

LOCAL PRESERVATION ORDINANCES

MAKING THEM WORK FOR YOUR COMMUNITY

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Introduction

Early-day historic preservation programs were often informal, limited to honorific designations, and administered by community historical organizations. However, the passage of the National Historic Preservation Act in 1966 nudged preservation programs into local land use planning programs, making it essential that local governments provide consideration and protection of historic properties in a manner that is legally defensible. Specifically, it states

The Congress finds and declares that the historical and cultural foundations of the nation should be preserved as a **living part of our community and development** [bold added] in order to give a sense of orientation to the American people. (Section 1(b) (16 U. S. C. 470))

The message is clear: preservation should relate to the here and now. The historic preservation ordinance provides the regulatory and legal framework for protecting historic properties and integrating preservation with other decision making at the local level of government.

One of the questions frequently fielded by the California Office of Historic Preservation (OHP) is, Do you have a model historic preservation ordinance? Our response is a resounding No! California has nearly 500 incorporated cities and 58 counties, each with its own culture and personality. In addition, in California state law grants cities and counties very broad authority to regulate historic properties without requiring them to adhere to any specific provisions. To presume that a one-size-fits-all ordinance exists would be a disservice to local governments. The ordinance should be prepared to meet the needs of the community; the community should not be force-fit into a model that doesn't work for it. So finding an ordinance that fits the community is a bit like Goldilocks searching for the perfect bowl of porridge.

Keep in mind that adopting new ordinances and amending existing ones occur within a political arena; the final decision is made by the City Council or the County Board of Supervisors. Hot button issues continue to exist which at times are the subject for public debate. Whether owner consent is required to designate a property remains a topic of heated discussion in California. Other issues include demolition and whether the local government can deny such a request or merely delay it; staff level review versus review by the full commission; review of interiors; review of infill projects in historic areas; and how to approach archeological properties.

Several years ago the City of Pasadena, California used a Certified Local Government Grant to contract with Clarion Associates of Denver, Colorado to update their ordinance. Because the grant wasn't large enough for a complete revision, city staff came up with the idea that Clarion would diagnose their current ordinance and follow up with alternatives for the city to consider. The city planning staff drafted the final version of the ordinance with limited legal support using the alternatives approach provided by Clarion. Pasadena's creative solution to a limited budget was serendipitous. We were so impressed with the approach Pasadena had taken that OHP contracted with Clarion to prepare similar guidance that would be relevant to all of California's local governments. The result was one of OHP's most ambitious publications, *Drafting*

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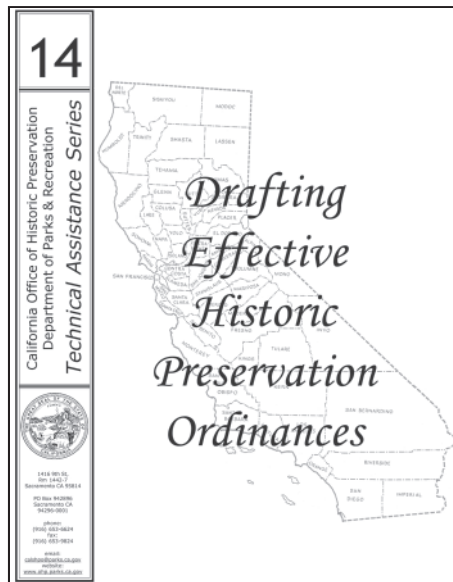
Effective Historic Preservation Ordinances: a Manual for California's Local Governments. The manual identifies significant issues that all communities need to address when preparing or revising an ordinance. The publication's table of contents effectively serves as an outline for the various sections that should appear in an ordinance. Each chapter is set up like a restaurant menu where the diner has choices: ham or pastrami; rice or potatoes? By working through a menu of choices presented in each chapter, the local government has the opportunity to craft an ordinance that is tailored-made to fit. One size does not fit all.

Obviously, this guidance is of great use to communities who are already in the process of revising or amending their existing ordinance as well as those who are just at the beginning stages of setting up a local preservation program. However, it is a very good idea for all local governments to periodically run a diagnostic check-up to determine if their ordinance still meets the needs of the community or whether a tune-up is called for.

Things to Consider in Creating, Amending, or Reviewing an Ordinance

The following are the key elements that every local government should consider including in an ordinance and the questions that each community must ask of itself:

- **Purpose:** What are the local preservation goals? Are there particular issues that potentially affect historic properties, such as infill in historic areas? What resources should be protected? How should they be protected? How should the ordinance be administered and enforced?
- **Enabling Authority:** What is the local government authority available to adopt a preservation ordinance? In California, for example, local governments have broad authority to adopt preservation ordinances as part of their police power established in the state constitution and specific state statutes.
- **Establishment of the Preservation Commission:** What entity will administer and enforce the ordinance? What is its composition? What is its scope of powers? Is it advisory to another body or does it have final review authority? Are professional qualifications required?
- **Procedures and Criteria for Designation of Historical Resources:** Does the ordinance outline specific procedures for designating historic properties? Who can nominate? Is owner consent required? What are the noticing requirements? Does the commission have authority to designate properties or is the decision made by an elected body? Is there an appeals process? Is there a provision for establishing historic contexts and carrying out surveys? What are the criteria for designating historical resources? Criteria that are modeled on those of the National Register have the advantage of being time-tested and being familiar. What types of resources will be protected, and how? Will districts be considered as well as individual properties? Are archeological resources included in the ordinance or should a separate archeological ordinance be considered? What about cultural landscapes?
- **Procedures and Criteria for Actions Subject to Review:** What activities will be regulated that could affect historic resources and what is the appropriate level and amount of review? Typically, rehabilitation, demolition, and relocation are included. What about new construction and infill in historic areas? Can the local government say "no" to the demolition of a historic property, or just delay



The manual above identifies significant issues that all communities need to address when preparing or revising an ordinance.
Photo courtesy of www.parks.ca.gov

the action? What review standards will be used to evaluate the appropriateness of a proposed change (not to be confused with design guidelines)? Does the commission have final authority or is it advisory to another body?

- **Consideration of Economic Effect of Designation or Review of Action:** To provide a “safety-valve” it is important to include a procedure that allows a property owner to demonstrate that in some cases enforcement of the ordinance would constitute an extreme economic hardship. Does the community offer economic incentives for preservation, such as property tax reduction, elimination or reduction of certain fees, or variances in zoning requirements?
- **Appeals:** How are decisions appealed and to whom? An appeals process provides an administrative resolution to claims that might otherwise end up in court. Some communities rely on a general citywide appeals board; others have an appeals process specific to the historic preservation ordinance.
- **Enforcement:** What enforcement provisions are actually feasible? It makes little sense to include provisions that the community is unable or unwilling to enforce. Remedies for nonconformance typically include fines, injunctive relief and compliance orders, receivership and entry on to land to correct violation, forced reconstruction, and loss of further entitlement. Sometimes it is tempting to want to disallow a property owner any further use of the property for some period of time after an egregious offence, such as an illegal demolition, has occurred. But, does anyone want to look at an empty lot for five years?
- **Definitions:** This is probably the most important part of the ordinance and this section should never be underestimated. We have reviewed ordinances where terms are not defined at all. For example, What exactly constitutes a demolition? Or, What is a major alteration? We also see ordinances where several terms seem to be used interchangeable such as historic property, cultural resource, and heritage landmark. Sound definitions are needed to sustain judicial challenge. It is a good idea to use terms shared by the National Register, the Secretary of the Interior, your state’s historic register, and your state’s own environmental laws. These have been time-tested.
- **Severability:** It is important that if for any reason a section of the ordinance is found to be invalid, that such a decision does not affect the validity of the remaining sections.

Some Other Things to Consider

Historic Preservation Overlay Zones

Because of the desire to strengthen the relationship between historic preservation and land use planning, some communities have adopted historic preservation overlay zones (HPOZs) as an alternative to the more traditional approach of designating individual properties or historic districts. HPOZs are established through the zoning ordinance, rather than the independent historic preservation ordinance. An HPOZ adds a layer of regulations over the underlying zoning regulations in a specific area. Another benefit that the zoning overlay has the potential to regulate use in addition to changes in design or fabric. In some jurisdictions HPOZs avoid the issue of a certain percentage of property owner approval. Other communities establish a historic district first through a historic preservation ordinance procedure, and then apply the historic overlay zoning.

Staff review

In an era of reduced budgets and in a political and economic climate where permit streamlining is often desired, some communities are delegating more responsibilities

under the ordinance to staff rather than consideration by the commission. If this is the approach the community wants to take, it is important that it is codified in the ordinance and not simply a staff or commission decision or common practice. Thresholds need to be established and defined; what can be reviewed by staff and what must be placed on the commission agenda.

Conservation Districts or Conservation Overlay Zones

More communities are becoming concerned with the preservation of neighborhood or community character in addition to the preservation of historic fabric and design. Conservation districts often address broad issues such as set back, height, traditional scale and character, and serve as an alternative to the more stringent historic district regulations.

Some Pitfalls

In California there is a healthy property rights sentiment and also high property values, neither of which is particularly conducive to a robust historic preservation. As a result, in an effort to not let anything slip through the cracks, we have seen proposed ordinances are so detailed that they are ineffective, so ambitious that they cannot be supported by local staff, and so rigid that any change is difficult. Keep in mind that the goal is to produce an ordinance that is workable and enforceable in your community and that has community and political support.

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