order to approve a permit, the commission shall find that:

1. — The project complies with all provisions of this chapter; and
2. — The project does not adversely affect the physical integrity or the historic significance of the subject property.
3. — The project is in compliance with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

B. — If the historical commission approves the historical alteration permit, or approves such permit subject to conditions, the development services director shall issue the permit in accordance with the recommendation, provided that no other approval is required under this code. In the event the historical commission recommends denial of the permit, the development services director shall notify the applicant that the requested permit will not be granted.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)

Editor's note(s) — Former § 12.44.1500, see editor's note § 12.44.080.

12.44.150 Appeal.

Within fourteen (14) days of any approval or denial by the historical commission, the decision may be appealed to the city council. The appeal may be filed by the applicant or any interested party and shall be accompanied by a fee to cover the administrative cost of handling the appeal as set by city council resolution. (Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)

Editor's note(s)—Former § 12.44.160, see editor's note § 12.44.080.

Article 4. Miscellaneous Provisions**12.44.160 Incentives for preserving historic resources.**

- A.—California Historical Building Code. It is the purpose of the state historical building code to provide regulations and standards for the rehabilitation, preservation, restoration (including related reconstruction) or relocation as applicable to all historical buildings, structures and properties deemed of importance to the history, architecture, or culture of an area by an appropriate local or state governmental jurisdiction. Such standards and regulations are intended to facilitate the restoration or change of occupancy so as to preserve their original or restored elements and features, to encourage energy conservation and a cost effective approach to preservation, and to provide for reasonable safety from fire, seismic forces or other hazards for occupants and users of such "buildings, structures and properties" and to provide reasonable availability and usability by the physically disabled. The state historical building code is defined in sections 18950 to 18961 of Division 13, Part 2.7 of Health and Safety Code (H&SC) Health and Safety Code, a part of California Law.
- B.—Economic incentives. In order to carry out more effectively and equitably the purposes of this chapter, the city council may, by resolution, adopt a program of economic (i.e., Mills Act contracts) and other incentives to support the preservation, maintenance and appropriate rehabilitation of the city's historic resources.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)

Editor's note(s)—Former § 12.44.170, see editor's note § 12.44.080.

12.44.170 Hardship.

Notwithstanding the criteria of this chapter, the development services director, on the recommendation of the historical commission or the planning commission or city council on appeal, may approve an application for a permit to conduct any proposed work upon or within a historic resource or historic landmark if the applicant presents clear and convincing evidence demonstrating that a disapproval of the application will cause immediate and substantial hardship on the applicant because of conditions peculiar to the person seeking to carry out the proposed work or because of conditions peculiar to the particular improvement, building, structure, topography or other feature involved. If a hardship is found to exist under this section, the historical commission or the planning commission or city council shall make a written finding to that effect, and shall specify the facts and reasons relied upon in making such finding.

(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)

Editor's note(s)—Former § 12.44.180, see editor's note § 12.44.080.

~~12.44.180 Fees.~~

- ~~A. — No fee shall be charged for the filing, processing or public noticing of any application for designation.~~
- ~~B. — The city council shall by resolution adopt a schedule of fees to be charged for any application for termination of a designation, for the filing and processing of applications for any permit required under this chapter, and for appeals pursuant to this chapter.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

~~Editor's note(s) — Former § 12.44.190, see editor's note § 12.44.080.~~

~~12.44.190 Ordinary maintenance and repair.~~

~~Nothing in this chapter shall be construed to prevent the ordinary maintenance, painting, landscaping or repair of any exterior feature in or upon any historic resource or historic landmark that does not involve a change in design, material or the external appearance thereof, nor does this chapter prevent the construction, reconstruction, alteration, restoration, demolition or removal of any historic resource or historic landmark which has been certified by the city building inspector, or fire chief, or other code enforcement officer as being in unsafe or dangerous condition which cannot be rectified through the use of the California State Historic Building Code.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

~~Editor's note(s) — Former § 12.44.200, see editor's note § 12.44.080.~~

~~12.44.200 Duty to keep in good repair.~~

- ~~A. — The owner, occupant or the person in actual charge of a historic resource or a historic landmark shall keep and maintain in good condition and repair all exterior portions of the improvement or structure, and all interior portions thereof whose maintenance is necessary to prevent deterioration and decay of any exterior architectural feature or natural feature.~~

- ~~B. — It shall be the duty of the development services director or their designee to enforce this section.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018; Ord. No. 2023-490, § 2(App. A), 3-28-2023)~~

~~Editor's note(s) — Former § 12.44.210, see editor's note § 12.44.080.~~

~~12.44.210 Enforcement.~~

~~The violation of any provision contained in this chapter is hereby declared to be unlawful and shall constitute a misdemeanor, subject to the penalties as prescribed in Title 1, Chapter 1.20 of this code.~~

~~(Ord. No. 2011-363, § 1, 3-8-2011; Ord. No. 2017-437, § 1, 3-13-2018)~~

~~Editor's note(s) — Former § 12.44.220, see editor's note § 12.44.080.~~



comments regarding historic preservation ordinances and mills act august 18th meeting agenda item 3

From baerjc

Date Sat 8/16/2025 8:46 AM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>

📎 1 attachment (1 MB)

mills act state legislative requirements.pdf;

Dear Commissioners

Below is a copy of our correspondence with city staff on the proposed changes to the Historic Preservation ordinances and Mills Act program which is before you for review and approval. The changes we requested are highlighted in red.

Despite what is reflected in the documents you received, these are not minor changes, but rather substantive changes from the current regulations. 14 of the current Mills Act property owners have banded together to advocate for changes to the documents which strengthen, not diminish historic preservation while ensuring homeowner rights are protected. Representative of our Mills Act "Gang of 14" met with City staff but essentially almost all our recommended changes were ignored, citing their non-conformity with state law. Most in fact, do not deviate from state law (a copy of which is attached for your reference).

We ask that you take a hard look at the changes being proposed and reject those that are not required by state law. We want to encourage historic preservation, not make the process so difficult that demolition becomes the de facto approach to historic structures in Los Altos. As current Mills Act property owners, we are committed to historic preservation but understand firsthand the existing challenges to doing so. Don't make it harder for others trying to follow in our footsteps.

Thank you.

Gabe-We have reviewed the draft document sent to the Historical Commission (the "Document"). It is good that current Mills Act contracts will not be subject to the changes outlined for Mills Act going forward. The fact that future contracts will be allowed to be amended by the City without restrictions will have a chilling effect on those who consider restoration of historic homes a better option than demolition.

As Mills Act property owners, we feel the need to ensure the proposed Mills Act changes work for future participants. While three of our discussion points were addressed on behalf of future Mills Act participants, there remain 24 additional points that were not. We understand there are several points where state law prevails (although we disagree with the City's interpretation of the language regarding interior inspections). In previous discussions and emails there were two changes you offered (the city contracting with and paying for someone to review contract compliance at the 10-year mark and allowing interior pictures instead of interior inspections) that are not addressed in the Document. In addition, there are about a dozen issues we raised which are not required by state law, that are also not addressed in the Document. By way of reference, our source of information about the requirements of the state law is the

actual government code, not the State Office of Historic Preservation bulletin, which in fact has one material error in it. I have attached a copy of the actual code sections.

Agenda Item 3.

As is, the proposed language in the Mills Act agreement/process and Historic Preservation ordinance will act as a deterrent to future homeowners with an interest in historic preservation.

By their own admission, the Planning Commissioners have neither the experience nor expertise to opine on any of the proposed changes. That the Planning Commission voted to approve these changes should be irrelevant to the Historical Commission discussion. Furthermore, these changes were presented in the document as primarily cleanup and ensuring compliance with current state law. The fact is, many of those changes were new and not required by state law, as described above. Those representations are inaccurate and misleading.

Discussions with you and Nick indicated the City was willing to make changes and address the issues that did not conflict with state law. The document forwarded to the Historical Commission is not consistent with those representations.

From: Gabriel Engeland <gengeland@losaltosca.gov>
Sent: Monday, August 11, 2025 9:32 AM
To: Jon Baer <>; Nick Zornes <nzornes@losaltosca.gov>
Cc: 'Duco Pasmooij'; Curt Riffle; Maria Bautista
Subject: RE: mills act and historic resources ordinances

Thank you, Jon. We will review these and respond. As we discussed in the meeting, we won't be able to make changes from what is in state law. The goal is to make the Mills Act contracts less subjective. You have examples below of changes you would like to make, but they are not supported by State law. The interior inspection is a good example of a state requirement that won't be waived. However, we can talk about how interior inspections are completed. As an example, Santa Clara allows photos to be submitted as opposed to sending out an inspector for formal review.

We should be able to get a response out soon and we can all go from there.

Thanks,

Gabe

From:
Sent: Thursday, August 7, 2025 9:24 PM
To: Gabriel Engeland <gengeland@losaltosca.gov>; Nick Zornes <nzornes@losaltosca.gov>
Cc: 'Duco Pasmooij' <>; Curt Riffle; Maria Bautista <>
Subject: mills act and historic resources ordinances

Gabe and Nick-

Thanks for meeting with the four of us on August 6 to discuss the proposed changes to Mills Act, and its relationship to the Historic Preservation Ordinances. We very much appreciate your willingness to listen to our concerns and make changes that are in support of clarity and making it easier for Mills Act property owners to preserve and restore their structures, now and in the future, and to incentivize additional homeowner participation in the Mills Act program.

1. *You have agreed to change the language in the document that was presented to Planning Commission on June 4, 2025 to make it clear that there will be no changes to existing Mills Act contracts held by the 17 existing property owners. Currently the language included in 14.91.130 states to the contrary.*
2. *You will review and incorporate in the changes we (Gabe and Jon) discussed mid-June as well as those covered in our discussion on August 6th, subject to their conforming with State laws and requirements. All changes from the June 4, 2025 draft will be redlined and it would help if there was a redline from the original ordinances in our current code.*
3. *The schedule we discussed during our meeting was for us to get changes back to you by 8/8- you now have them. Please let us know what changes you are agreeing to make and the ones you are not, in enough time to discuss prior to distribution to the Historical Commission.*
4. *It is our understanding that you will share the draft ordinance with Historical Commission on Friday August 15 in support of their meeting on the 18th. We would appreciate the opportunity to review your final draft prior to the 15th-ideally by COB on the 13th so we can provide any additional feedback by COB on the 14th. Please let us know you can work with us to meet that schedule. Also, please get back to us with questions. Our sincere goal is to have a draft ordinance we can fully support.*

The following are additional changes which we are requesting be made prior to submission of the draft Historical Preservation and Mills Act Ordinances to Historical Commission for their review and support.

1. *Ensure the draft ordinance has the benefit of review by the City attorney as it is to be part of the City's zoning regulations. There are number of places where the language is vague or it is unclear who the responsible party is.*
2. *14.90.040B -does not allow residents to nominate a property for inclusion in the HRI. Particularly given the alacrity with which the HRI has been update (something like 25 years), nominations should be allowed by any resident of the City. This would conform with the rules at a national level.*
3. *14.90.040G-We ask that repeal may only be allowed if based on "material" new information, discovery of earlier "material" misinformation or "material" changes of original circumstances.....*
4. *14.90.050 -We need more and better examples of changes that do not require a Historic Alternation Permit as well as more and better examples of changes that do. Reference the roof example and driveway paving for example.*
5. *14.90.080-We had previously mentioned that for residential applicants there should be a choice of having a joint meeting or sequential meetings. We think the community is best served by allowing Historical Commission meetings to be separate so as to allow the kind of detailed discussion that gets lost in a joint meeting. But it should be the applicant choice. For commercial or City owned properties separate meetings should be required- the projects are more complex and residential input more critical. Two meetings allows full discussion and gives the public the opportunity to offer input on different aspects of the project.*
6. *14.91.040C-why July 1 as a cutoff? We understand that anything beyond July 1 might not be completed until after December 31, but not clear why this date is used, seems arbitrary. Also inconsistent with 14.91.090A which says June 1.*
7. *14.91.050B4—not at all clear that the actual contract should include a 10 year maintenance agreement; it should be an addendum that gets updated every 10 years. Otherwise, the actual contract will need to be cancelled on year 2 and a new one put in place 8 years hence. Does the City really want to manage that process?*

8. 14.91.050B5-Contrary to what is written, the State does NOT require interior inspection unless the interior is subject to preservation and restoration to the SOI standards. Los Altos does not require this of any properties (other jurisdictions do) and therefore there is no need for interior inspections or photos. If the goal is to encourage historic preservation and Mills Act is a tool, this provision will put a serious damper on any homeowner's willingness to participate. If there are specific concerns about the internal framing or foundation, the City likely already has the ability to inspect based on health and safety.
9. 14.91.060B1,2- Does this mean the mortgage holder has to sign off on Mills Act application? There should be specific exclusion of any lien holder from having to sign application.
10. 14.91.060B7- Verifiable cost estimates-often difficult if not impossible to obtain, particularly for work not being undertaken immediately.
11. 14.91.060B11-Strike the need for independent certified appraisal. There is absolutely no need for this to be done for any property under Mills Act.
12. 14.91.060D-again no interior inspection unless the actual interior is being considered for historic preservation.
13. 14.91.110A-no interior inspection-unless a specific problem identified and certainly no photos of interior.
14. 14.91.110B-color photos of work done-not always practical. Copies of building permits-the City already has the information. Such other information as may be "reasonably" required by zoning....
15. 14.91.110D-first the City should pay for this, not the homeowner. Secondly the City should first really understand who can do the required work and what the practical outcome of such work will be. We are doubtful that it will achieve the stated goal, in part because most qualified historians aren't necessarily construction experts, they do not have access to the approved plans etc. The contracts aren't amended to update the maintenance/rehab plan. In fact, the contract does not change. The only thing that changes is the maintenance plan.
16. 14.91.120B-only 10 days to respond? A nonrenewal is a very big thing and given residents (and staffs) busy lives/schedules, the notification period should allow 30 days for response.
17. 14.91.130A and C-asking a resident, who has spent \$3-6M and made a significant financial commitment upfront that their contract with the City can be amended by the City is a disincentive for anyone to apply for Mills Act. It takes 15-30 years to pay off a mortgage and often 20-50 years or more to recoup via Mills Act the cost of renovation and ongoing maintenance of a historic home. This is a two-sided agreement and it needs to be fair to both sides. Allowing the City to make changes unilaterally violates the spirit of such an agreement.
18. 14.91.130F-and beyond the City making changes at will, the homeowner must pay the county recording fee? This is unreasonable.
19. 14.91.140B/C-the operative word that needs to be added is "material"-i.e. material condition of the contract
20. 14.91.140D-12-1/2% of any property currently in Los Altos is over \$500K. While discouraging Mills Act property owners from neglecting their responsibilities is important, the penalty is way out of proportion to the tax savings that would accrue. Suggest a sliding scale that somehow tracks against the property tax savings received to date.

As a reminder the issues raised during our meeting were as follows:

1. Make sure the document references that all properties on HRI are eligible for Mills Act consideration
2. 14.90.020-Definition of alterations needs to be more specific. It should also discuss the things which are not considered alternations for this chapter. Please specifically include Los Altos HRI in reference to California historic building code.
3. 14.90.070A-only require site plan when structure being built
4. 14.90.080-allow homeowners option of joint meeting. We believe everyone benefits from separate meetings since the topics are different. We think the best format is sequential meetings-where Historical Commission meets first while Planning Commissioners sits in

audience. That provides the informality of a Historical Commission meeting with the of Planning commissioners hearing the discussion in real time prior to their meeting.

- 5. 14.90.110- if there is no process for the appeal of the determination that a property has unsafe or dangerous conditions which allow demolition, then the findings and conclusions need to be documented in writing along with photos and submitted to the Historical Commission. The matter should be agendized by the Historical Commission for public comment and discussion prior to issuing a demolition permit.*

Please note, our meeting yesterday concerned the Mills Act and its relationship to the draft Historic Preservation ordinance, but we did not have the opportunity to discuss the Historic Preservation Ordinance. Two of the most concerning aspects of the proposed changes to the Historic Preservation Ordinance are as follows:

- 1. Appeal Process- moving the Historic Preservation Ordinance to Zoning limits the appeal process to a small group: residents within 300 feet of a property. Many of our historic resources are public buildings/public lands and therefore community assets, and should be subject to appeal by any resident or interested party. Our current Historic Preservation ordinance allows for broader appeal which ensures that a historic resource is better protected. The same is true for noticing requirements. A separate Noticing and Appeals section should be maintained in the proposed Historic Preservation Ordinance.*
- 2. Definition of Historical Properties- the draft ordinance has reduced the definition compared to the State Code, eliminating properties recognized by the County and any property defined as part of a District. Los Altos no longer has historic districts, but could in the future (such as the neighborhood with all the Eichlers). It only makes sense to include everything that is allowable by the State Code with respect to definitions.*



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GOVERNMENT CODE - GOV

TITLE 5. LOCAL AGENCIES [50001 - 57607] (Title 5 added by Stats. 1949, Ch. 81.)

DIVISION 1. CITIES AND COUNTIES [50001 - 52203] (Division 1 added by Stats. 1949, Ch. 81.)

PART 1. POWERS AND DUTIES COMMON TO CITIES AND COUNTIES [50001 - 51298.5] (Part 1 added by Stats. 1949, Ch. 81.)

CHAPTER 1. General [50001 - 50290] (Chapter 1 added by Stats. 1949, Ch. 81.)

ARTICLE 12. Historical Property Contracts [50280 - 50290] (Article 12 added by Stats. 1972, Ch. 1442.)

50280. Upon the application of an owner or the agent of an owner of any qualified historical property, as defined in Section 50280.1, the legislative body of a city, county, or city and county may contract with the owner or agent to restrict the use of the property in a manner which the legislative body deems reasonable to carry out the purposes of this article and of Article 1.9 (commencing with Section 439) of Chapter 3 of Part 2 of Division 1 of the Revenue and Taxation Code. The contract shall meet the requirements of Sections 50281 and 50282.

(Amended by Stats. 1985, Ch. 965, Sec. 1.7.)

50280.1. "Qualified historical property" for purposes of this article, means privately owned property which is not exempt from property taxation and which meets either of the following:

- (a) Listed in the National Register of Historic Places or located in a registered historic district, as defined in Section 1.191-2(b) of Title 26 of the Code of Federal Regulations.
- (b) Listed in any state, city, county, or city and county official register of historical or architecturally significant sites, places, or landmarks.

(Added by Stats. 1985, Ch. 965, Sec. 2.)

50281. Any contract entered into under this article shall contain the following provisions:

- (a) The term of the contract shall be for a minimum period of 10 years.
- (b) Where applicable, the contract shall provide the following:
 - (1) For the preservation of the qualified historical property and, when necessary, to restore and rehabilitate the property to conform to the rules and regulations of the Office of Historic Preservation of the Department of Parks and Recreation, the United States Secretary of the Interior's Standards for Rehabilitation, and the State Historical Building Code.
 - (2) For an inspection of the interior and exterior of the premises by the city, county, or city and county, prior to a new agreement, and every five years thereafter, to determine the owner's compliance with the contract.
 - (3) For it to be binding upon, and inure to the benefit of, all successors in interest of the owner. A successor in interest shall have the same rights and obligations under the contract as the original owner who entered into the contract.

(Amended by Stats. 2013, Ch. 210, Sec. 6.5. (SB 184) Effective January 1, 2014.)

50281.1. The legislative body entering into a contract described in this article may require that the property owner, as a condition to entering into the contract, pay a fee that shall not exceed the reasonable cost of providing the service pursuant to this article for which the fee is charged.

(Amended by Stats. 2011, Ch. 278, Sec. 2. (AB 654) Effective January 1, 2012.)

50282. (a) Each contract shall provide that on the anniversary date of the contract or such other annual date as is specified in the contract, a year shall be added automatically to the initial term of the contract unless notice of nonrenewal is given as provided in this section. Each contract shall also provide that after five years, and every five years thereafter, the city, county, or city and county shall inspect the interior and exterior of the premises to determine the owner's continued compliance with the contract. If the property owner or the legislative body desires in any year not to renew the contract, that party shall serve written notice of nonrenewal of the contract on the other party in advance of the annual renewal date of the contract. Unless the notice is served by the owner at least 90 days prior to the renewal date or by the legislative body at least 60 days prior to the renewal date, one year shall automatically be added to the term of the contract.

(b) Upon receipt by the owner of a notice from the legislative body of nonrenewal, the owner may make a written protest of the notice of nonrenewal. The legislative body may, at any time prior to the renewal date, withdraw the notice of nonrenewal.

(c) If the legislative body or the owner serves notice of intent in any year not to renew the contract, the existing contract shall remain in effect for the balance of the period remaining since the original execution or the last renewal of the contract, as the case may be.

(d) The owner shall furnish the legislative body with any information the legislative body shall require in order to enable it to determine the eligibility of the property involved.

(e) No later than 20 days after a city or county enters into a contract with an owner pursuant to this article, the clerk of the legislative body shall record with the county recorder a copy of the contract, which shall describe the property subject thereto. From and after the time of the recordation, this contract shall impart a notice thereof to all persons as is afforded by the recording laws of this state.

(Amended by Stats. 2011, Ch. 278, Sec. 3. (AB 654) Effective January 1, 2012.)

50284. If the legislative body determines that the owner has breached any of the conditions of the contract provided for in this article or has allowed the property to deteriorate to the point that it no longer meets the standards for a qualified historical property, the legislative body shall do one of the following:

(a) Cancel the contract by following the procedures specified in Sections 50285 and 50286.

(b) Bring any action in court necessary to enforce a contract, including, but not limited to, an action to enforce the contract by specific performance or injunction.

(Amended by Stats. 2011, Ch. 278, Sec. 4. (AB 654) Effective January 1, 2012.)

50285. No contract shall be canceled under Section 50284 until after the legislative body has given notice of, and has held, a public hearing on the matter. Notice of the hearing shall be mailed to the last known address of each owner of property within the historic zone and shall be published pursuant to Section 6061.

(Added by Stats. 1972, Ch. 1442.)

50286. (a) If a contract is canceled under Section 50284, the owner shall pay a cancellation fee equal to 12¹/₂ percent of the current fair market value of the property, as determined by the county assessor as though the property were free of the contractual restriction.

(b) The cancellation fee shall be paid to the county auditor, at the time and in the manner that the county auditor shall prescribe, and shall be allocated by the county auditor to each jurisdiction in the tax rate area in which the property is located in the same manner as the auditor allocates the annual tax increment in that tax rate area in that fiscal year.

(c) Notwithstanding any other law, revenue received by a school district pursuant to this section shall be considered property tax revenue for the purposes of Section 42238.02 of the Education Code, as implemented pursuant to Section 42238.03 of the Education Code, and revenue received by a county superintendent of schools pursuant to this section shall be considered property tax revenue for purposes of Article 4 (commencing with Section 2570) of Chapter 12 of Part 2 of Division 1 of Title 1 of the Education Code.

(Amended by Stats. 2013, Ch. 47, Sec. 109. (AB 97) Effective July 1, 2013.)

50287. As an alternative to cancellation of the contract for breach of any condition, a landowner that is a party to the contract may bring any action in court necessary to enforce a contract, including, but not limited to, an action to enforce the contract by specific performance or injunction.

(Amended by Stats. 2011, Ch. 278, Sec. 5. (AB 654) Effective January 1, 2012.)

50288. In the event that property subject to contract under this article is acquired in whole or in part by eminent domain or other acquisition by any entity authorized to exercise the power of eminent domain, and the acquisition is determined by the legislative body to frustrate the purpose of the contract, such contract shall be canceled and no fee shall be imposed under Section 50286. Such contract shall be deemed null and void for all purposes of determining the value of the property so acquired.

(Amended by Stats. 1974, Ch. 544.)

50289. In the event that property restricted by a contract with a county under this article is annexed to a city, the city shall succeed to all rights, duties, and powers of the county under such contract.

(Added by Stats. 1972, Ch. 1442.)

50290. Local agencies and owners of qualified historical properties may consult with the State Historical Resources Commission for its advice and counsel on matters relevant to historical property contracts.

(Amended by Stats. 1985, Ch. 965, Sec. 8.)



Historical Commission Public Comment August 18, 2025: Item #3 Historic Preservation and Mills Act

From Kate Disney

Date Sat 8/16/2025 11:44 AM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>; City Council <council@losaltosca.gov>

Dear Historical Commissioners,

This letter expresses my support for a serious, professional and robust study of Los Altos Historic Preservation policies and procedures before adopting any changes to current municipal code.

Historic Preservation is one of the most important elements of Los Altos and a longtime tenet of our General Plan. Historical Preservation is important to residents and our historic features give our city a “sense of place”; an important value that we all share.

Whether in consideration of buildings, landscapes or environmental features, Los Altos must have a strong set of principles and guidelines for how we maintain, rehabilitate and restore places of historical significance that add texture and character to our daily lives.

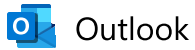
Rather than hurrying to adopt poorly vetted ordinances, I urge you to seek resources and support from City Council to create a comprehensive Historic Preservation Plan that includes sufficient public input and time.

Historic features are valued, in part, based on context. We are living during a time of great change.

Preserving historic structures and features must be viewed holistically as the removal or degradation of one will surely impact the others. Changes need to be carefully considered with comprehensive vetting from all stakeholders.

Thank you,

Kate Disney
184 Del Monte Ave.
Los Altos



Outlook

Public comment August 18 2025 meeting Item 3

From Pat Marriott**Date** Sat 8/16/2025 12:39 PM**To** Public Comment - HC <HCpubliccomment@losaltosca.gov>

Commissioners and Staff:

I saw Jon Baer's public comment to the commission. I know he owns a historic property, so obviously has a stake in these discussions. He and other historic home owners raise a lot of important points that have not been addressed in the proposal. Seems like there's still a big gap between the city's perspective and the homeowners. In spite of the short time frame, I hope you will carefully consider this item.

Thanks,
Pat Marriott



Historical Commission Public Comment August 18, 2025: Item #3 Historic Preservation and Mills Act

From Alice Mansell

Date Sat 8/16/2025 6:07 PM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>

Cc City Council <council@losaltosca.gov>

Dear Historical Commissioners,

I support PALLA's public comments on this agenda item.

For the public record, I didn't hear about this "special" meeting until a day or two ago through the oral grapevine. As of Friday, August 15, 2025 at 3:45pm I could not find a working link for the agenda on the newly reformatted City website nor download on my personal computer the link for the packet.

I went to the City Hall public desk Friday, August 15 about 4pm and a staffer first told me to use a public library computer. Then, she needed two City computers and over 10 minutes to get any City computer to load to show me the agenda on a screen. No hard copy agenda or packet was available anywhere at City Hall. The agenda was not posted on the City Hall's outdoor bulletin board by Friday at 4:45pm. I note one was posted there by Saturday, August 16 by 4:30pm.

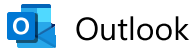
Also for the public record, there seems to be a date discrepancy on some or all of the newspaper public notice ads for the August 18 meeting. At least one newspaper ad shows August 19.

The proposed historic ordinance changes require by law meaningful and sufficient public input. Not this "special" rush job. Why the rush this month?

Regards,
Alice

Alice Mansell
Los Altos, California

P.S. The City's Heritage Orchard is still not shown on the Civic Center locator map outside City Hall. At least the long-gone Hillview Elementary School and historic Youth Center are still on that map. Does City leadership care about historic lands and structures?



Outlook

RE: comments regarding historic preservation ordinances and mills act august 18th meeting agenda item 3

From baerjc**Date** Sun 8/17/2025 11:01 AM**To** Public Comment - HC <HCpubliccomment@losaltosca.gov>; Gabriel Engeland <gengeland@losaltosca.gov>; Nick Zornes <nzornes@losaltosca.gov>

Gabe, Nick and Historical Commission members-in my email to city staff previously included in my email to all of you, I incorrectly stated the State Office of Historic Preservation bulletin had an error in its description of Mills Act. In fact, the language is consistent with the State Legislative documentation. My apologies for any confusion I may have created. My other comments stand as stated however. Thank you.-j



Historical Commission Public Comment August 18, 2025: Item #3 Historic Preservation and Mills Act

From PALLA

Date Mon 8/18/2025 7:55 AM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>

Cc City Council <council@losaltosca.gov>

4 attachments (3 MB)

MT20250814_PALLA_MillsAct_CL.pdf; AttachmentB_clgrequirements.pdf;

MT20250814_PALLA_HistoricPreservationOrdinance_CL_Final.pdf; AttachmentA_14_hp_ordinances.pdf;

Please confirm receipt of this public comment and attached documents.

Dear Historical Commissioners:

Despite a City staff determination that repealing and replacing the Los Altos Historic Preservation Ordinance is to “modernize and strengthen” historic preservation in our community, and “streamline” it for efficiency, it is evident that the proposed ordinance is weakening historic preservation and fails to meet the required Certified Local Government (CLG) stewardship and necessary oversight by the Historic Commission.

By contrast, the City of San Mateo is in the midst of a months-long process to strengthen and amend its Historical Preservation Ordinance, Historic Preservation Plan and Context Statement for the General Plan Element –this involves an informed and qualified ordinance review and multiple study sessions with public participation: www.cityofsanmateo.org/4877/Historic-Policy-Update-Effort. With a tradition of and a commitment to steward our local historic preservation efforts, Los Altos deserves a process on par with what San Mateo is doing and nothing less.

The Preservation Action League Los Altos (PALLA) urges you to—

- Vote to Continue Item #3 to a future, regularly scheduled meeting with action items to adequately consider and evaluate the proposed repeal and replacement.

Or

- Choose tonight to hear and record ONLY Public Comment—written and in person—with no discussion or council recommendation for adoption.

And formally move to:

•Seek a more rigorous process and adequate qualified resources from City Council to professionalize the process of analyzing and crafting ordinances and historic preservation laws that meet best practices and best serve historic preservation in Los Altos.

Please find attached two letters from the law firm of Mitchell M Tsai on behalf of PALLA providing additional clarification and specificity on the impacts of the proposed changes to repeal and replace the Los Altos Historic Preservation Ordinance and the codifying of the Mills Act Ordinance as well as commentary on the failures of the current process.

Beyond their legal relevance, attachments Exhibits A and B provide additional context for best practices in order to properly maintain, review, oversee and steward historic preservation in the City. Exhibit A is the Certified Local Government (CLG) Requirements and Exhibit B is the California Office of Historic Preservation Guidelines for Drafting Effective Historic Preservation Ordinances which delineates best practices for “strengthening” a historic ordinance.

The character of our city and our irreplaceable historic and environmental resources are at risk with the alterations to and omissions from the proposed codes. Among concerns, the proposed codes-

- change and minimize definitions of historic resources,
- move historic preservation law to Zoning, focusing only on buildings and residential structures,
- modify and/or remove clarifying language for City-owned properties, landscapes, Secretary of Interior Standards and the General Plan
- restrict historic commission review, and public participation,
- deny appeal rights,
- disincentivize Mills Act owners, new historic designations and other stewardship maintenance and preservation efforts.

Additionally, the process and justification for the timing and proposed changes must be called into question. Neither the replacement of the Historic Preservation Ordinance nor the creation of a Mills Act Ordinance is on the Historical Commission Work Plan. The ordinance changes have not been identified as a priority or a project by the Council, or as a part of the General Plan project or other effort.

The 17 Los Altos Mills Act owners, PALLA, business owners and residents are alarmed at a compromised process that has not included even one regularly scheduled meeting of a fully seated Historical Commission.

It must be noted that the Historical Commission is out of compliance with CLG requirements for a 5-person commission that permits only a 60-day seat vacancy before an appointment must be made. As such, the Historical Commission cannot rightfully make decisions and recommendations during a Special Meeting on August 18, 2025.

Other procedural errors should be acknowledged:

1. Noticing Errors: The Special Meeting for the Historical Commission, August 18, 2025, had inadequate public noticing with fewer than 10 days. Notice appeared nowhere except on a sign at the house at 81 Pepper Avenue. An August Historical Commission meeting first appeared on the City website on Thursday, August 14, 2025 at 4:30pm. A newspaper advertisement indicated an incorrect date.

2. Improper Sequencing: The proposed historic preservation ordinances were erroneously presented to the Planning Commission on June 5, 2025 before coming to your commission. That commission rendered a recommendation without discussion or working knowledge of historic ordinances or properties, and before a Historical Commission review.
3. Initial Study: Changes to the Los Altos municipal code constitute a project, and specifically a project with impact to historic and environmental resources and are thereby subject to an initial CEQA review, and cannot be considered exempt.
4. Timing: Your commission and the public have been given 72 hours to consider significant changes proposed by City staff, without justification, redlines or the ability to receive formal replies for questions of staff.

Whether in consideration of buildings, landscapes or environmental features, Los Altos must have a clearly stated intent and purpose and inclusive guidelines for how we maintain, rehabilitate and restore the places of historical significance that add texture and character to our daily lives. Our Historic Preservation deserves to stand alone as a chapter in the municipal code.

Rather than hurrying to adopt ill-wrought ordinances, residents, businesses, community leaders and preservationists urge you to seek resources and support from City Council to create a comprehensive Historic Preservation Plan that includes robust public engagement and better supports our community commitment to historical preservation and stewardship.

Please begin on the right foot, and move forward with better planning and an appreciation for our rich, dynamic heritage and cultural spaces and places.

Please see attachments.

Sincerely,

Maria Bautista and Catherine Nunes

Representing the Preservation Action League Los Altos (PALLA)

EXHIBIT A

14

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



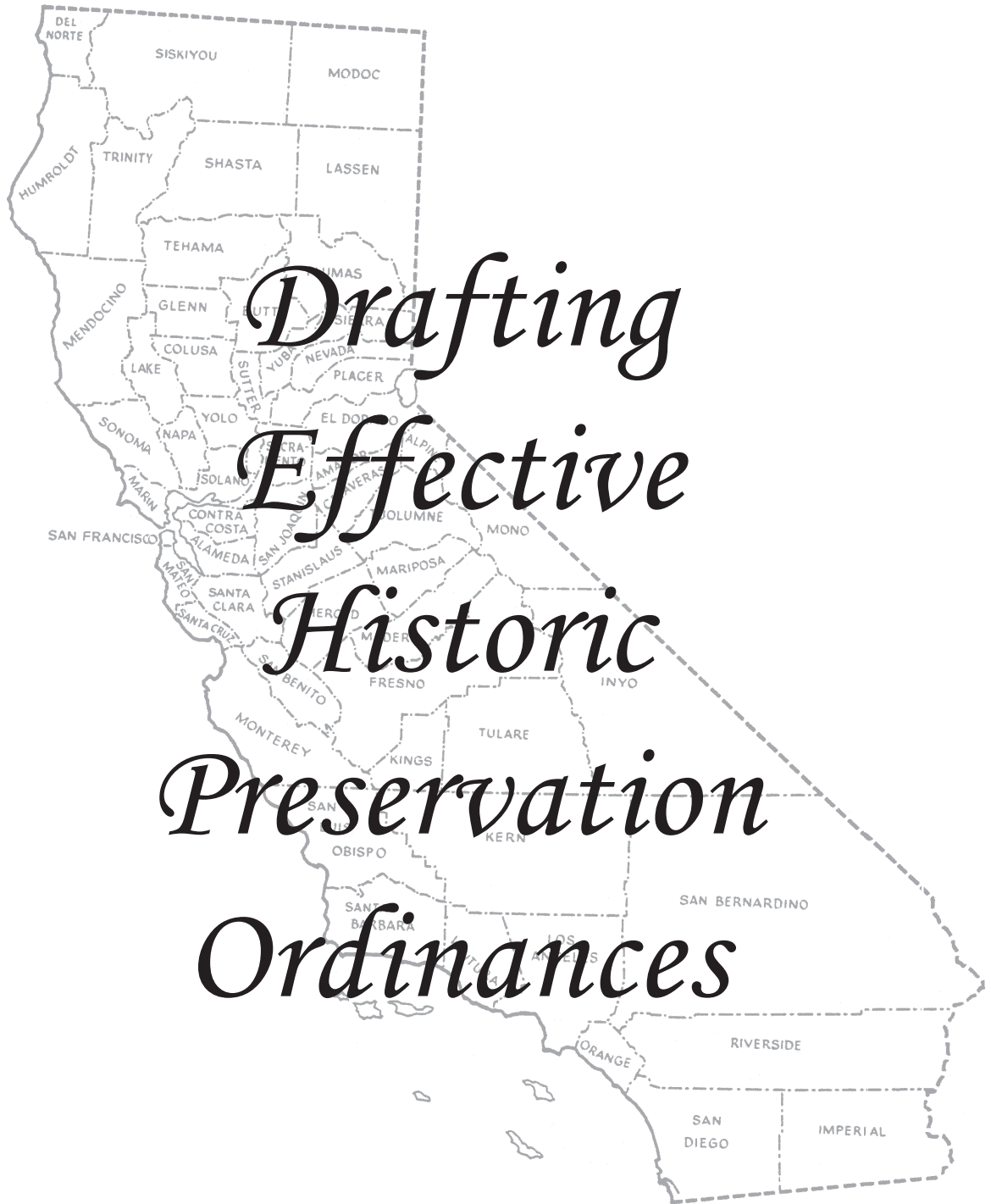
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*Drafting
Effective
Historic
Preservation
Ordinances*



**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

**EDITED BY
OFFICE OF HISTORIC PRESERVATION LOCAL GOVERNMENT STAFF**

Technical Assistance Bulletin #1 is intended to assist California's local governments in creating or revising a historic preservation ordinance. It identifies key issues that all various jurisdictions deal with in these key areas, thus allowing each community to craft an ordinance that best fits their own preservation goals and 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 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.

Revised June 2005

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INTRODUCTION

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 in coordination with other local laws and programs. 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 or historic contexts and surveys, economic assistance, and education and technical assistance. 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.

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

preservation of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

Recent estimates suggest that at least 250 to 300 of these monuments in California have the ones that are the most important for the preservation of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

PURPOSE OF THIS MANUAL

The purpose of this manual is to provide a guide for the staff of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

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KEY ELEMENTS OF A LOCAL PRESERVATION ORDINANCE

The purpose of this manual is to provide a guide for the staff of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

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 ACTIONS SUBJECT TO REVIEW

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.

Note: For the purposes of this manual, historical resources also includes archaeological resources, sometimes referred to as cultural resources, and cultural landscapes.

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 archaeological, architectural or historical? Most communities rely on multiple reasons to justify their preservation programs.
- Are there currently any threats to a particular historical or archaeological 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?
- Are there known archaeological sites that need to be protected? Has the community developed an archaeological preservation plan?
- Has a survey of historical resources, including known and potential archeological 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 historic plantings, cultural landscapes, or open space associated with archaeological and historical resources be protected?

- Should the ordinance focus on new construction in historic or archaeologically sensitive 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 and prehistory do the existing historical resources reflect?
- In addition to historic residential buildings, neighborhoods and districts, are there also historic business or industrial resources which need consideration and protection?
-

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?
- Where there are known archaeological sites or where there is likelihood for archeological resources to be present, are there provisions for identifying and evaluating such resources, developing treatment plans and developing and enforcing mitigation measures?

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

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.

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

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,

¹⁰ The Eureka, California, ordinance also provides several (Samples of the) proactive powers that may be given to a preservation commission

[illegible]

Distorted test situations (isolation in the workplace, building) but also a generalised situation

11 and even interiors that are visible to the public. The City of London, for example, guards its historic core as a means to preserve the ability to

¹² In the City of Davis, the Historic Preservation and Historical Commission is empowered to provide

Electricity is the flow of electrons, which is used to generate the heat for infrared radiation or

CALIFORNIA CODE EXCERPTS: SCOPE OF POWERS

CITY OF DAVIS

Section 40.23.050 Powers and Duties.

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...”).

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).

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;
- 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

- 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;
- N. 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

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).

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.

- 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

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).

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 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 DESIGNATING 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 archaeological, historical or architectural significance? Who should receive notice of proposed historic designations? This section discusses the basic issues regarding surveys and studies to identify historic resources for planning as well as designation purposes, designation procedures and criteria. Other related topics that are covered include owner consent; designation of interiors; and alternatives to designation, such as conservation districts.

SURVEYS AND STUDIES

The most effective preservation ordinances are supported by thorough, methodical studies and surveys of the community's archaeological and historic resources. 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 provide information for a variety of local government purposes. They 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, heritage tourism initiatives, pre-disaster mitigation plans and incentives. By making information available early in the project planning process, such surveys help the review process to operate more efficiently.

Resources of potential historical significance should be surveyed and the archaeological, 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 resource is arbitrary and capricious.

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.¹⁷

Using the survey as a guide, the community then should choose carefully those individual resources, neighborhoods or districts 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.¹⁸

Once a community has completed its initial survey and designated landmarks and districts, it should ensure that the survey is periodically reviewed and updated. Resources 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 survey be “periodically” updated.¹⁹

It takes time to gather essential documentation, develop historic contexts and complete survey 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.²⁰

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

¹⁷ Burbank, California, Municipal Code, § 31-928(a)(1).

¹⁸ *South of Second Associates v. Georgetown*, 580 P.2d 807 (Colo. 1978).

¹⁹ County of Ventura, California, Code of Ordinances, § 1364-11 (Surveys).

²⁰ *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 preservation plan).

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 an individual building, structure, site 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.²¹ 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.

CRITERIA FOR DESIGNATING HISTORICAL RESOURCES

The goal of a comprehensive preservation program should be to consider the full range of resources which represent the community's history including historic and prehistoric archaeological resources and cultural landscapes as well as the built environment. Historic signage and streetscapes may also warrant consideration and protection. 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.²² 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

²¹ 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 over inclusive list... never, in any way, intended to constitute a final determination" as to actual historic value).

²² For a general discussion of basic survey and designation standards in California, see the seminal case of *Bohannon 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.

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, 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*,²³ 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,

²³ 554 S.W.2d 924 (Tex. 1977).

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.²⁴

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.”

²⁴ 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 vagueness within local ordinances).

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.²⁵

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 *Maier 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."²⁶

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

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.²⁷

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.²⁸

²⁵ *Society for Ethical Culture v. Spatt*, 415 N.E.2d 922 (N.Y. 1980).

²⁶ *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

²⁷ *Coscan Washington, Inc. v. Maryland-National Capital Park & Plan. Comm'n*, 590 A.2d 1080 (Md. App. 1991).

²⁸ See, *Victorian Realty group v. City of Nashua*, 534 A.2d 381 (N.H. 1987)

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.²⁹

Unlike, for example, state code provisions regarding subdivision and annexation,³⁰ 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 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.).³¹

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.³² There are several pitfalls, however, that review bodies should avoid. In

²⁹ 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).

³⁰ 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).

³¹ *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).

³² See generally, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (discussing due process and the

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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

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- 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.³⁴ 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).³⁵ 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 historical resources and develop a plan regarding their preservation and use. The local owner consent provision was ruled illegal because it subordinated all historical

³⁴ 16 U.S.C. 470a(a)(6) (2001).

³⁵ *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).

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.³⁶

³⁶ 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.³⁷

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...³⁸

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 9.36.100.³⁹

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...⁴⁰

³⁷ *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).

³⁸ Pasadena, California, Code of Ordinances, § 2.46.150; *see also*, Berkeley, California, Code of Ordinances, § 3.24.100(B)(1).

³⁹ Santa Monica, California, Code of Ordinances, § 9.36.110.

⁴⁰ 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").

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 "structures" or "buildings."⁴¹ The reasoning in *Sameric Corp. v. City of Philadelphia*⁴² 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*,⁴³ 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.)⁴⁴

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

⁴¹ 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).

⁴² 558 A.2d 155 (Pa. App. 1985).

⁴³ 634 F. Supp. 86 (D.D.C. 1986).

⁴⁴ *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).

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 preservation law be observed.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.

⁴⁵ *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).

⁴⁶ *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).

⁴⁷ Berkeley, California, Code of Ordinances, § 3.24.320; *see also*, § 3.24.100(B) (review for publicly owned property).

(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.⁴⁸

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.⁴⁹ 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.

⁴⁸ Sacramento, California, Code of Ordinances, § 32.05.512 (City Projects).

⁴⁹ U.S. Constitution, Article VI, cl. 2.

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 1996,⁵⁰ which is intended to reduce various types of barriers and introduce more competition into the telecommunications industry. Section 704 of the Act⁵¹ expresses federal intent regarding land-use regulation. Preemption of local zoning and other land-use controls is of a limited nature.⁵² 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,”⁵³ and, secondly, the requirement that “substantial evidence” in a written record must accompany a decision to deny a permit for a telecommunication facility.⁵⁴

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,⁵⁵ yet reasonable regulations that do not effectively prohibit the provision of wireless services will be upheld.⁵⁶ 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.⁵⁷

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

⁵⁰ Pub. L. 104-104, 110 Stat. 56 (1996).

⁵¹ Codified at 47 U.S.C. § 332(c).

⁵² 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.”)

⁵³ 47 U.S.C. § 332(c)(7)(B)(i)(II).

⁵⁴ 47 U.S.C. § 332(c)(7)(B)(iii).

⁵⁵ *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).

⁵⁶ Brian R. Manuel, “Protecting Historic Landscapes Against the Proliferation of Cell Towers,” 19 *Preservation L. Rep.* 1001, 1028-30 (2000).

⁵⁷ *Omnipoint Communications Enterprises, L.P. v. Warrington Township*, 63 F.Supp.2d 658 (E.D. Pa. 1999).

review.⁵⁸ 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 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. Constitution⁵⁹ and analogous provisions of state constitutions.⁶⁰ 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.⁶¹ Given the contrast of settled legal authority for local governments to regulate

⁵⁸ Tallahassee, Florida, Telecommunication Ordinance, Chapter 27, § 18.7.

⁵⁹ U.S. Constitution, Amendment I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁶⁰ See, California Constitution, Article I, Section 4 (Establishment Clause and No Preference Provision); California Constitution, Article XVI, Section 5 (government may not aid religion).

⁶¹ 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

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.

FEDERAL LEGAL BACKGROUND

In 2000, the U.S. Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),⁶² 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.”⁶³ 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.⁶⁴

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.⁶⁵ 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

[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).

⁶² Pub. L. 106-274; 114 Stat. 803, 42 U.S.C. § 2000cc, *et seq.*

⁶³ 146 Cong. Rec. S7774, 7776 (daily ed., July 27, 2000).

⁶⁴ See, *Rectors, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990).

⁶⁵ “Congress Enacts Religious Land Use Law,” 19 Preservation L. Rep. 1111, 1120, 1121 (2000).

within a jurisdiction.⁶⁶ 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.

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.⁶⁷

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

⁶⁶ *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).

⁶⁷ For information on current cases, presented by an organization supporting RLUIPA, see <http://www.rluipa.com/cases/>.

Constitutions,⁶⁸ 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.”⁶⁹

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.⁷⁰ Though condemnation power is not commonly contemplated within the scope of an historic preservation ordinance, it is a legally acceptable strategy to protect historical resources⁷¹ and the

⁶⁸ *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.

⁶⁹ *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.

⁷⁰ 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).

⁷¹ 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).

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 rather than the historic fabric 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 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.⁷²

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.⁷³ The purpose and intent statement of the Alhambra Corridor area, at Chapter 17.104.010 of the City code is excerpted below.

⁷² Fresno, California, Code of Ordinances, § 12-242.

⁷³ Sacramento, California, Code of Ordinances, § 17.92, et seq. (Special Planning Districts).

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 use 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:

- 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 ACTIONS SUBJECT TO REVIEW

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 (approvals for these actions are usually called *Certificates of Appropriateness* or COAs.) Applications to demolish historical resources 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.⁷⁴

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.

⁷⁴ 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.

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 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.⁷⁵ The language of the Davis code is typical of ordinances that maintain a broad standard of review:

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.⁷⁶

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.⁷⁷ (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.⁷⁸

⁷⁵ 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 category for structures of merit).

⁷⁶ Davis, California, Zoning Code, § 29-145.13 (Alteration Permit Standards of Review).

⁷⁷ San Diego, California, Municipal Code, § 143.0220(a).

⁷⁸ Santa Monica, California, Code of Ordinances, § 9.36.140(e)(1).

PROCEDURES FOR REVIEWING CERTIFICATES OF APPROPRIATENESS (COAs)

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 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.⁷⁹

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.⁸⁰

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

⁷⁹ 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).

⁸⁰ Glendale, California, Code of Ordinances, § 15.20.080(A) (Permit required for demolition, removal or major alterations of historical resources).

separate procedure for demolition (See annex Santa Cruz also has developed a

~~REDACTED~~

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.⁸¹

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.⁸²

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.

⁸¹ Danville, California, Code of Ordinances, § 32-72.16 (Review and determination).

⁸² Palo Alto, California, Code of Ordinances, § 16.49.134.

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 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 40.37.⁸³

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

⁸³ Davis, California, Code of Ordinances, § 40.23.080(B) (Alteration Permits).

regulations were applied.⁸⁴ 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.⁸⁵ 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.⁸⁶

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.⁸⁷
- Regulatory takings are not found in reference to highest and best use, nor does a substantial diminution in value necessarily result in a taking.⁸⁸ 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.⁸⁹

⁸⁴ *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).

⁸⁵ *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).

⁸⁶ *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).

⁸⁷ *Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 848-49 (listing on the National Register of Historic Places is not a taking).

⁸⁸ *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).

⁸⁹ *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).

- A broad range of evidence and legal theories may be used to construct and defend a takings claim.⁹⁰

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.⁹¹ 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 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)

⁹⁰ *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).

⁹¹ 438 U.S. 104 (1978).

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,⁹² 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)⁹³ 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 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.⁹⁴ 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.

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.

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

⁹² See, San Francisco, California, Planning Code § 128(a).

⁹³ Cal. Pub. Res. Code § 21000, *et seq.*

⁹⁴ CEQA Technical Advice Series, CEQA and Historic Resources: CEQA Provisions, *available at* http://ceres.ca.gov/topic/env_law/ceqa/more/tas/page3.html.

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...⁹⁵

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.⁹⁶

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.⁹⁷

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.

⁹⁵ Fresno, California, Code of Ordinances § 13-412 (Historic Resource Permit Review Process).

⁹⁶ Davis, California, Code of Ordinances § 29.145.20 (Time Extensions).

⁹⁷ 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).

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. Local associations and preservation groups under CEQA is given

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 allowing a court time to rule on issue of whether CEQA review is required prior to issuance of the demolition permit.⁹⁸

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.⁹⁹ 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,¹⁰⁰ or where a proposed impact to an historic resource is part of a larger project that is discretionary.¹⁰¹ 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.¹⁰²

⁹⁸ 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).

⁹⁹ *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 Cal.Rptr. 542 (1981).

¹⁰⁰ *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App.3d 203, [174 Cal.Rptr. 784,] (1981).

¹⁰¹ *Orinda Ass'n v. Board of Supervisors*, 182 Cal.App.3d 1145, 1171-72, [227 Cal.Rptr. 688,] (1986).

¹⁰² *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).

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:¹⁰³

- **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 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.

¹⁰³ Cal. Code Regs., tit. 14, § 15000, *et seq.*

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.¹⁰⁴

A Negative Declaration¹⁰⁵ 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

¹⁰⁴ *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).

¹⁰⁵ Cal. Pub. Res. Code §§ 21064, 21080(c)(1).

have substantial adverse change on the historical resource.¹⁰⁶ A Mitigated Negative Declaration¹⁰⁷ 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).¹⁰⁸ 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 effect¹⁰⁹ 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.¹¹⁰

In general, the EIR “must describe all reasonable alternatives, including those capable of reducing or eliminating environmental effects.”¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ As a result, a project may be sent “back to the drawing board” by a court even after complying with all EIR requirements and

¹⁰⁶ 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 have a Negative Declaration).

¹⁰⁷ Cal. Pub. Res. Code §§ 21064, 21080(c)(2).

¹⁰⁸ Cal. Pub. Res. Code §§ 21061, 21100, 21100.1 (definition and contents of EIRs), 21155 (EIR process).

¹⁰⁹ See, Cal. Pub. Res. Code § 21080(e).

¹¹⁰ *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).

¹¹¹ *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).

¹¹² *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).

¹¹³ *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).

¹¹⁴ Cal. Pub. Res. Code §§ 21002, 21002.1

procedures.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

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.¹¹⁸

¹¹⁵ 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 infeasibility of mitigation).

¹¹⁶ 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).

¹¹⁷ 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).

¹¹⁸ *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).

SECTION 6: CONSIDERATION OF ECONOMIC EFFECTS

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.

ECONOMIC INCENTIVES

One of the most important forms of economic incentives for preservation is a state law (the Mills Act, California Govt. Code §§ 50280, et seq.) that allows owners of certain historic properties 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.¹¹⁹

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.¹²⁰

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;

¹¹⁹ 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."

¹²⁰ Glendale, California, Code of Ordinances, § 15.20.070 (Incentive program for historic resources).

- 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;
- m. Such other incentives as Town Council may from time-to-time implement.

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The County of Santa Cruz provides a flexible approach in its zoning code that encourages the continued use of nonconforming historic properties.

The County of Santa Cruz's 2004 code amendments provide a series of indirect incentives to encourage the continued use of historic properties:

- a. State Historic Building Code. . . .
- b. Parking. The parking requirements of Section 13.10.550 et seq., may be modified in connection with an application involving an historic resource. . . .
- c. Non-conforming structures. The ordinary maintenance and repair, structural enlargement, extension, reconstruction or alteration of a non-conforming historic resource shall be allowed according to Section 13.10.265(d).
- d. Floor Area Ratio. For development on properties where an historic resource exists, the Floor Area Ratio shall be 0.6:1.
- e. Lot Coverage. For development on properties where an historic resource exists, maximum lot coverage shall be 1.125 times the standard lot coverage for the particular zone district. 122

Some communities, including San Juan Bautista, have adopted the Secretary of the Interior's Standards for the Treatment of Historic Properties as the threshold to invoke exceptions to existing zoning codes, making the use of the Standards an indirect economic incentive.

The following preservation incentives shall be made available to properties listed on the City of San Juan Bautista Register of Historic Resources that undergo maintenance or alteration consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

¹²¹ Danville, California, Code of Ordinances, § 32-72.5 (Incentives).

¹²² Santa Cruz County, California, Code of Ordinances, § 16.42.090 (Incentives).

- C. The following exceptions to the underlying zoning standards, upon grant of a Use Permit and Site Plan and a Design Review by Planning Commission:
- a. Multi-family residential uses in a single-family residential district
 - b. Commercial uses in a multi-family district
 - c. Industrial uses in a commercial district
 - d. Guest Houses on lots less than the minimum required lot size for the R-1 and R-2 zoning districts.¹²³

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.¹²⁴

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 providing for economic assistance, 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. Applications for inappropriate work on landmark properties through the certificate of appropriateness process can become contentious and controversial. Many people have the perception that historic preservation is necessarily expensive or difficult. Others lack the knowledge or skills to carry out sensitive maintenance or rehabilitation work and rely on quick fixes from the local building supply store. Many people are unaware of the history or significance of their neighborhood or town. 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 inform homeowners, developers, and others about why historic resources are significant in the community, and what steps the city is taking to protect those resources. Education efforts 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. Some communities, including the City of Ontario, take the time to explain to property owners the significance of their neighborhood, assist owners in identifying

¹²³ San Juan Bautista, California, Code of Ordinances, Ch. 13, § 11.13.100 (Incentives)

¹²⁴

and locating appropriate building materials such as siding and windows, and then recognize those property owners who carry out good projects.

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.

ECONOMIC HARDSHIP

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.”¹²⁵ 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 should play no 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*,¹²⁶ 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.

¹²⁵ U.S. Constitution, Amendment V (“nor shall private property be taken for public use, without just compensation”).

¹²⁶ 438 U.S. 104 (1978).

Washington D.C. Code Ann. §§ 5-1001-1015.

but most jurisdictions, courts have been reluctant to establish administrative procedures to bring

The Washington D.C. preservation ordinance¹²⁷ demonstrates just how effective this

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OWNER'S BONA FIDE ATTEMPT TO RENT OR SELL PROPERTY

900 G Street Assoc. v. D.C. Department of Housing & Community Development, 430 A.2d 1387 (D.C. 1981)

...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.¹²⁹

¹²⁷ D.C. Code Ann. §§ 5-1001-1015.

¹²⁸ See, *Committee of 100 v. District of Columbia*, 571 A.2d 195 (D.C. 1990); *Cf.*, *900 G 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).

¹²⁹ 360 A.2d 257 (Pa. 1976). See also, *Maier 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).

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.

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.¹³⁰

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*¹³¹ 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*,¹³² 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.¹³³ The court noted that, in making the

¹³⁰ See, *Mitchell v. County of Orange*, 165 Cal.App.3d 1185, 211 Cal.Rptr. 563 (Cal. App. 1985).

¹³¹ 599 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).

¹³² 106 Cal.App.3d 893, 165 Cal.Rptr. 401 (Cal. App. 1980).

¹³³ *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (Forest City*

Deposition of the National Defense Science and Engineering Graduate Fellowship Program

- (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.

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

CERTIFICATES OF ECONOMIC HARDSHIP

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.¹³⁴

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.).

¹³⁴ *Phillips v. Board of Zoning Adjustments of City of New Orleans*, 197 So.2d 916, 916-20 (La. 1967).

**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.

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.¹³⁵ 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.

¹³⁵ 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.¹³⁶

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.¹³⁷

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.”¹³⁸ 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.

¹³⁶ Sacramento, California, Landmarks Preservation Ordinance, § 15.124.360.

¹³⁷ San Francisco, California, Planning Code, § 1004.5.

¹³⁸ Los Angeles, California, Municipal Code, § 12.20.3(J).

On the day of the hearing, the City Clerk shall provide a copy of the agenda to the appeals,

of the City Council Commission, by then, by the application of the Planning Commission property on
 the grievance affected by any decision of the application of a Planning Commission of the city

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Any other person who is not a member of the City Council shall be allowed to appear at the hearing and

FILED BY THE CLERK OF THE CITY OF SANTA MONICA, CALIFORNIA, ON 11/11/11, AT 11:11 AM. THE CLERK OF THE CITY OF SANTA MONICA, CALIFORNIA, IS A PUBLIC OFFICER.

The action of the Board of the City of Santa Monica shall be subject to appeal to the City Council no later than 10 business days after the action of the Board.

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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:

-
-
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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

Article 11 of the Code of Ordinances of the City of Chicago, Illinois, which was originally adopted by the Board of Aldermen on January 1, 1907, and which has since been amended, is hereby repealed, and the following article is hereby enacted into law:

REMEDIES FOR NONCOMPLIANCE

Article 11 of the Code of Ordinances of the City of Chicago, Illinois, which was originally adopted by the Board of Aldermen on January 1, 1907, and which has since been amended, is hereby repealed, and the following article is hereby enacted into law:

Fines

Article 11 of the Code of Ordinances of the City of Chicago, Illinois, which was originally adopted by the Board of Aldermen on January 1, 1907, and which has since been amended, is hereby repealed, and the following article is hereby enacted into law:

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.¹⁴¹

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.”¹⁴²

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

¹⁴¹ Fresno, California, Code of Ordinances § 13.423 (Civil and Criminal Penalties).

¹⁴² 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.¹⁴³

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.¹⁴⁴

¹⁴³ West Hollywood, California, Code of Ordinances, § 19.58.180(B).

¹⁴⁴ See, *City of Dayton v. Carroll*, 515 S.E.2d 144 (Ga. 1999).

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 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.¹⁴⁵

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.¹⁴⁶

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.

¹⁴⁵ Section 16.49.090(a)(4)

¹⁴⁶ San Clemente, California, Code of Ordinances, § 17.16.170(F) (Penalty for Demolition of Historic Structures).

- 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.

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.¹⁴⁷

¹⁴⁷ 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,

Minimum maintenance standards are not particularly controversial from a legal standpoint. The leading case is *Maier 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 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.¹⁴⁸

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 *Maier* 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

California, Code of Ordinances, § 3.24.290.

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

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*,¹⁴⁹ 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.

The Court explained that there is sufficient probable 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

¹⁴⁹ 387 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 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.¹⁵⁰

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.

- 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

¹⁵⁰ *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).

Resource in order that such Resource may be preserved in accordance with this article.¹⁵¹

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; 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.¹⁵²

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.

¹⁵¹ Fresno, California, Code of Ordinances, § 13.421 (Minimum Maintenance).

¹⁵² 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).

DEVELOPMENT MORATORIA AND EMERGENCY DEMOLITION BANS

Preservation Commission, and the City of Redondo Beach, California, Code of Ordinances, § 10.4.305 (Delay of work pending hearing).

...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...¹⁵³

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 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.¹⁵⁴

In California, municipal government moratoria on development permits are allowed under the authority of Government Code Section 65858.¹⁵⁵ 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.¹⁵⁶

In jurisdictions where demolitions are ministerial, situations continue to arise in which an owner is able to secure a permit to demolish a potentially significant historic building. 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 as a historic district. Some owners, in an attempt to circumvent anticipated 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

¹⁵³ Palo Alto, California, Code of Ordinances, § 16.49.80.

¹⁵⁴ Redondo Beach, California, Code of Ordinances, § 10.4.305 (Delay of work pending hearing).

¹⁵⁵ See, *Bank of the Orient v. Town of Tiburon*, 220 Cal.App.3d 992 [269 Cal.Rptr. 690] (Cal. App. 1990).

¹⁵⁶ *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.

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.¹⁵⁷

Invoking emergency demolition bans raises two major legal issues, involving procedural due process and vested rights. While the constitutional guarantee of due process 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.¹⁵⁸

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.

¹⁵⁷ Davis, California, Code of Ordinances, § 29-145.11 (Designation Procedures – Work Moratorium).

¹⁵⁸ See, Selinger v. City Council, 216 Cal.App.3d 259, 270-71 [216 Cal.Rptr. 499] (Cal. App. 1989).

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 or will 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.

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 AND SEVERABILITY

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 (but are not limited to):

- “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.

CALIFORNIA CODE EXCERPT:
DEFINITIONS

City of Danville
32-72.2 Definitions.

As used in this chapter, the following words and phrases have the following meanings:

Alteration shall mean any demolition, exterior change or modification to a historically significant resource or heritage resource or of a contributing property located within an historic district including, but not limited to:

1. Exterior changes to or modifications of structure, architectural details or visual characteristics including paint color and surface texture;
2. Grading or surface paving;
3. Construction of new structures;
4. Cutting or removal of trees and other natural features;
5. Disturbance of archaeological sites or areas; and
6. The placement or removal of any exterior objects including signs, plaques, light fixtures, street furniture, walls, fences, steps, plantings and landscape accessories that affect the exterior visual qualities of the property.

Architectural feature shall mean the architectural elements embodying style, design, general arrangements and components of the exterior of any building or structure, including, but not limited to, the kind, color and texture of the building materials and the style and type of all windows, doors, lights, signs and other fixtures.

Certificate of Approval shall mean a certificate issued pursuant to this chapter approving any proposed alteration to a historically significant resource, a heritage resource or a contributing property located within a historic district.

Contributing property shall mean a building, structure, site, feature or object within an historic district that embodies the significant physical characteristics and features, or adds to the historical associations, historic architectural qualities or archaeological values identified for the historic district, and was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period.

Design guidelines shall mean the “Town of Danville Design Guidelines for Heritage Resources” adopted by the Town and as may be amended from time to time.

Heritage resource shall mean a structure, site, improvement or natural feature that has been designated for heritage preservation pursuant to Section 32-72.6. Heritage Resource Commission (HRC) shall mean the Town’s Heritage Resource Commission established pursuant to the provisions of this Code...

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.

Another way to eliminate potential confusion is to use terms and definitions shared by the National Register, the California Register, and the CEQA guidelines. These definitions are commonly understood and have withstood the test of time and judicial challenges. When the ordinance uses the same terms and definitions as used in CEQA, it facilitates environmental reviews and promotes better understanding among decision makers, consultants, and members of the community.

SEVERABILITY

It is important to include a severability statement to protect the ordinance as a whole in case a particular section is later determined to be unconstitutional or void. Danville, Fresno, and Davis all include the following language in their ordinances:

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.

CONCLUSION

Because historic preservation takes place at the local level, the ordinance is perhaps the most important tool in developing and implementing a successful preservation program. Because communities have different preservation goals and issues, no single “model” ordinance exists. However, as demonstrated throughout this manual, there are key issues that all jurisdictions will want to address.

Below is a checklist which can be used to analyze existing or draft ordinances. Note that in some communities, key elements of the preservation process may be found in other local ordinances and regulations.

ORDINANCE REVIEW CHECKLIST

JURISDICTION

REVIEWER

DATE OF REVIEW	Comments
STATEMENT OF PURPOSE/ GOALS	☐
Legitimate Purpose of Government	☐
Resource types to be protected	☐
Survey & inventory	☐
How to protect	☐
ENABLING AUTHORITY – LEGAL BASIS	☐
ESTABLISH PRESERVATION COMMISSION	☐
Powers & Authority	☐
Existing zoning and land use regulations/tools	☐
Level of authority	☐
Monitoring	☐
Enforcement	☐
Duties	☐
Qualifications of commissioners	☐
Terms of service	☐
Relationship to other Loc Gov. LUP entities	☐
PROCEDURES & CRITERIA FOR DESIGNATION	☐
Property types to be protected	☐
Criteria for eligibility	☐
Interiors	☐
Who may apply/nominate	☐
Application/nomination format	☐
Owner Consent/objection	☐
Public notice	☐
Fees	☐
Alternatives to designation	☐

Recordation	☐
PROCEDURES & CRITERIA FOR REVIEWABLE ACTIONS	☐
Actions Subject to Review Defined	☐
Demolition/Major alteration	☐
New construction in historic districts or areas	☐
Design review	☐
Cumulative effects	☐
Hazardous/Unsafe Conditions	☐
Review Authority (Binding or Advisory)	☐
Legal Effects of Review	☐
Process	☐
Fees	☐
CONSIDERATION OF ECONOMIC EFFECTS	☐
Incentives	☐
Extreme economic hardship	☐
Provisions to prevent mothballing	☐
Inverse condemnation	☐
APPEAL PROCEDURE	☐
Administrative resolution of contested decisions	☐
ENFORCEMENT	☐
How to ensure compliance	☐
Required Maintenance	☐
Cures/penalties for Demolition by Neglect	☐
Penalties	☐
Recordation	☐
DEFINITIONS – KEY TERMS	☐
SEVERABILITY	☐
OTHER	☐
Preservation Elements in Other Ordinances?	☐

EXHIBIT B

Requirements

(Excerpt from Appendix G, Certified Local Government Application and Procedures, August 1999, pp 41-47.)

Local governments may be certified to participate in the CLG program by complying with the following requirements:

- I Enforce appropriate state or local legislation for the designation and protection of historic properties:
 - A. State enabling legislation provides for local jurisdictions to enact appropriate historic preservation legislation. California Government Code Sections 65850, 25373, and 37361 enable city and county legislative bodies to provide 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.”
 - B. Local governments must adopt local historic preservation ordinances with provisions to enforce the designation and protection of historic and archeological resources.
 - C. The local legislation shall be consistent with the intent and purpose of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470).
 - D. The CLG will adopt a historic preservation plan or a historic preservation element for the local jurisdiction's General Plan, as authorized by the California Government Code, prior to or upon applying for a CLG grant.
 - E. The CLG commission will participate in the environmental review of specific federally sponsored projects, such as community development programs involving HUD Block Grant funds unless it is determined by OHP that the necessary expertise is not available to the local government. The CLG will establish programmatic agreements with the state agreeing to ensure compliance with Section 106 provisions of the NHPA.
 - F. The CLG commission will participate in the environment review of local projects in accordance with the requirements under the California Environmental Quality Act (CEQA). The commission may review and comment on permit actions affecting significant listed historic properties and other resources eligible for listing, in accordance with local ordinance requirements and with CEQA. Procedural guidelines should include standards for demolition stays, design review criteria, anti-neglect requirements, and appeal strategies.
- II Establish an adequate and qualified historic preservation review commission by local law:
 - A. The commission shall include a minimum membership of five (5) individuals with all members having demonstrated interest, competence, or knowledge in historic preservation.
 - B. At least two (2) Commission members are encouraged to be appointed from among professionals in the disciplines of history, architecture, architectural

- history, planning, pre-historic and historic archeology, 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.
- C. A local government may be certified without the minimum number or types of disciplines established in state procedures if it can be demonstrated to the satisfaction of the 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.
 - D. Commission members shall be appointed by the chief elected local official, city council, or board of supervisors consistent with the provisions of the preservation ordinance. The appointing authority shall make interim appointments to fill unexpired terms in the event of vacancies occurring during the term of members of the commission. The appointing authority shall also act within sixty (60) days to fill a vacancy. Terms of office of the commission members shall be according to the local preservation ordinance.
 - E. The commission shall meet at least four times a year, with meetings held in a public place, advertised in advance, and open to the public, pursuant to the Ralph M. Brown Act (G.C. Section 54950 et seq.) for open meetings. Written minutes of commission meetings shall be kept on file, available for public inspection, and submitted to the state as a part of the CLG Annual Report.
 - F. Each commission member is required to attend at least one informational or educational meeting, seminar, workshop, or conference per year that pertains directly to the work and functions of the commission and would be approvable by the state. The CLG Regional Workshops sponsored by the OHP are important sources of information. The annual State Historic Preservation Conference generally provides special sessions devoted to the issues, objectives, and responsibilities of commissions. Commissions may also bring in professionals to provide training on site.
 - G. An annual report of the activities of the commission shall be submitted to the state at the end of each calendar year. The reports shall include, but not be limited to, such information as narrative summary of accomplishments, summaries of new and corrected survey activities, number of properties designated under local ordinance in relation to inventory for community, summaries of National Register applications reviewed, summaries of historical contexts prepared, number of federal tax certifications reviewed, number of properties on which design review was held, number of properties on which environmental project reviews were conducted, property owners of Mills Act contracts approved, summarization of local preservation activities, list of local landmark designations, description of public education activities, lists of commission members and resumes, list of staff and resumes, detailed listing of commission and staff training received, commission attendance

records, summary of changes in preservation laws, summary of adoption or updates of historic preservation plan or historic preservation element of your community's General Plan, commission meeting minutes and agendas, and other pertinent activities performed by the commission.

III Maintain a system for the survey and inventory of historic properties:

The CLG shall be responsible for organizing, developing, and administering an inventory of cultural resources within the entire spatial jurisdiction of the CLG.

- A. The commission shall develop procedures for conducting an inventory of culture resources. Survey activities shall be coordinated with and complementary to the state program to ensure that survey results produced by the CLG will be readily integrated into the statewide comprehensive historic preservation planning process.
 1. The CLG shall be responsible for overseeing the compiling, recording, and updating of inventory information on cultural resources within its jurisdiction. The information shall be based on comprehensive surveys conducted in conformance with state survey standards and procedures. Surveys completed prior to the certification of a local government may be re-evaluated in accordance with state standards and may be submitted for inclusion in the State database.
 2. As part of any ongoing survey effort, procedural requirements must allow for periodic update of survey results as buildings gain maturity and as new areas are incorporated or annexed by the CLG.
 3. The commission must adopt state guidelines for conducting its inventory of historic properties. State-approved inventory forms (DPR-523, A-L) and the OHP's Instructions For Recording Historical Resources shall be used to facilitate integration into the state electronic data system and for statewide comprehensive historic preservation planning purposes. Dimitri software is available for the DPR 523 forms.
 4. Standards for the evaluation of properties must be consistent with the National Register of Historic Places criteria.
- A. The commission shall establish internal procedures to facilitate the use of survey results in the planning process by the CLG officials and departments. The commission shall submit survey results to the local government for adoption, then forward to OHP. Copies of the survey should be on deposit at the local planning department, building and safety office, public works department, and redevelopment agency. Libraries, colleges, and historical societies should also receive copies. OHP will make copies available for the appropriate "California Historical Resources Information System" regional center. See IV(A)(2) below for public access requirements.

IV Provide for adequate public participation in the local historic preservation program:

- A The CLG shall provide opportunities for public participation in all responsibilities delegated to the CLG, in accordance with appropriate regulations, standards, and guidelines.

1. Public participation shall be fully encouraged at local commission meetings. Commission meetings shall be open to the public, with published agenda and minutes in accordance with the Ralph M. Brown Act (G.C. Section 54950 et seq.) for open meetings. The published agenda shall be mailed in advance of meetings to individuals and citizen organizations interested in the commission's activities.
 2. Public participation shall be fully encouraged in the performance of the historic survey program at all levels of responsibility to identify and inventory significant cultural resources in the jurisdiction of the CLG. The public can serve as volunteers to assist in the survey effort. Survey results shall be of public record and on file at a public institution, except in the case of sensitive resources, e.g., archeological sites subject to vandalism.
 3. Public participation shall be fully encouraged in the nomination process for the National Register of Historic Places program. The CLG shall invite comments from the general public regarding National Register nominations.
 4. Public participation shall be fully encouraged in all public hearings on projects related to CEQA and Section 106 processes.
- V Satisfactorily perform the responsibilities delegated to the CLG:
- A. The CLG shall prepare a comprehensive local historic preservation plan which would identify preservation missions, goals, and priorities. The plan would also establish preservation strategies, programs, and time schedules.
 - B. The CLG will participate in the review and comment on historic preservation certification applications for tax incentives. The CLG and state may establish procedures for implementation of the investment tax credit program at the local level in conformance with the Secretary of the Interior's Standards for Historic Preservation.
 - C. Each CLG must have a local historic preservation plan prior to or upon becoming a CLG before any additional grant applications will be considered. The state shall monitor and evaluate the performance of the CLG for consistency with the identification, evaluation, and preservation priorities of the comprehensive state historic preservation planning process.
 1. Annual Review of CLGs:
The State shall conduct an annual review of CLGs to assure that each government continues to meet the minimal requirements and is satisfactorily performing its responsibilities. As part of this review, the state shall examine the annual reports submitted by the CLGs, records of the administration of funds allocated from the HPF, and other documents as necessary. The CLG shall make these records available to the state. A more thorough review and site visit to the Certified Local Government will occur at least once every three (3) years.
 2. Procedures for Decertification:
If the state evaluation indicates that the CLG no longer meets the minimal requirements or that in any other way a CLG's performance is not

- VI The CLG shall assume certain responsibilities for reviewing and recommending properties within its jurisdiction to the National Register of Historic Places.
 - A. The SHPO shall have the sole responsibility of nominating National Register properties directly to the Secretary of the Interior (Secretary).
 - B. The CLG shall establish local procedures for the National Register nomination process consistent with the requirements in the NHPA, Section 101(c)(2).
 - 1. Before a property within the jurisdiction of a CLG may be considered by the state to be nominated to the National Register, the state shall notify the owner, the applicable chief elected local official, and the local historic preservation commission. The commission, after reasonable opportunity for public comment, shall prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register. Within sixty (60) days of notice from the state, the chief elected local official shall transmit the report of the commission and his/her recommendation to the state. After receipt of such report and recommendation, or if no such report and recommendation are received within sixty (60) days, the state

VII By mutual written agreement with the local governing body, the state may delegate additional responsibilities to the CLG. Local governments may be certified to participate in specific program activities under Programmatic Agreements.

- A. The CLG may develop educational programs promoting historic preservation at the local level such as, but not limited to, sponsorship of preservation workshops, publication of preservation information, organizing preservation fairs, conducting walking tours, preparing preservation curricula for schools, etc.
- B. Commission members may act in an advisory capacity to other officials and departments within the local government and act as a liaison on behalf of the CLG to individuals and organizations concerned with historic preservation issues at the local level.
- C. The CLG may participate in the Mills Act program or other economic incentive programs to provide property-tax relief for owners of historic properties.
- D. The CLG may participate in the Marks Historical Rehabilitation Act for issuance of tax-exempt industrial development bonds, providing that the commission shall serve as a part of the required citizen advisory board.
- E. The CLG may assume certain responsibilities of recommending National Register of Historic Places properties, identified in the CLG jurisdiction, directly to the State Historical Resources Commission.
- F. By mutual written agreement with the local governing body, the state may delegate additional responsibilities to the CLG.



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VIA E-MAIL

August 14, 2025

Historical Commission
City of Los Altos
1 N. San Antonio Rd
Los Altos, CA
Em: sgallegos@losaltosca.gov

RE: City of Los Altos – Proposed Zoning Code Amendments for
Historic Preservation.

Dear Commissioners,

On behalf of Preservation Action League of Los Altos (“**PALLA**”), my Office is submitting these comments on the City of Los Altos’ (“**City**” or “**Lead Agency**”) proposed amendments for the City Municipal Code regarding Historic Preservation, which will be discussed at the Historical Commission’s special meeting on August 18, 2025.

PALLA expressly reserves the right to supplement these comments at or prior to hearings on the proposed amendment, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Moreover, PALLA requests that the City provide notice for any and all events or hearings referring or related to the proposed amendments, as issued under the California Environmental Quality Act (“**CEQA**”), Cal Public Resources Code (“**PRC**”) § 21000 *et seq*, and the California Planning and Zoning Law (“**Planning and Zoning Law**”), Cal. Gov’t Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency’s governing body.

I. THE PROPOSED ORDINANCE WOULD RESULT SIGNIFICANT REDUCTION OF PUBLIC PARTICIPATION

Certified Local Government Programs are required to provide for adequate public participation in their local historic preservation programs. (Appendix G, Certified Local Government Application and Procedures.) Specifically, Appendix G highlights the following areas for public participation:

1. Public participation shall be fully encouraged at local commission meetings. Commission meetings shall be open to the public, with published agenda and minutes in accordance with the Ralph M. Brown Act (G.C. Section 54950 et seq.) for open meetings. The published agenda shall be mailed in advance of meetings to individuals and citizen organizations interested in the commission's activities.
2. Public participation shall be fully encouraged in the performance of the historic survey program at all levels of responsibility to identify and inventory significant cultural resources in the jurisdiction of the CLG. The public can serve as volunteers to assist in the survey effort. Survey results shall be of public record and on file at a public institution, except in the case of sensitive resources, e.g., archeological sites subject to vandalism.
3. Public participation shall be fully encouraged in the nomination process for the National Register of Historic Places program. The CLG shall invite comments from the general public regarding National Register nominations.
4. Public participation shall be fully encouraged in all public hearings on projects related to CEQA and Section 106 processes.

As maintaining public participation in these areas is a clear requirement of the Certified Local Government Program, the City should consider revisions to the proposed ordinance, as outlined below.

A. The Proposed Ordinance Unnecessarily Limits the Public from Designating Public Historic Resources

Both the existing and proposed ordinance limit the public from identifying and seeking designation of historical resources, namely public properties. The City should revise the proposed ordinance to allow for any interested person or group within Los Altos to seek historical designation of a property based on the

existing criteria. As the Office of Historical Preservation has made clear, historic resources are of interest to the entire community, not just individual property owners. By needlessly limiting who can seek historic designation of these community resources, the proposed ordinance would diminish public participation.

For example, the City of Whittier allows for any interested individual or group to seek designation of historic resources in the city.

Any person or group, including the city, may nominate a historic resource(s) for designation as a historic landmark or district by submitting an application to the planning department. Applications shall include, but are not limited to, submittal of the following:

- A. Documentation indicating how the nominated resource satisfies the designation criteria;
- B. Any other information determined to be necessary for review of the proposed work; and
- C. Required filing fees, as set by council resolution. City initiated nominations are not subject to filing fees.

(Whittier Municipal Code Section 18.84.070.)

In allowing for individuals and groups beyond property owners to seek designation of a property, the City would allow for greater protection of public resources that may otherwise go undesignated and would preserve the public participation that is central to Certified Local Government Programs.

B. The Proposed Ordinance Would Dramatically Reduce the Ability of the Public to Appeal Decisions Regarding Historical Resources.

The changes to the Historic Preservation Ordinance include a dramatic change in who is allowed to appeal decisions impacting historical resources. Specifically, the proposed changes would remove the ability of any interested party to appeal a decision and would impose the limitations for appeals as outlined in Title 14 of the Municipal Code. This title limits appeals to property owners or residents *within a 300-ft radius* of the impacted property. (See Los Altos Municipal Code, Sec. 14.01.100.)

Limiting the appeal opportunities by an arbitrary radius ignores the fact that historic resources are of interest to the entire citizenry. In Drafting Historic

Ordinances, the California Office of Historic Preservation notes that many cities have chosen to incorporate broad appeal rights into their preservation ordinances.

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.” 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.

(California Office of Historic Preservation, Technical Assistance Bulletin #14, *Drafting Effective Historic Preservation Ordinances*, p. 76.)

If the City has actual interest in fostering a robust historic preservation program, including protection of broad public participation, the proposed amendment should be revised to ensure a broad right to appeal.

C. The City has Failed to Follow the Proper Review Procedure for the Proposed Amendment.

The Los Altos Municipal Code Specifies that the Historical Commission has the power and duty to “[r]eview and comment upon existing or proposed ordinances, plans or policies of the city as they relate to historic resources.” (*See* Los Altos Municipal Code Section 2.12.030.) Here, the City has failed to bring the proposed amendment to the ordinance before the Historical Commission before it was heard by the Planning Commission. As such, any prior action by the Planning Commission was improper and must be disregarded. Any changes that arise from this hearing must be presented to the Planning Commission for review and recommendation to the City Council. Any future Planning Commission or City Council meeting on the matter must be given proper notice to ensure adequate public participation.

II. THE PROJECT WOULD REDUCE THE CITY COUNCIL’S AUTHORITY OVER FUTURE PROJECTS

Historical preservation programs offer cities the ability to direct development that impacts historical resources. As city authority continues to be chipped away

by statewide mandates surrounding development, historical ordinances allow cities maintain control over projects that would impact these historical resources. These programs offer cities a chance to have input on projects that would otherwise be taken out of local control due to streamlining efforts. By weakening the City’s preservation ordinance, the City will reduce its own ability to control development within Los Altos.

III. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The adoption of the proposed amendment constitutes a project under CEQA. "To encapsulate the *Muzzy Ranch* test, a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment." (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1198 [citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372].) Here, the Court determined that the City had incorrectly determined that the project was exempt from CEQA and should have continued with additional environmental review to determine the potentially significant impacts associated with the project.

CEQA Section 21060.5 defines the “environment” to include “historic” conditions within an area which will be affected by a proposed project. According to Section 21084.1, a “project that may cause substantial adverse change in the significance of an *historical resource* is a project that may have a significant effect on the environment.” (Emphasis added.)

As the proposed ordinance ***directly impacts*** how the City treats historic resources, there is a reasonably foreseeable, direct change in the “environment” as it relates to the City’s historical resources. Thus, the significant impacts of the discretionary project upon historic resources must be reviewed through an initial study.

A. The Project Would be Approved in Violation of CEQA as the Changes Would Likely Result in Significant, Cumulative Impacts to Historical Resources.

The City has argued that CEQA Guidelines section 15061(b)(3)¹ would apply to the adoption of the proposed amendment. However, the commonsense exemption does not apply in instances where a significant impact may occur. Here, the proposed amendment results in reduced oversight on developments impacting historical resources, the loss of appeal rights for the majority of community members, and the removal of the portions of the historical ordinance that discuss hardships and financial incentives, require separate advisory review by the Historical Commission, and note that a purpose of the historical preservation program is to fulfill the City's CEQA and Federal Section 106 review responsibilities. These changes will result in significant, cumulative impacts on all of the City's historic resources by reducing the efficacy of the protection embedded in the original ordinance. As such, the City must prepare an initial study and determine whether a Mitigated Negative Declaration or Environmental Impact Report is necessary for the project. Until additional CEQA analysis is performed, the City must refrain from adopting the proposed ordinance amendment.

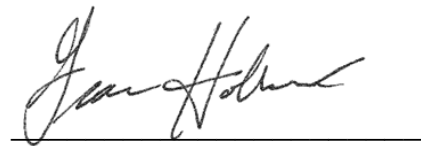
The commonsense exemption from CEQA environmental review can only be relied upon "where it can be seen with *certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment." (CEQA Guidelines § 15061(b)(3).) The agency has the burden of providing substantial evidence, with both evidence and analysis, to provide the support for its decision that a project is exempt. (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 187; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106 [finding that the City failed to support its decision to exempt an ordinance under the "common sense" exemption].) Here, no such support has been provided to support the findings. As such, the exemption is improper.

¹ The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 150000 *et seq.*, are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. (Cal. Pub. Res. Code § 21083.) The CEQA Guidelines are given "great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous." *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 217.

II. CONCLUSION

PALLA requests that the City formally review the environmental impacts of the proposed amendment through the preparation of an initial study considering the proposed ordinance's significant impacts on the City's historical resources. Further, PALLA requests that the City revise the proposed changes to ensure local engagement in decisions impacting historical resources is not arbitrarily limited. Lastly, PALLA urges the City to follow the procedure required by the Municipal Code by presenting any revisions and recommendations from the Historical Commission to the Planning Commission at a properly notice public hearing. If the City has any questions or concerns, feel free to contact my Office.

Sincerely,



Grace M. Holbrook

Attorneys for the Preservation Action League of Los Altos

Attached:

Exhibit A: California Office of Historic Preservation, Technical Assistance Bulletin #14, *Drafting Effective Historic Preservation Ordinances*.

Exhibit B: Excerpt from Appendix G, Certified Local Government Application and Procedures

EXHIBIT A

14

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



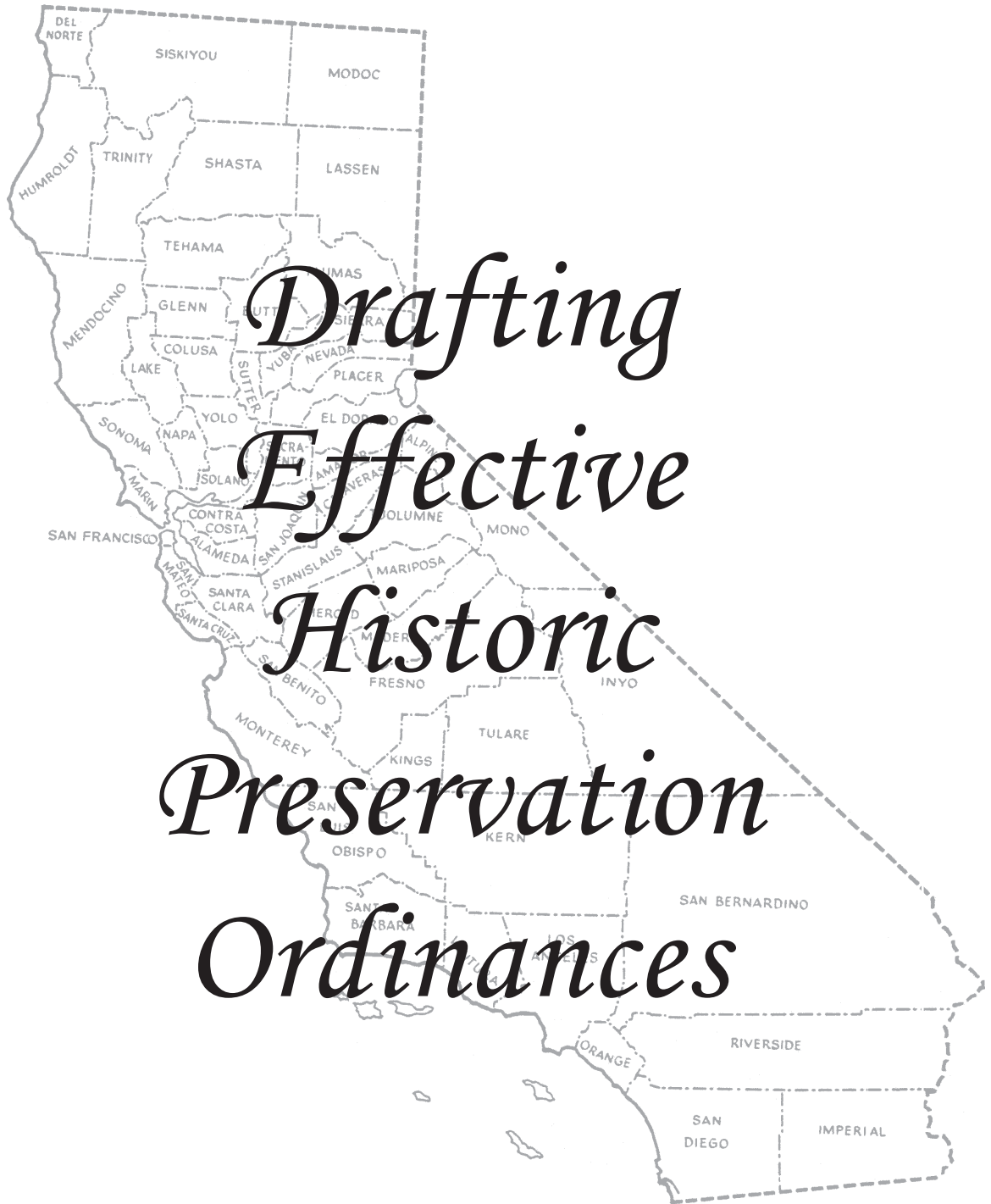
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*Drafting
Effective
Historic
Preservation
Ordinances*



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

TECHNICAL ASSISTANCE BULLETIN #14

Prepared by

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

WITH A GENEROUS GRANT FROM THE CALIFORNIA STATE PARKS FOUNDATION

**EDITED BY
OFFICE OF HISTORIC PRESERVATION LOCAL GOVERNMENT STAFF**

Technical Assistance Bulletin #1 is intended to assist California's local governments in creating or revising a historic preservation ordinance. It identifies key issues that all various jurisdictions deal with in these key areas, thus allowing each jurisdiction to draft an ordinance that best fits their own preservation goals and 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 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.

Revised June 2005

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INTRODUCTION

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 in coordination with other local laws and programs. 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 or historic contexts and surveys, economic assistance, and education and technical assistance. 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.

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

preservation of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

Recent estimates suggest that at least 250 to 300 of these monuments in California have the ones that are the most important for the preservation of the historic site. The staff would be responsible for the preservation of the historic site, and the staff would be responsible for the preservation of the historic site.

PURPOSE OF THIS MANUAL

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KEY ELEMENTS OF A LOCAL PRESERVATION ORDINANCE

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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 ACTIONS SUBJECT TO REVIEW

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.

Note: For the purposes of this manual, historical resources also includes archaeological resources, sometimes referred to as cultural resources, and cultural landscapes.

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 archaeological, architectural or historical? Most communities rely on multiple reasons to justify their preservation programs.
- Are there currently any threats to a particular historical or archaeological 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?
- Are there known archaeological sites that need to be protected? Has the community developed an archaeological preservation plan?
- Has a survey of historical resources, including known and potential archeological 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 historic plantings, cultural landscapes, or open space associated with archaeological and historical resources be protected?

- Should the ordinance focus on new construction in historic or archaeologically sensitive 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 and prehistory do the existing historical resources reflect?
- In addition to historic residential buildings, neighborhoods and districts, are there also historic business or industrial resources which need consideration and protection?
-

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?
- Where there are known archaeological sites or where there is likelihood for archeological resources to be present, are there provisions for identifying and evaluating such resources, developing treatment plans and developing and enforcing mitigation measures?

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

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.

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

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,

“structures preservation” of historic resources surveys. Some communities establish a list of
¹⁰ The Eureka, California, ordinance also provides several
 (See examples of the following) proactive powers that may be given to a preservation commission

As a condition of the proposed historic preservation ordinance, the City of Eureka, California, has established a list of historic resources that are subject to the ordinance. The ordinance also provides for the establishment of a historic preservation commission, which will be responsible for the review and approval of historic preservation projects. The ordinance also provides for the establishment of a historic preservation fund, which will be used to support the work of the historic preservation commission.

Historic resources preservation ordinance, which will be responsible for the review and approval of historic preservation projects. The ordinance also provides for the establishment of a historic preservation fund, which will be used to support the work of the historic preservation commission.

¹¹ and even interiors that are visible to the public. The City of Berkeley, for example, grants its preservation commission the ability to

¹² In the City of Davis, the Historic Resources Commission is empowered to provide
¹³

the historic resources preservation ordinance, which will be responsible for the review and approval of historic preservation projects. The ordinance also provides for the establishment of a historic preservation fund, which will be used to support the work of the historic preservation commission.

CALIFORNIA CODE EXCERPTS: SCOPE OF POWERS

CITY OF DAVIS Section 40.23.050 Powers and Duties.

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...”).

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).

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;
- 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

- 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;
- N. 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

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).

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.

- 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

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).

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 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 DESIGNATING 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 archaeological, historical or architectural significance? Who should receive notice of proposed historic designations? This section discusses the basic issues regarding surveys and studies to identify historic resources for planning as well as designation purposes, designation procedures and criteria. Other related topics that are covered include owner consent; designation of interiors; and alternatives to designation, such as conservation districts.

SURVEYS AND STUDIES

The most effective preservation ordinances are supported by thorough, methodical studies and surveys of the community's archaeological and historic resources. 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 provide information for a variety of local government purposes. They 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, heritage tourism initiatives, pre-disaster mitigation plans and incentives. By making information available early in the project planning process, such surveys help the review process to operate more efficiently.

Resources of potential historical significance should be surveyed and the archaeological, 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 resource is arbitrary and capricious.

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.¹⁷

Using the survey as a guide, the community then should choose carefully those individual resources, neighborhoods or districts 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.¹⁸

Once a community has completed its initial survey and designated landmarks and districts, it should ensure that the survey is periodically reviewed and updated. Resources 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 survey be “periodically” updated.¹⁹

It takes time to gather essential documentation, develop historic contexts and complete survey 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.²⁰

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

¹⁷ Burbank, California, Municipal Code, § 31-928(a)(1).

¹⁸ *South of Second Associates v. Georgetown*, 580 P.2d 807 (Colo. 1978).

¹⁹ County of Ventura, California, Code of Ordinances, § 1364-11 (Surveys).

²⁰ *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 preservation plan).

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 an individual building, structure, site 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.²¹ 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.

CRITERIA FOR DESIGNATING HISTORICAL RESOURCES

The goal of a comprehensive preservation program should be to consider the full range of resources which represent the community's history including historic and prehistoric archaeological resources and cultural landscapes as well as the built environment. Historic signage and streetscapes may also warrant consideration and protection. 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.²² 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

²¹ 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 over inclusive list... never, in any way, intended to constitute a final determination" as to actual historic value).

²² For a general discussion of basic survey and designation standards in California, see the seminal case of *Bohannon 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.

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, 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*,²³ 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,

²³ 554 S.W.2d 924 (Tex. 1977).

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.²⁴

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.”

²⁴ 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 vagueness within local ordinances).

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.²⁵

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."²⁶

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

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.²⁷

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.²⁸

²⁵ *Society for Ethical Culture v. Spatt*, 415 N.E.2d 922 (N.Y. 1980).

²⁶ *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

²⁷ *Coscan Washington, Inc. v. Maryland-National Capital Park & Plan. Comm'n*, 590 A.2d 1080 (Md. App. 1991).

²⁸ See, *Victorian Realty group v. City of Nashua*, 534 A.2d 381 (N.H. 1987)

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.²⁹

Unlike, for example, state code provisions regarding subdivision and annexation,³⁰ 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 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.).³¹

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.³² There are several pitfalls, however, that review bodies should avoid. In

²⁹ 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).

³⁰ 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).

³¹ *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).

³² See generally, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (discussing due process and the

and the results of the analysis of the data were applied to the design of the study.

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

³³ 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.

- 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.³⁴ 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).³⁵ 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 historical resources and develop a plan regarding their preservation and use. The local owner consent provision was ruled illegal because it subordinated all historical

³⁴ 16 U.S.C. 470a(a)(6) (2001).

³⁵ *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).

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.³⁶

³⁶ 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.³⁷

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...³⁸

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 9.36.100.³⁹

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...⁴⁰

³⁷ *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).

³⁸ Pasadena, California, Code of Ordinances, § 2.46.150; *see also*, Berkeley, California, Code of Ordinances, § 3.24.100(B)(1).

³⁹ Santa Monica, California, Code of Ordinances, § 9.36.110.

⁴⁰ 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").

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 "structures" or "buildings."⁴¹ The reasoning in *Samerica Corp. v. City of Philadelphia*⁴² 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*,⁴³ 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.)⁴⁴

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

⁴¹ 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).

⁴² 558 A.2d 155 (Pa. App. 1985).

⁴³ 634 F. Supp. 86 (D.D.C. 1986).

⁴⁴ *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).

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 preservation law be observed.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.

⁴⁵ *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).

⁴⁶ *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).

⁴⁷ Berkeley, California, Code of Ordinances, § 3.24.320; *see also*, § 3.24.100(B) (review for publicly owned property).

(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.⁴⁸

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.⁴⁹ 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.

⁴⁸ Sacramento, California, Code of Ordinances, § 32.05.512 (City Projects).

⁴⁹ U.S. Constitution, Article VI, cl. 2.

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 1996,⁵⁰ which is intended to reduce various types of barriers and introduce more competition into the telecommunications industry. Section 704 of the Act⁵¹ expresses federal intent regarding land-use regulation. Preemption of local zoning and other land-use controls is of a limited nature.⁵² 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,”⁵³ and, secondly, the requirement that “substantial evidence” in a written record must accompany a decision to deny a permit for a telecommunication facility.⁵⁴

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,⁵⁵ yet reasonable regulations that do not effectively prohibit the provision of wireless services will be upheld.⁵⁶ 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.⁵⁷

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

⁵⁰ Pub. L. 104-104, 110 Stat. 56 (1996).

⁵¹ Codified at 47 U.S.C. § 332(c).

⁵² 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.”)

⁵³ 47 U.S.C. § 332(c)(7)(B)(i)(II).

⁵⁴ 47 U.S.C. § 332(c)(7)(B)(iii).

⁵⁵ *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).

⁵⁶ Brian R. Manuel, “Protecting Historic Landscapes Against the Proliferation of Cell Towers,” 19 Preservation L. Rep. 1001, 1028-30 (2000).

⁵⁷ *Omnipoint Communications Enterprises, L.P. v. Warrington Township*, 63 F.Supp.2d 658 (E.D. Pa. 1999).

review.⁵⁸ 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 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. Constitution⁵⁹ and analogous provisions of state constitutions.⁶⁰ 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.⁶¹ Given the contrast of settled legal authority for local governments to regulate

⁵⁸ Tallahassee, Florida, Telecommunication Ordinance, Chapter 27, § 18.7.

⁵⁹ U.S. Constitution, Amendment I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁶⁰ See, California Constitution, Article I, Section 4 (Establishment Clause and No Preference Provision); California Constitution, Article XVI, Section 5 (government may not aid religion).

⁶¹ 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

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.

FEDERAL LEGAL BACKGROUND

In 2000, the U.S. Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),⁶² 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.”⁶³ 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.⁶⁴

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.⁶⁵ 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

[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).

⁶² Pub. L. 106-274; 114 Stat. 803, 42 U.S.C. § 2000cc, *et seq.*

⁶³ 146 Cong. Rec. S7774, 7776 (daily ed., July 27, 2000).

⁶⁴ See, *Rectors, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990).

⁶⁵ “Congress Enacts Religious Land Use Law,” 19 Preservation L. Rep. 1111, 1120, 1121 (2000).

within a jurisdiction.⁶⁶ 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.

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.⁶⁷

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

⁶⁶ *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).

⁶⁷ For information on current cases, presented by an organization supporting RLUIPA, see <http://www.rluipa.com/cases/>.

Constitutions,⁶⁸ 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.”⁶⁹

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.⁷⁰ Though condemnation power is not commonly contemplated within the scope of an historic preservation ordinance, it is a legally acceptable strategy to protect historical resources⁷¹ and the

⁶⁸ *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.

⁶⁹ *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.

⁷⁰ 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).

⁷¹ 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).

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 rather than the historic fabric 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 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.⁷²

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.⁷³ The purpose and intent statement of the Alhambra Corridor area, at Chapter 17.104.010 of the City code is excerpted below.

⁷² Fresno, California, Code of Ordinances, § 12-242.

⁷³ Sacramento, California, Code of Ordinances, § 17.92, et seq. (Special Planning Districts).

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 use 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:

- 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 ACTIONS SUBJECT TO REVIEW

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 (approvals for these actions are usually called *Certificates of Appropriateness* or COAs.) Applications to demolish historical resources 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.⁷⁴

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.

⁷⁴ 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.

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 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.⁷⁵ The language of the Davis code is typical of ordinances that maintain a broad standard of review:

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.⁷⁶

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.⁷⁷ (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.⁷⁸

⁷⁵ 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 category for structures of merit).

⁷⁶ Davis, California, Zoning Code, § 29-145.13 (Alteration Permit Standards of Review).

⁷⁷ San Diego, California, Municipal Code, § 143.0220(a).

⁷⁸ Santa Monica, California, Code of Ordinances, § 9.36.140(e)(1).

PROCEDURES FOR REVIEWING CERTIFICATES OF APPROPRIATENESS (COAs)

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 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.⁷⁹

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.⁸⁰

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

⁷⁹ 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).

⁸⁰ Glendale, California, Code of Ordinances, § 15.20.080(A) (Permit required for demolition, removal or major alterations of historical resources).

separate procedure for demolition (See annex Santa Cruz also has developed a

~~REDACTED~~

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.
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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.⁸¹

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.⁸²

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.

⁸¹ Danville, California, Code of Ordinances, § 32-72.16 (Review and determination).

⁸² Palo Alto, California, Code of Ordinances, § 16.49.134.

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 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 40.37.⁸³

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

⁸³ Davis, California, Code of Ordinances, § 40.23.080(B) (Alteration Permits).

regulations were applied.⁸⁴ 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.⁸⁵ 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.⁸⁶

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.⁸⁷
- Regulatory takings are not found in reference to highest and best use, nor does a substantial diminution in value necessarily result in a taking.⁸⁸ 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.⁸⁹

⁸⁴ *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992).

⁸⁵ *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).

⁸⁶ *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).

⁸⁷ *Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 848-49 (listing on the National Register of Historic Places is not a taking).

⁸⁸ *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).

⁸⁹ *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).

- A broad range of evidence and legal theories may be used to construct and defend a takings claim.⁹⁰

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.⁹¹ 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 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)

⁹⁰ *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).

⁹¹ 438 U.S. 104 (1978).

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,⁹² 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)⁹³ 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 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.⁹⁴ 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.

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.

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

⁹² See, San Francisco, California, Planning Code § 128(a).

⁹³ Cal. Pub. Res. Code § 21000, *et seq.*

⁹⁴ CEQA Technical Advice Series, CEQA and Historic Resources: CEQA Provisions, *available at* http://ceres.ca.gov/topic/env_law/ceqa/more/tas/page3.html.

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...⁹⁵

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.⁹⁶

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.⁹⁷

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.

⁹⁵ Fresno, California, Code of Ordinances § 13-412 (Historic Resource Permit Review Process).

⁹⁶ Davis, California, Code of Ordinances § 29.145.20 (Time Extensions).

⁹⁷ 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).

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. ~~provisions that allow a local authority to serve historic preservation goals~~ under CEQA is given

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 allowing a court time to rule on issue of whether CEQA review is required prior to issuance of the demolition permit.⁹⁸

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.⁹⁹ 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,¹⁰⁰ or where a proposed impact to an historic resource is part of a larger project that is discretionary.¹⁰¹ 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.¹⁰²

⁹⁸ 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).

⁹⁹ *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 Cal.Rptr. 542 (1981)].

¹⁰⁰ *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App.3d 203, [174 Cal.Rptr. 784,] (1981).

¹⁰¹ *Orinda Ass'n v. Board of Supervisors*, 182 Cal.App.3d 1145, 1171-72, [227 Cal.Rptr. 688,] (1986).

¹⁰² *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).

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:¹⁰³

- **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 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.

¹⁰³ Cal. Code Regs., tit. 14, § 15000, *et seq.*

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.¹⁰⁴

A Negative Declaration¹⁰⁵ 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

¹⁰⁴ *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).

¹⁰⁵ Cal. Pub. Res. Code §§ 21064, 21080(c)(1).

have substantial adverse change on the historical resource.¹⁰⁶ A Mitigated Negative Declaration¹⁰⁷ 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).¹⁰⁸ 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 effect¹⁰⁹ 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.¹¹⁰

In general, the EIR “must describe all reasonable alternatives, including those capable of reducing or eliminating environmental effects.”¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ As a result, a project may be sent “back to the drawing board” by a court even after complying with all EIR requirements and

¹⁰⁶ 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 have a Negative Declaration).

¹⁰⁷ Cal. Pub. Res. Code §§ 21064, 21080(c)(2).

¹⁰⁸ Cal. Pub. Res. Code §§ 21061, 21100, 21100.1 (definition and contents of EIRs), 21155 (EIR process).

¹⁰⁹ See, Cal. Pub. Res. Code § 21080(e).

¹¹⁰ *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).

¹¹¹ *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).

¹¹² *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).

¹¹³ *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).

¹¹⁴ Cal. Pub. Res. Code §§ 21002, 21002.1

procedures.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

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.¹¹⁸

¹¹⁵ 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 infeasibility of mitigation).

¹¹⁶ 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).

¹¹⁷ 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).

¹¹⁸ *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).

SECTION 6: CONSIDERATION OF ECONOMIC EFFECTS

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.

ECONOMIC INCENTIVES

One of the most important forms of economic incentives for preservation is a state law (the Mills Act, California Govt. Code §§ 50280, et seq.) that allows owners of certain historic properties 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.¹¹⁹

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.¹²⁰

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;

¹¹⁹ 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."

¹²⁰ Glendale, California, Code of Ordinances, § 15.20.070 (Incentive program for historic resources).

- 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;
- m. Such other incentives as Town Council may from time-to-time implement.

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The County of Santa Cruz provides a flexible approach in its zoning code that encourages the continued use of nonconforming historic properties.

The County of Santa Cruz's 2004 code amendments provide a series of indirect incentives to encourage the continued use of historic properties:

- a. State Historic Building Code. . . .
- b. Parking. The parking requirements of Section 13.10.550 et seq., may be modified in connection with an application involving an historic resource. . . .
- c. Non-conforming structures. The ordinary maintenance and repair, structural enlargement, extension, reconstruction or alteration of a non-conforming historic resource shall be allowed according to Section 13.10.265(d).
- d. Floor Area Ratio. For development on properties where an historic resource exists, the Floor Area Ratio shall be 0.6:1.
- e. Lot Coverage. For development on properties where an historic resource exists, maximum lot coverage shall be 1.125 times the standard lot coverage for the particular zone district. 122

Some communities, including San Juan Bautista, have adopted the Secretary of the Interior's Standards for the Treatment of Historic Properties as the threshold to invoke exceptions to existing zoning codes, making the use of the Standards an indirect economic incentive.

The following preservation incentives shall be made available to properties listed on the City of San Juan Bautista Register of Historic Resources that undergo maintenance or alteration consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

¹²¹ Danville, California, Code of Ordinances, § 32-72.5 (Incentives).

¹²² Santa Cruz County, California, Code of Ordinances, § 16.42.090 (Incentives).

- C. The following exceptions to the underlying zoning standards, upon grant of a Use Permit and Site Plan and a Design Review by Planning Commission:
- a. Multi-family residential uses in a single-family residential district
 - b. Commercial uses in a multi-family district
 - c. Industrial uses in a commercial district
 - d. Guest Houses on lots less than the minimum required lot size for the R-1 and R-2 zoning districts.¹²³

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.¹²⁴

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 providing for economic assistance, 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. Applications for inappropriate work on landmark properties through the certificate of appropriateness process can become contentious and controversial. Many people have the perception that historic preservation is necessarily expensive or difficult. Others lack the knowledge or skills to carry out sensitive maintenance or rehabilitation work and rely on quick fixes from the local building supply store. Many people are unaware of the history or significance of their neighborhood or town. 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 inform homeowners, developers, and others about why historic resources are significant in the community, and what steps the city is taking to protect those resources. Education efforts 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. Some communities, including the City of Ontario, take the time to explain to property owners the significance of their neighborhood, assist owners in identifying

¹²³ San Juan Bautista, California, Code of Ordinances, Ch. 13, § 11.13.100 (Incentives)

¹²⁴

and locating appropriate building materials such as siding and windows, and then recognize those property owners who carry out good projects.

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.

ECONOMIC HARDSHIP

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.”¹²⁵ 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 should play no 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*,¹²⁶ 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.

¹²⁵ U.S. Constitution, Amendment V (“nor shall private property be taken for public use, without just compensation”).

¹²⁶ 438 U.S. 104 (1978).

Washington D.C. Code Ann. § 5-1001-1015.

but most jurisdictions, courts have been reluctant to establish administrative procedures to bring

The Washington D.C. preservation ordinance¹²⁷ demonstrates just how effective this

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OWNER'S BONA FIDE ATTEMPT TO RENT OR SELL PROPERTY

Washington D.C. Code Ann. § 5-1001-1015.

...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.¹²⁹

¹²⁷ D.C. Code Ann. §§ 5-1001-1015.

¹²⁸ 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).

¹²⁹ 360 A.2d 257 (Pa. 1976). See also, *Maier 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).

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.

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.¹³⁰

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*¹³¹ 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*,¹³² 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.¹³³ The court noted that, in making the

¹³⁰ See, *Mitchell v. County of Orange*, 165 Cal.App.3d 1185, 211 Cal.Rptr. 563 (Cal. App. 1985).

¹³¹ 599 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).

¹³² 106 Cal.App.3d 893, 165 Cal.Rptr. 401 (Cal. App. 1980).

¹³³ *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (Forest City*

~~On this date, the applicant has provided the following information to the City of San Francisco, California:~~

(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.

~~On this date, the applicant has provided the following information to the City of San Francisco, California:~~

CERTIFICATES OF ECONOMIC HARDSHIP

~~REPEATED: THE FOLLOWING INFORMATION IS NOT A SUBSTITUTE FOR THE CITY OF SAN FRANCISCO, CALIFORNIA, HISTORIC PRESERVATION ORDINANCES, AND THE CITY OF SAN FRANCISCO, CALIFORNIA, HISTORIC PRESERVATION COMMISSION'S DECISIONS.~~

Development, Inc.), Case No. A095827, California Ct. App., First District, Division Three (decided Sept. 30, 2002, scheduled for publication in Cal. App. 4th).

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.¹³⁴

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.).

¹³⁴ *Phillips v. Board of Zoning Adjustments of City of New Orleans*, 197 So.2d 916, 916-20 (La. 1967).

**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.

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.¹³⁵ 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.

¹³⁵ 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.¹³⁶

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.¹³⁷

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.”¹³⁸ 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.

¹³⁶ Sacramento, California, Landmarks Preservation Ordinance, § 15.124.360.

¹³⁷ San Francisco, California, Planning Code, § 1004.5.

¹³⁸ Los Angeles, California, Municipal Code, § 12.20.3(J).

On the day of the appeal, the City Clerk shall provide a copy of the appeal to the City Council.

of the City Council Commission, by the day of the appeal, the City Clerk shall provide a copy of the appeal to the City Council.

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Any appeal of a decision of the City Council shall be filed with the City Clerk no later than 10 business days after the action of the Board.

On the day of the appeal, the City Clerk shall provide a copy of the appeal to the City Council.

The action of the City Council shall be filed with the City Clerk no later than 10 business days after the action of the Board.

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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, 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

Any person who violates any provision of this article shall be liable for a civil penalty of up to \$10,000 for each violation. The penalty shall be assessed by the Commission or Council, as provided in this article, and shall be payable to the City of San Francisco.

REMEDIES FOR NONCOMPLIANCE

Any person who violates any provision of this article shall be liable for a civil penalty of up to \$10,000 for each violation. The penalty shall be assessed by the Commission or Council, as provided in this article, and shall be payable to the City of San Francisco.

Fines

Any person who violates any provision of this article shall be liable for a civil penalty of up to \$10,000 for each violation. The penalty shall be assessed by the Commission or Council, as provided in this article, and shall be payable to the City of San Francisco.

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.¹⁴¹

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.”¹⁴²

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

¹⁴¹ Fresno, California, Code of Ordinances § 13.423 (Civil and Criminal Penalties).

¹⁴² 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 issued by the Advisory Board or comply with a condition of approval of any certificate or permit issued 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.¹⁴³

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 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.¹⁴⁴

¹⁴³ West Hollywood, California, Code of Ordinances, § 19.58.180(B).

¹⁴⁴ See, *City of Dayton v. Carroll*, 515 S.E.2d 144 (Ga. 1999).

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 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.¹⁴⁵

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.¹⁴⁶

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.

¹⁴⁵ Section 16.49.090(a)(4)

¹⁴⁶ San Clemente, California, Code of Ordinances, § 17.16.170(F) (Penalty for Demolition of Historic Structures).

- 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.

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.¹⁴⁷

¹⁴⁷ 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,

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 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.¹⁴⁸

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

California, Code of Ordinances, § 3.24.290.

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

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*,¹⁴⁹ 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.

The Court explained that there is sufficient probable 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

¹⁴⁹ 387 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 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.¹⁵⁰

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.

- 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

¹⁵⁰ *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).

Resource in order that such Resource may be preserved in accordance with this article.¹⁵¹

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; 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.¹⁵²

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.

¹⁵¹ Fresno, California, Code of Ordinances, § 13.421 (Minimum Maintenance).

¹⁵² 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).

DEVELOPMENT MORATORIA AND EMERGENCY DEMOLITION BANS

Preservation Commission, and the City of Redondo Beach, California, Code of Ordinances, § 10.4.305 (Delay of work pending hearing).

...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...¹⁵³

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 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.¹⁵⁴

In California, municipal government moratoria on development permits are allowed under the authority of Government Code Section 65858.¹⁵⁵ 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.¹⁵⁶

In jurisdictions where demolitions are ministerial, situations continue to arise in which an owner is able to secure a permit to demolish a potentially significant historic building. 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 as a historic district. Some owners, in an attempt to circumvent anticipated 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

¹⁵³ Palo Alto, California, Code of Ordinances, § 16.49.80.

¹⁵⁴ Redondo Beach, California, Code of Ordinances, § 10.4.305 (Delay of work pending hearing).

¹⁵⁵ See, *Bank of the Orient v. Town of Tiburon*, 220 Cal.App.3d 992 [269 Cal.Rptr. 690] (Cal. App. 1990).

¹⁵⁶ *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.

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.¹⁵⁷

Invoking emergency demolition bans raises two major legal issues, involving procedural due process and vested rights. While the constitutional guarantee of due process 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.¹⁵⁸

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.

¹⁵⁷ Davis, California, Code of Ordinances, § 29-145.11 (Designation Procedures – Work Moratorium).

¹⁵⁸ See, *Selinger v. City Council*, 216 Cal.App.3d 259, 270-71 [216 Cal.Rptr. 499] (Cal. App. 1989).

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 or will 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.

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 AND SEVERABILITY

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 (but are not limited to):

- “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.

CALIFORNIA CODE EXCERPT:
DEFINITIONS

City of Danville
32-72.2 Definitions.

As used in this chapter, the following words and phrases have the following meanings:

Alteration shall mean any demolition, exterior change or modification to a historically significant resource or heritage resource or of a contributing property located within an historic district including, but not limited to:

1. Exterior changes to or modifications of structure, architectural details or visual characteristics including paint color and surface texture;
2. Grading or surface paving;
3. Construction of new structures;
4. Cutting or removal of trees and other natural features;
5. Disturbance of archaeological sites or areas; and
6. The placement or removal of any exterior objects including signs, plaques, light fixtures, street furniture, walls, fences, steps, plantings and landscape accessories that affect the exterior visual qualities of the property.

Architectural feature shall mean the architectural elements embodying style, design, general arrangements and components of the exterior of any building or structure, including, but not limited to, the kind, color and texture of the building materials and the style and type of all windows, doors, lights, signs and other fixtures.

Certificate of Approval shall mean a certificate issued pursuant to this chapter approving any proposed alteration to a historically significant resource, a heritage resource or a contributing property located within a historic district.

Contributing property shall mean a building, structure, site, feature or object within an historic district that embodies the significant physical characteristics and features, or adds to the historical associations, historic architectural qualities or archaeological values identified for the historic district, and was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period.

Design guidelines shall mean the “Town of Danville Design Guidelines for Heritage Resources” adopted by the Town and as may be amended from time to time.

Heritage resource shall mean a structure, site, improvement or natural feature that has been designated for heritage preservation pursuant to Section 32-72.6. Heritage Resource Commission (HRC) shall mean the Town’s Heritage Resource Commission established pursuant to the provisions of this Code...

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.

Another way to eliminate potential confusion is to use terms and definitions shared by the National Register, the California Register, and the CEQA guidelines. These definitions are commonly understood and have withstood the test of time and judicial challenges. When the ordinance uses the same terms and definitions as used in CEQA, it facilitates environmental reviews and promotes better understanding among decision makers, consultants, and members of the community.

SEVERABILITY

It is important to include a severability statement to protect the ordinance as a whole in case a particular section is later determined to be unconstitutional or void. Danville, Fresno, and Davis all include the following language in their ordinances:

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.

CONCLUSION

Because historic preservation takes place at the local level, the ordinance is perhaps the most important tool in developing and implementing a successful preservation program. Because communities have different preservation goals and issues, no single “model” ordinance exists. However, as demonstrated throughout this manual, there are key issues that all jurisdictions will want to address.

Below is a checklist which can be used to analyze existing or draft ordinances. Note that in some communities, key elements of the preservation process may be found in other local ordinances and regulations.

ORDINANCE REVIEW CHECKLIST

JURISDICTION

REVIEWER

DATE OF REVIEW	Comments
STATEMENT OF PURPOSE/ GOALS	☐
Legitimate Purpose of Government	☐
Resource types to be protected	☐
Survey & inventory	☐
How to protect	☐
ENABLING AUTHORITY – LEGAL BASIS	☐
ESTABLISH PRESERVATION COMMISSION	☐
Powers & Authority	☐
Existing zoning and land use regulations/tools	☐
Level of authority	☐
Monitoring	☐
Enforcement	☐
Duties	☐
Qualifications of commissioners	☐
Terms of service	☐
Relationship to other Loc Gov. LUP entities	☐
PROCEDURES & CRITERIA FOR DESIGNATION	☐
Property types to be protected	☐
Criteria for eligibility	☐
Interiors	☐
Who may apply/nominate	☐
Application/nomination format	☐
Owner Consent/objection	☐
Public notice	☐
Fees	☐
Alternatives to designation	☐

Recordation	☐
PROCEDURES & CRITERIA FOR REVIEWABLE ACTIONS	☐
Actions Subject to Review Defined	☐
Demolition/Major alteration	☐
New construction in historic districts or areas	☐
Design review	☐
Cumulative effects	☐
Hazardous/Unsafe Conditions	☐
Review Authority (Binding or Advisory)	☐
Legal Effects of Review	☐
Process	☐
Fees	☐
CONSIDERATION OF ECONOMIC EFFECTS	☐
Incentives	☐
Extreme economic hardship	☐
Provisions to prevent mothballing	☐
Inverse condemnation	☐
APPEAL PROCEDURE	☐
Administrative resolution of contested decisions	☐
ENFORCEMENT	☐
How to ensure compliance	☐
Required Maintenance	☐
Cures/penalties for Demolition by Neglect	☐
Penalties	☐
Recordation	☐
DEFINITIONS – KEY TERMS	☐
SEVERABILITY	☐
OTHER	☐
Preservation Elements in Other Ordinances?	☐

EXHIBIT B

Requirements

(Excerpt from Appendix G, Certified Local Government Application and Procedures, August 1999, pp 41-47.)

Local governments may be certified to participate in the CLG program by complying with the following requirements:

- I Enforce appropriate state or local legislation for the designation and protection of historic properties:
 - A. State enabling legislation provides for local jurisdictions to enact appropriate historic preservation legislation. California Government Code Sections 65850, 25373, and 37361 enable city and county legislative bodies to provide 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.”
 - B. Local governments must adopt local historic preservation ordinances with provisions to enforce the designation and protection of historic and archeological resources.
 - C. The local legislation shall be consistent with the intent and purpose of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470).
 - D. The CLG will adopt a historic preservation plan or a historic preservation element for the local jurisdiction's General Plan, as authorized by the California Government Code, prior to or upon applying for a CLG grant.
 - E. The CLG commission will participate in the environmental review of specific federally sponsored projects, such as community development programs involving HUD Block Grant funds unless it is determined by OHP that the necessary expertise is not available to the local government. The CLG will establish programmatic agreements with the state agreeing to ensure compliance with Section 106 provisions of the NHPA.
 - F. The CLG commission will participate in the environment review of local projects in accordance with the requirements under the California Environmental Quality Act (CEQA). The commission may review and comment on permit actions affecting significant listed historic properties and other resources eligible for listing, in accordance with local ordinance requirements and with CEQA. Procedural guidelines should include standards for demolition stays, design review criteria, anti-neglect requirements, and appeal strategies.
- II Establish an adequate and qualified historic preservation review commission by local law:
 - A. The commission shall include a minimum membership of five (5) individuals with all members having demonstrated interest, competence, or knowledge in historic preservation.
 - B. At least two (2) Commission members are encouraged to be appointed from among professionals in the disciplines of history, architecture, architectural

- history, planning, pre-historic and historic archeology, 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.
- C. A local government may be certified without the minimum number or types of disciplines established in state procedures if it can be demonstrated to the satisfaction of the 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.
 - D. Commission members shall be appointed by the chief elected local official, city council, or board of supervisors consistent with the provisions of the preservation ordinance. The appointing authority shall make interim appointments to fill unexpired terms in the event of vacancies occurring during the term of members of the commission. The appointing authority shall also act within sixty (60) days to fill a vacancy. Terms of office of the commission members shall be according to the local preservation ordinance.
 - E. The commission shall meet at least four times a year, with meetings held in a public place, advertised in advance, and open to the public, pursuant to the Ralph M. Brown Act (G.C. Section 54950 et seq.) for open meetings. Written minutes of commission meetings shall be kept on file, available for public inspection, and submitted to the state as a part of the CLG Annual Report.
 - F. Each commission member is required to attend at least one informational or educational meeting, seminar, workshop, or conference per year that pertains directly to the work and functions of the commission and would be approvable by the state. The CLG Regional Workshops sponsored by the OHP are important sources of information. The annual State Historic Preservation Conference generally provides special sessions devoted to the issues, objectives, and responsibilities of commissions. Commissions may also bring in professionals to provide training on site.
 - G. An annual report of the activities of the commission shall be submitted to the state at the end of each calendar year. The reports shall include, but not be limited to, such information as narrative summary of accomplishments, summaries of new and corrected survey activities, number of properties designated under local ordinance in relation to inventory for community, summaries of National Register applications reviewed, summaries of historical contexts prepared, number of federal tax certifications reviewed, number of properties on which design review was held, number of properties on which environmental project reviews were conducted, property owners of Mills Act contracts approved, summarization of local preservation activities, list of local landmark designations, description of public education activities, lists of commission members and resumes, list of staff and resumes, detailed listing of commission and staff training received, commission attendance

records, summary of changes in preservation laws, summary of adoption or updates of historic preservation plan or historic preservation element of your community's General Plan, commission meeting minutes and agendas, and other pertinent activities performed by the commission.

III Maintain a system for the survey and inventory of historic properties:

The CLG shall be responsible for organizing, developing, and administering an inventory of cultural resources within the entire spatial jurisdiction of the CLG.

- A. The commission shall develop procedures for conducting an inventory of culture resources. Survey activities shall be coordinated with and complementary to the state program to ensure that survey results produced by the CLG will be readily integrated into the statewide comprehensive historic preservation planning process.
 1. The CLG shall be responsible for overseeing the compiling, recording, and updating of inventory information on cultural resources within its jurisdiction. The information shall be based on comprehensive surveys conducted in conformance with state survey standards and procedures. Surveys completed prior to the certification of a local government may be re-evaluated in accordance with state standards and may be submitted for inclusion in the State database.
 2. As part of any ongoing survey effort, procedural requirements must allow for periodic update of survey results as buildings gain maturity and as new areas are incorporated or annexed by the CLG.
 3. The commission must adopt state guidelines for conducting its inventory of historic properties. State-approved inventory forms (DPR-523, A-L) and the OHP's Instructions For Recording Historical Resources shall be used to facilitate integration into the state electronic data system and for statewide comprehensive historic preservation planning purposes. Dimitri software is available for the DPR 523 forms.
 4. Standards for the evaluation of properties must be consistent with the National Register of Historic Places criteria.
- A. The commission shall establish internal procedures to facilitate the use of survey results in the planning process by the CLG officials and departments. The commission shall submit survey results to the local government for adoption, then forward to OHP. Copies of the survey should be on deposit at the local planning department, building and safety office, public works department, and redevelopment agency. Libraries, colleges, and historical societies should also receive copies. OHP will make copies available for the appropriate "California Historical Resources Information System" regional center. See IV(A)(2) below for public access requirements.

IV Provide for adequate public participation in the local historic preservation program:

- A The CLG shall provide opportunities for public participation in all responsibilities delegated to the CLG, in accordance with appropriate regulations, standards, and guidelines.

1. Public participation shall be fully encouraged at local commission meetings. Commission meetings shall be open to the public, with published agenda and minutes in accordance with the Ralph M. Brown Act (G.C. Section 54950 et seq.) for open meetings. The published agenda shall be mailed in advance of meetings to individuals and citizen organizations interested in the commission's activities.
 2. Public participation shall be fully encouraged in the performance of the historic survey program at all levels of responsibility to identify and inventory significant cultural resources in the jurisdiction of the CLG. The public can serve as volunteers to assist in the survey effort. Survey results shall be of public record and on file at a public institution, except in the case of sensitive resources, e.g., archeological sites subject to vandalism.
 3. Public participation shall be fully encouraged in the nomination process for the National Register of Historic Places program. The CLG shall invite comments from the general public regarding National Register nominations.
 4. Public participation shall be fully encouraged in all public hearings on projects related to CEQA and Section 106 processes.
- V Satisfactorily perform the responsibilities delegated to the CLG:
- A. The CLG shall prepare a comprehensive local historic preservation plan which would identify preservation missions, goals, and priorities. The plan would also establish preservation strategies, programs, and time schedules.
 - B. The CLG will participate in the review and comment on historic preservation certification applications for tax incentives. The CLG and state may establish procedures for implementation of the investment tax credit program at the local level in conformance with the Secretary of the Interior's Standards for Historic Preservation.
 - C. Each CLG must have a local historic preservation plan prior to or upon becoming a CLG before any additional grant applications will be considered. The state shall monitor and evaluate the performance of the CLG for consistency with the identification, evaluation, and preservation priorities of the comprehensive state historic preservation planning process.
 1. Annual Review of CLGs:
The State shall conduct an annual review of CLGs to assure that each government continues to meet the minimal requirements and is satisfactorily performing its responsibilities. As part of this review, the state shall examine the annual reports submitted by the CLGs, records of the administration of funds allocated from the HPF, and other documents as necessary. The CLG shall make these records available to the state. A more thorough review and site visit to the Certified Local Government will occur at least once every three (3) years.
 2. Procedures for Decertification:
If the state evaluation indicates that the CLG no longer meets the minimal requirements or that in any other way a CLG's performance is not

- VI The CLG shall assume certain responsibilities for reviewing and recommending properties within its jurisdiction to the National Register of Historic Places.
 - A. The SHPO shall have the sole responsibility of nominating National Register properties directly to the Secretary of the Interior (Secretary).
 - B. The CLG shall establish local procedures for the National Register nomination process consistent with the requirements in the NHPA, Section 101(c)(2).
 - 1. Before a property within the jurisdiction of a CLG may be considered by the state to be nominated to the National Register, the state shall notify the owner, the applicable chief elected local official, and the local historic preservation commission. The commission, after reasonable opportunity for public comment, shall prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register. Within sixty (60) days of notice from the state, the chief elected local official shall transmit the report of the commission and his/her recommendation to the state. After receipt of such report and recommendation, or if no such report and recommendation are received within sixty (60) days, the state

VII By mutual written agreement with the local governing body, the state may delegate additional responsibilities to the CLG. Local governments may be certified to participate in specific program activities under Programmatic Agreements.

- A. The CLG may develop educational programs promoting historic preservation at the local level such as, but not limited to, sponsorship of preservation workshops, publication of preservation information, organizing preservation fairs, conducting walking tours, preparing preservation curricula for schools, etc.
- B. Commission members may act in an advisory capacity to other officials and departments within the local government and act as a liaison on behalf of the CLG to individuals and organizations concerned with historic preservation issues at the local level.
- C. The CLG may participate in the Mills Act program or other economic incentive programs to provide property-tax relief for owners of historic properties.
- D. The CLG may participate in the Marks Historical Rehabilitation Act for issuance of tax-exempt industrial development bonds, providing that the commission shall serve as a part of the required citizen advisory board.
- E. The CLG may assume certain responsibilities of recommending National Register of Historic Places properties, identified in the CLG jurisdiction, directly to the State Historical Resources Commission.
- F. By mutual written agreement with the local governing body, the state may delegate additional responsibilities to the CLG.



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139 S. Hudson Ave. Ste 200
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VIA E-MAIL

August 14, 2025

Historical Commission
City of Los Altos
1 N. San Antonio Rd
Los Altos, CA
Em: sgallegos@losaltosca.gov

RE: City of Los Altos – Proposed Mills Act Ordinance.

Dear Commissioners,

On behalf of Preservation Action League of Los Altos (“**PALLA**”), my Office is submitting these comments on the City of Los Altos’ (“**City**” or “**Lead Agency**”) proposed amendment for the City Municipal Code regarding the Mills Act, which will be discussed at the Historical Commission’s special meeting on August 18, 2025.

PALLA expressly reserves the right to supplement these comments at or prior to hearings on the proposed amendment, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Moreover, PALLA requests that the City provide notice for any and all events or hearings referring or related to the proposed amendments, as issued under the California Environmental Quality Act (“**CEQA**”), Cal Public Resources Code (“**PRC**”) § 21000 *et seq*, and the California Planning and Zoning Law (“**Planning and Zoning Law**”), Cal. Gov’t Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency’s governing body.

I. ADDITIONAL LANGUAGE SHOULD BE ADDED TO MATCH THE STATE LEVEL MILLS ACT

The proposed version of the Mills Act Ordinance does not fully encompass the version of the statute that exists on the state level. For instance, the definition of “Qualified Historical Property” is more limited in the proposed ordinance than in the Mills Act. Here, the proposed language includes the following:

"Qualified historical property" means a privately owned property, inclusive of the qualified historical improvements and any land on which the qualified historical improvements are located, which is not exempt from property taxation and which meets any one of the following criteria:

1. A property or structure listed individually in the National Register of Historic Places;
2. A property or structure listed individually in the California Register of Historical Resources;
3. A property or structure listed individually in the City of Los Altos' adopted Historical Resource Inventory;

(Proposed Mills Act Ordinance, 14.91.030 – Definitions.)

Yet, the Mills Act statute defines the term as follows:

“Qualified historical property” for purposes of this article, means privately owned property which is not exempt from property taxation and which meets either of the following:

- (a) Listed in the National Register of Historic Places or located in a registered historic district, as defined in Section 1.191-2(b) of Title 26 of the Code of Federal Regulations.
- (b) Listed in any state, city, county, or city and county official register of historical or architecturally significant sites, places, or landmarks.

(California Government Code § 50280.1.)

Here, the proposed ordinance lacks the inclusion of properties within a registered historic district or listed on any state, city, county, or city and county official register. Rather, the ordinance would restrict the properties to those solely on the National Register of Historic Places, the California Register of Historical Resources, and the City of Los Altos' adopted Historical Resource Inventory. Importantly, the City's own historic inventory was last updated thirteen years ago in 2012. Since then, many

properties have become eligible for inclusion on the inventory. By limiting the ordinance's reach, the ordinance arbitrarily limits the properties that may be considered for these contracts.

PALLA recommends the City revise the proposed ordinance to include the broader list of qualified properties included in the actual Statue. Further, PALLA recommends that the ordinance include a procedure for identifying and including properties in the City's historic resources inventory that have become eligible in the time following the last inventory update in 2012. Such a procedure would allow for continued application of Mills Act contracts despite any failure to timely revise and adopt an update to the historical resource inventory.

II. THE PROPOSED ORDINANCE DOES NOT ALLOW FOR SUFFICIENT PUBLIC PARTICIPATION

Certified Local Government Programs are required to provide for adequate public participation in their local historic preservation programs, including fully encouraging public participation at local historical commission meetings and all other public hearings. (Appendix G, Certified Local Government Application and Procedures.) The proposed Mills Act ordinance does not allow for public participation throughout much of the process. For instance, only the cancellation of historic property contracts would be required to go before the Historical Commission at a noticed public hearing. Yet, there are numerous other proposed procedures that would benefit from public participation including the initial review of application by the Historical Commission. As written, Section 14.91.090 only requires the Historical Commission to review and recommend the applications to City Council but does not require that said review occur at a public hearing. This is at odds with the requirement that the City Council's ultimate approval of the contracts must be at a publicly noticed hearing.

Additional areas where the Historical Commission should have input through a public hearing include decisions of nonrenewal of historic property contracts (Section 14.91.120) and amendment of historic property contracts (Section 14.91.130).

For decisions of nonrenewal, the Historical Commission is completely removed from any decision-making process. Whenever the request for nonrenewal comes from the City Council, the Historical Commission should be given the opportunity to evaluate the potential impacts on the historic property associated with the nonrenewal. While ultimate authority may still lay with the City Council, the Historical Commission and

the public should be given an opportunity to voice concerns surrounding any nonrenewal.

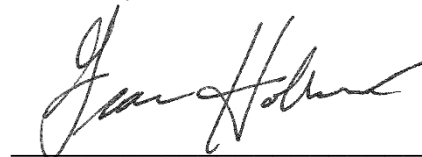
As for amendments to historic property contracts, the proposed procedure allows for a recommendation from the Historical Commission to the City Council but does not include any requirement that this recommendation comes from a publicly noticed hearing. As with the other highlighted provisions, the impacts of amendments to these historic property contracts should be presented before the public for input and a thorough analysis of any potential impacts associated with the changes.

Additionally, the proposed ordinance notes that any public meeting notices would be pursuant to Los Altos Municipal Code Section 14.01.130. However, PALLA would recommend providing a broader notice procedure than currently outlined in the municipal code. Public interest in historic properties around Los Altos is not limited by the 300-foot radius prescribed in the code usually applicable to development project approvals. Rather, the City should include a more inclusive notice procedure to ensure that anyone interested in the historic preservation of Los Altos would be given sufficient notice to participate in all the matters, as outlined above, at both the Historical Commission and City Council level.

III. CONCLUSION

PALLA requests that the City revise the proposed Mills Act ordinance to ensure properties are not arbitrarily removed from consideration and local engagement in decisions impacting historical resources is not arbitrarily limited. If the City has any questions or concerns, feel free to contact my Office.

Sincerely,

A handwritten signature in black ink, appearing to read "Grace M. Holbrook", written over a horizontal line.

Grace M. Holbrook

Attorneys for the Preservation Action League of Los Altos



mills act, item #3 august 18th meeting

From baerjc

Date Mon 8/18/2025 9:48 AM

To Public Comment - HC <HCpubliccomment@losaltosca.gov>

Commissioners-I have been asked to put together an comprehensive list the changes in Mills Act before you tonite which are not required by state law and those change which we think are appropriate to the Mills Act and Historic Preservation ordinance, which are likewise not precluded by state law. All of these changes were previously requested of city staff but none of them were made.

I would be happy to answer any questions you have about any of the specifics below, either prior to or at the meeting. Thank you.-j

Changes to Mills Act contract and requirements that are not required by state law

- Interior inspections are not required when interior is not part of Mills Act restrictions of what is to be preserved
14.91.050B5-Contrary to what is written, the State does not require interior inspections unless the interior is subject to preservation and restoration to the SOI standards. Note the word "as applicable". It is only applicable if the city is including Mills Act restrictions on the interior. Los Altos does not require this of any properties (other jurisdictions do) and therefore there is no need for interior inspections or photos in the contract (nor in the section about inspection). If the goal is to encourage historic preservation and Mills Act is a tool, this provision will put a serious damper on any homeowner's willingness to participate. If there are specific concerns about the internal framing or foundation, the City likely already has the ability to inspect based on health and safety.
- Independent appraisal of property not required and not needed by anyone 14.91.060B11-Strike the need for independent certified appraisal. There is absolutely no need for this to be done for any property under Mills Act.
- Interior inspections only if interior preservation part of scope of the actual Mills Act restrictions in the contract
14.91.060D-again no interior inspection unless the actual interior is included for historic preservation. Note the wording "as may be necessary to determine owners' compliance with the contract".
- 14.91.110A-no interior inspection-unless a specific problem identified and certainly no photos of interior.
- Contracts are for 10 yrs, adding a year annually. This is done so homeowners have certainty. Work plans can be changed but language allowing unlimited changes to contracts is not part of the state law
14.91.130A and C-telling a resident, who has spent \$3-6M and made a significant financial commitment upfront that their contract with the City can be amended by the City annually, with no restriction on what those changes are, is a disincentive for anyone to apply for Mills Act. It takes 15-30 years to pay off a mortgage and often 20-50 years or more to recoup via Mills Act the cost of renovation and ongoing maintenance of a historic home. This is a two-sided agreement and it needs to be fair to both sides. Allowing the City to make changes unilaterally violates the spirit of such an agreement.

Changes that should be made for clarity and reasonability and which do not run contrary to what is required by state law

- 14.90.040G-We ask that repeal may only be allowed if based on “material” new information, discovery of earlier “material” misinformation or “material” changes of original circumstances.....
- 14.90.050 -We need more and better examples of changes that do not require a Historic Alternation Permit as well as more and better examples of changes that do. It turns out re-roofing, relandscaping, repaving driveway or other hardscape requires prior city approval, which is not obvious from reading the rules.
- 14.91.040C-why July 1 as a cutoff? We understand that anything beyond July 1 might not be completed until after December 31, but not clear why this date is used, seems arbitrary and to the best of our knowledge not a state requirement. Any Mills Act contract signed before December 31 would make the property eligible for Mills Act tax reduction the following year, which is a reasonable request and consistent with goal of encouraging preservation where savings goes to the restoration work.
- 14.91.050B4—not at all clear that the actual contract should include a 10-year maintenance agreement; it should be an addendum that gets updated every 10 years. If the contract can be modified (apparently with any changes, not just the maintenance agreement) then it is inconsistent with being a 10-year contract. Alternatively, will the contract will need to be cancelled on year 2 and a new one put in place 8 years hence?
- 14.91.060B1,2- Does this mean the mortgage holder has to sign off on Mills Act application? There should be specific exclusion of any lien holder from having to sign application.
- 14.91.060B7- Verifiable cost estimates-often difficult if not impossible to obtain, particularly for work not being undertaken immediately.
- 14.91.110B-color photos of work done-not always practical. Copies of building permits-the City already has the information. Such other information as may be “reasonably” required by zoning....
- 14.91.110D-first the City should pay for this, not the homeowner. Secondly the City should first really understand who can do the required work and what the practical outcome of such work will be. We are doubtful that it will achieve the stated goal, in part because most qualified historians aren’t necessarily construction experts, they do not have access to the approved plans etc. The contracts aren’t amended to update the maintenance/rehab plan. In fact, the contract does not change. The only thing that changes is the maintenance plan.
- 14.91.130F-and beyond the City making changes at will, the homeowner must pay the county recording fee? This is unreasonable.
- 14.91.140B/C-the operative word that needs to be added is “material”-i.e. material condition of the contract
- 14.90.020-Definition of alterations needs to be more specific. It should also discuss the things which are not considered alternations for this chapter. Please specifically include Los Altos HRI in reference to California Historic Building Code.

Changes that help ensure the public is heard and involved

- 14.90.040B -does not allow residents to nominate a property for inclusion in the HRI. Given the alacrity with which the HRI has been update (something like 25 years), nominations should be allowed by any resident of the City. This would conform with the rules at both the state and national level.
- 14.90.080-for residential applicants there should be a choice of having a joint meeting or sequential meetings. We think the community is best served by allowing Historical Commission meetings to be separate so as to allow the kind of detailed discussion that

gets lost in a joint meeting. But it should be the applicant choice. We think the best format is sequential meetings-where Historical Commission meets first while Planning Commissioners sits in audience. That provides the informality of a Historical Commission meeting with the benefit of Planning Commissioners hearing the discussion in real time prior to their meeting.

For commercial or City owned properties separate meetings should be required- the projects are more complex and residential input more critical. Two meetings allow full discussion and gives the public the opportunity to offer input on different aspects of the project.

- 14.90.110- if there is no process for the appeal of the determination that a property has unsafe or dangerous conditions which allow demolition, then the findings and conclusions need to be documented in writing along with photos and submitted to the Historical Commission. The matter should be agendaized by the Historical Commission for public comment and discussion prior to issuing a demolition permit.
- Appeal Process- moving the Historic Preservation Ordinance to Zoning limits the appeal process to a small group: residents within 300 feet of a property. Many of our historic resources are public buildings/public lands and therefore community assets, and should be subject to appeal by any resident or interested party. Our current Historic Preservation ordinance allows for broader appeal which ensures that a historic resource is better protected. The same is true for noticing requirements. A separate Noticing and Appeals section should be maintained in the proposed Historic Preservation Ordinance.
- Definition of Historical Properties- the draft ordinance has reduced the definition compared to the State Code, eliminating properties recognized by the County and any property defined as part of a District. Los Altos no longer has historic districts, but could in the future (such as the neighborhood with all the Eichlers). It only makes sense to include everything that is allowable by the State Code with respect to definitions.