

A Citizen's Guide to Protecting Historic Places: Local Preservation Ordinances

Smart Growth Tools for Main Street



Charleston, South Carolina

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Among the first lessons the preservationist learns is that the legal power to protect historic places lies chiefly with local government. This is a lesson often learned the hard way, for many people assume that the federal government, being the "highest" level of government, is the strongest guardian of historic sites. They assume that if a property is listed on the National Register of Historic Places, it must be protected automatically. This, unfortunately, is not the case. When it comes to historic preservation, the strongest protection is typically found in preservation ordinances enacted by local governments.

Preservation ordinances in the United States date to 1931, when Charleston, S.C., became the first American city to establish a local historic district. Today there are over 2,300 communities with preservation ordinances in place. Big cities and small towns alike have found these laws to be an effective tool in protecting historic places from such undesirable fates as demolition for surface parking lots or deterioration through neglect.

Preservation ordinances are local laws through which owners of historic properties are usually prohibited from demolishing their property, or making major alterations to it,¹ without local government approval. Such restrictions are comparable to the many zoning and housing subdivision regulations in place across the country. While restrictions in preservation ordinances are imposed primarily to protect a community's heritage, they often protect homes and businesses against the devaluing effects of unsightly or inappropriate development on nearby properties.

A preservation ordinance can protect individual landmarks only, entire historic districts, or both landmarks and districts. To ensure that new buildings blend in with their older neighbors, preservation ordinances typically regulate the design of new construction as well as changes to existing structures.

The authority to regulate private property through historic preservation and land-use laws is derived from the states' police powers. Virtually every state has delegated these powers to the local governments in their jurisdictions and empowered them to regulate development affecting historic sites.

Local preservation ordinances vary widely, but they must all comply with five cardinal land-use principles:

1. An ordinance must promote a valid public purpose. That is, it must in some way advance the public health, safety, morals or general welfare.
2. An ordinance must not be so restrictive as to deprive a property owner of all reasonable economic use of his property.
3. An ordinance must honor a citizen's constitutional right to "due process." In other words, fair hearings must be provided and rational procedures must be followed in an ordinance's administration.

4. An ordinance must comply with relevant state laws.
5. An ordinance must apply with equal force to everyone. That's called "equal protection" of the law.

If an ordinance violates any one of these rules, it stands the risk of being invalidated by a court. If it violates the second rule, a court may order the local government to pay a property owner "just compensation" for taking private property in violation of the Fifth Amendment.

The basic constitutionality of historic preservation ordinances was upheld in 1978 by the U.S. Supreme Court and has been reaffirmed several times since.ⁱⁱ In *Penn Central Transportation Co. v. City of New York*,¹ the court settled two important questions. First, it found historic preservation to be a valid public purpose:

Because this Court has recognized, in a number of settings, that States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city...appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible government goal...

The restrictions imposed (by New York's landmark ordinance) are substantially related to the promotion of the general welfare...

Secondly, the court held that New York's ordinance – and by inference, similar ordinances enacted by other cities – had not taken private property in violation of the U.S. Constitution because the ordinance's restrictions left the Penn Central company with a "reasonable beneficial use" of its landmark property. The court punctured the oft-heard argument that property owners are entitled to make the most possible money from their land:

...the submission that [property owners] may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available is quite simply untenable.

But local ordinances must do more than pass muster under the federal Constitution; they must also comply with state laws and constitutions. Those drafting these ordinances should obviously check on any relevant requirements imposed by state laws.

With the legal authority for local preservation ordinances now well established in the U.S., the question arises: what should an ordinance look like? Some state historic preservation offices and nonprofit organizations have prepared model ordinances for communities to use as a starting point. If such models are used, however, they should be

¹ 438 U.S. 104 (1978)

adapted to local needs. Ordinance drafters should also look into state case law, for important court decisions affecting local ordinances may have been rendered.

Basic Elements of A Preservation Ordinance

1. Statement of Purpose

An ordinance should clearly state its public purpose. Although historic preservation can be justified for its own sake, many jurisdictions have found it legally and politically prudent to link historic preservation to other community goals as well. That's because some lower courts have ruled that "aesthetic regulation" is not a valid public purpose, but have sanctioned such activities as economic development, heritage education and neighborhood revitalization. Cape May, New Jersey's ordinance includes among its purposes *"to preserve and enhance the environmental quality of neighborhoods, to strengthen the Township's economic base by the stimulation of the tourist industry, to establish and improve property values; to foster economic development; to manage growth..."*

2. Definitions

Technical terms--e.g., "alterations," "demolition by neglect," "environmental settings," and so on --should be clearly defined in the ordinance.

3. Preservation Commissions

Some entity within local government must be charged with administering the ordinance. Usually this is a preservation or design review commission comprised of local citizens. Many ordinances require preservation commissioners to have special expertise in certain disciplines, such as architectural history, architecture, law or real estate, to guard against claims or arbitrary and capricious decision making. Some ordinances call for representation by the city planning board on the commission to ensure that local planning goals are related to historic preservation. The qualifications of commission members as well as their terms of office need to be spelled out.

4. Commission Powers and Duties

Most commissions are charged with the duty to conduct historic surveys, maintain inventories, and keep adequate records of their actions. Their authority over the designation and regulation of historic properties varies, however. Some commissions may only make recommendations to other governmental bodies--e.g., a planning board or city council--whereas others have the final word on whether and how historic properties may be altered. Although a property owner must submit development or rehabilitation plans to a commission with merely advisory powers, he or she need not follow the commission's recommendations. Obviously the more authority vested in the commission, the stronger the protection for historic sites.

Many commissions are empowered with the authority to deny proposals to demolish historic buildings; other may only delay such actions. Despite claims to the contrary, demolition denials do not constitute a "taking" in violation of the U.S. Constitution so long as a property owner has not been denied all reasonable use of his property. Mere reductions in property values due to regulations are not "takings."

5. Criteria for Designating Historic Properties

Objective, relevant criteria should be established for evaluating the historic or architectural worth of a structure. Appropriate criteria include such factors as a building's role in national, state or local history; its association with prominent historical figures; its architectural or engineering excellence; its cultural significance, etc. Although ordinances in a few jurisdictions require an owner's consent before a property may be officially landmarked, this is not recommended. The wishes of an individual property owner are not an objective, relevant criterion. Private individuals are not allowed to veto zoning regulations or other public laws; they should not be allowed to veto historic property designations.ⁱⁱⁱ

6. Procedures for Designating Historic Landmarks and Districts

Ordinances must comply with basic "due process" requirements. Property owners must be given adequate notice and an opportunity to be heard before their property rights are curtailed. Otherwise, an ordinance could be invalidated by a court. The ordinance needs to explain who can nominate properties for historic designation; how and when affected property owners are notified; how many public hearings there are; who must approve designations; and what the timetable for these actions is.

7. Reviewable Actions and Procedures and Standards for Reviewing Them

The ordinance should explain what types of changes--e.g., demolitions, building/landscape alterations, new construction in historic districts--are subject to review. Many ordinances wisely exempt minor repair and maintenance from review. It is also important that alteration or demolition requests be acted upon fairly and in a timely fashion. It is critical for commissions to review such requests according to reasonable standards clearly set forth in the ordinance. The goal is to let property owners know what the rules are. A system perceived to be rational and equitable will go a long way toward avoiding legal problems.

Some cities have incorporated the Secretary of the Interior's Standards for Rehabilitation into their ordinances. Although these standards are a useful set of guiding principles for the federal programs for which they were intended, if used by local preservation commissions, they should be adapted to meet local needs and phrased in appropriate regulatory language.

8. Economic Hardship

All historic preservation ordinances should include a process and standard for evaluating economic hardship claims. Such provisions can act as a safety valve if the ordinance is challenged in court; conversely, their absence can make an ordinance vulnerable to attack. The ordinance should explain the process for obtaining a hardship finding and spell out what information the commission needs to evaluate hardship claims. The timing for reviewing hardship claims is also important. Such claims should be considered only after an application for approval to alter or demolish a structure has been denied, not while properties are still being considered for historic designation or before applications for alterations are acted upon. In effect, economic hardship review is comparable to the variance process under zoning laws.

9. Interim Protection Provisions

Often the mere discussion of historic property designations will prompt property owners fearful of new regulations to seek demolition permits. It is important to provide interim protection for buildings nominated, but not yet officially designated as, local historic landmarks. This allows the local governing body to weigh the merits of specific nominations without witnessing a rash of demolitions. Interim control provisions should be set for a time period and should state the public purpose--e.g., comprehensive planning reasons--for the controls.

10. Demolition by Neglect

Occasionally a landowner will deliberately neglect a historic structure in the hope of obtaining a demolition permit on the ground that the building jeopardizes public safety. Many ordinances include "affirmative maintenance" provisions to prevent this. The Charlottesville, Virginia ordinance states that a property owner shall not permit a structure to deteriorate so badly that it produces a "detrimental effect" on a historic district or landmark. The ordinance also calls for the maintenance of the "*surrounding environment, e.g., fences, gates, sidewalks, steps, signs, accessory structures and landscaping.*"

11. Penalties

Ordinances must be enforced if they are to be effective. Penalties for violating the ordinance provisions may include fines (usually levied for each day a violation continues), requirements to restore or pay for willfully damaged landmarks, denial of permission to rebuild on sites where landmarks were illegally demolished, and even jail. The stiffness of the penalty varies with each community depending on the likelihood of non-compliance.

12. Appeals

Even if an ordinance is silent on appeals, a citizen still has the right to challenge a commission's ruling in court. However, it is wise to clarify the appeals process. While

some ordinances make commission decisions appealable only to the courts, others find it easier and less expensive to have boards of zoning appeals or some other administrative body to handle these cases. If the latter course is chosen, it's important to give such bodies clear criteria for considering appeals. Otherwise, they may use political criteria or assume unproven economic hardship on the part of the property owner. Appeal board reviews should be limited to the facts presented to the preservation commission in considering whether a decision was made arbitrarily or capriciously.

Local Innovations

While most local preservation ordinances include the basic elements listed above, many go even further to address common problems in innovative ways. Below are some examples:

- **Automobile Dominance:** Nothing destroys a historic area faster than subservience to the automobile. Seattle's Pioneer Square Historic District Ordinance promotes a pedestrian-friendly environment by banning gas stations, drive-in businesses and surface parking lots. It also limits curb cuts and subjects the few parking garages that are allowed to special design review.
- **Environmental Settings:** The value of a historic structure is greatly diminished if it is surrounded by ugly, incompatible development. The structure's setting should be protected from such development if at all possible. Miami, Florida's ordinance calls for drawing historic district boundaries so as to *"include properties which individually do not contribute to the historic character of the district, but which require regulation in order to control potentially adverse influences on the character and integrity of the district."*
- **Design Guidelines:** Portland, Maine's ordinance contains well-organized and clear guidelines for reviewing new construction in historic districts. Not only does the ordinance provide guidelines for new buildings as individual structures, but it also discusses the relationships between buildings and streets. Leesburg, Virginia has an overlay district to regulate the design of new construction along the highways that lead into the town's historic district.
- **Surface Parking Lots:** To protect historic structures from being demolished for surface parking lots, Atlanta's ordinance requires property owners to provide detailed architectural plans and evidence of financing for new building projects.^{iv} Salt Lake City's ordinance requires demolition permit applications to be accompanied by landscaping plans. The city planning department may obtain performance bonds to ensure that landscaping promised is actually provided.
- **Use of Historic Structures:** Although preservation ordinances typically stay out of land use questions, as national chains and franchises relentlessly homogenize American communities, many preservationists are looking for ways to preserve the small, locally-owned businesses that give each city its unique flavor. The guidelines

of the Pike Place Market Historical District Ordinance in Seattle state that all businesses using the Market are to be operated "*with the owner involved in the daily management. Businesses serving local residents are preferred over those which are primarily tourism-oriented.*" The guidelines encourage local farmers to use the market and discourage fast-food outlets from doing so.

Resources

- *Maintaining Community Character: How to Establish a Local Historic District* (Order No. 2158). Go to www.preservationbooks.org and click on "Historic Districts."
- *Design Review in Historic Districts* (Order No. 2185). Go to www.preservationbooks.org and click on "Historic Districts."
- *A Layperson's Guide to Preservation Law: Federal, State and Local Laws Governing Historic Resource Protection* (Order No. 2199). Go to www.preservationbooks.org and click on "Preservation Law."

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ⁱ Most ordinance restrictions are limited to changes affecting the exterior of a structure, leaving property owners free to modify interiors as they wish. However, a few cities have enacted ordinances that regulate changes to historic building interiors, primarily interiors in public or commercial buildings that are open to the public.

ⁱⁱ The U.S. Supreme Court has issued several major land-use rulings since 1978. While these do not focus on historic preservation, it is important to know about them because they may affect preservation. In Keystone Bituminous Coal Assn. v. DeBenedictis (480 U.S. 470 (1987)), the Supreme Court rejected a takings claim against Pennsylvania's land subsidence law. Among other things, the court observed: "Under our system of government, one of the state's primary ways of preserving the public wealth is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." In First English Evangelical Lutheran Church v. County of Los Angeles (482 U.S. 304 (1987)), the court held that the remedy for a temporary regulatory taking is not merely the invalidation of a land use ordinance but just compensation to the property owner for the period during which the taking occurred. And in Nollan v. California Coastal Commission (483 U.S. 825 (1987)), the court said there must be a nexus between the purpose of a land-use regulation and the specific regulation used to achieve that purpose. In other words, the means should further the ends. Significantly, the court did not back away from its Penn Central ruling in any of these decisions. The court has yet to explain how compensation should be determined in a temporary regulatory taking case. See also Agins v. Tiburon, (447 U.S. 255 (1980)), San Diego Gas & Electric Co. v. City of San Diego, (450 U.S. 621 (1981)), Williamson County Regional Planning Commission v. Hamilton Bank, (473 U.S. (1985)), and MacDonald, Sommer & Frates v. County of Yolo (Calif.), (477 U.S. 340 (1986)).

ⁱⁱⁱ Owner consent provisions should also raise legal questions in that they arguably represent a standard-less and thus unconstitutional delegation of police powers to private individuals. As noted in the U.S. Supreme Court's Mugler v. Kansas ruling (123 U.S. 623 (1887)):

[The power to regulate land] must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of government. It belongs to that department to exert what are known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

For an excellent discussion of the "owner consent" issue, see "Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?" by Julia Hatch Miller. Preservation Law Reporter. February 191. Volume 10, Number 2.

^{iv} Albany, New York's law, which also conditions the issuance of demolition permits on the approval of new construction, was challenged but upheld in Lemme v. Dolan, 558 N.Y.S. Appellate 2d 991 (A.D. 3 Dept. 1990)