



Memorandum

Planning Division
Community & Economic Development Department

To: Historic Landmark Commission

From: Janice Lew, Senior Historic Preservation Planner

Date: May 30, 2013

**Re: Work Session on Petition PLNPCM2009-00014 - Demolition of
Historic Buildings/Economic Hardship**

Purpose

Salt Lake City's ordinance contemplates the possibility of an owner avoiding the strict application of historic preservation standards, due to "economic hardship." In the typical hardship case, an applicant has the right to apply for an "economic hardship" exemption after a request to demolish a historic property has been denied. Confusion, however, frequently surrounds the application of various economic and/or finance related provisions found in historic preservation laws.

The exact legal meaning of the term depends on how the term is defined in a specific ordinance. New York City, for example, has provided that a certificate of appropriateness can be granted if the applicant demonstrates that they cannot earn a statutorily set "reasonable rate of return" on the property in its present state. Some cities, including the District of Columbia, have drafted their preservation laws in a manner that specifically incorporates the federal constitutional standard for a taking.

Salt Lake City's zoning ordinance establishes a high standard for demonstrating that a property owner would suffer an unreasonable economic hardship if denied a demolition permit. This standard is consistent with the constitutional regulatory takings standards established by the courts. In order to fully understand the operation of the economic hardship provision, it is necessary to have a working knowledge of constitutional takings law. In doing so, the City will be able to craft an orderly, consistent process that better enables the commission to evaluate regulatory actions to assure that these actions do not result in unconstitutional takings of private property. The discussion below is intended to clarify the

relationship between economics and historic preservation. Economic hardship deals with the accountability of the property itself, not the owner's personal financial situation.

Penn Central

The Fifth Amendment to the U.S. Constitution states that private property [shall not] be taken for public use, without just compensation. The Supreme Court, in *Penn Central Transp. Co. v. City of New York City*, 438 U.S. 104 (1978) set out three factors for courts to review when a landowner alleges a taking has resulted because of governmental regulation. Primary among these factors are the economic impact of the regulation on the property owner and, particularly, the extent to which the regulation, interferes with "investment backed expectations." In addition, the "character of the governmental action" is considered.

These limitations imposed by the Fifth Amendment and takings jurisprudence seek to strike a healthy balance between needed and worthy land use regulation and the impact experienced by individual landowners. In acting upon an application for a certificate of economic hardship, a commission is required to determine whether the economic impact of a historic preservation law, as applied to the property, has gone "too far" and unreasonably limited the use of the property. Courts have generally ruled that economic impacts, short of a denial of some reasonable use, are simply part of the general burdens and benefits of living in an ordered society.

When there is a request for determination of economic hardship, the petitioner has the burden of proving that all economically viable use of the property has been deprived by the denial of a certificate of appropriateness for demolition. This must be proven not by merely asserting that all beneficial use is denied, but instead by providing sufficient evidence that it is the case. Although the ordinance suggests a list of evidence that might be presented, this is not an exclusive list. The commission will need to make a judgment as to whether or not the information provided is credible. It is also the commission's responsibility to make a judgment, given the totality of the evidence, whether an owner can carry out the traditional use of the property, or whether another viable use for the property remains.

What constitutes an economically viable use is determined on a case-by-case basis. The outcome will depend on factual circumstances of each case such as: When were the regulations adopted? Is the loss claimed by the owner the speculative value of future development? Could the owner make a reasonable return under the property's current use, or some other allowed use?

Balancing Test

The Court in *Penn Central* acknowledged that it was unable to develop any 'set formula' for evaluating regulatory takings claims, but identified "several factors that have particular significance." More recent decisions highlight the Court's continued reliance on the *Penn Central* check list of factors and indicate that this is the appropriate approach for most takings cases. If the regulation or regulatory action

acts more to provide a public benefit than to prevent a public harm, it would generally be evaluated using the takings analysis discussed below. Where there is less than a complete deprivation of all value, a court will also evaluate whether a taking has occurred by balancing these factors.

Other factors to consider include the presence or absence of reciprocal benefits and the manner in which costs and benefits of regulations are shared. For example, zoning regulation may eliminate some profitable uses of property while simultaneously preserving or enhancing property value by limiting certain activities.

Applying this takings analysis, courts have generally adopted a “whole parcel” analysis, focusing not on a portion of time when the property may be used, whether distinct property interests have been taken or destroyed, or a physical segment of the property being regulated, but on whether regulation affords an owner an economically viable use of the land considered as a whole. This concept, however, has been under attack in recent years.

The elements of the *Penn Central* balancing test are discussed below:

Character of Governmental Action

This standard focuses on the nature of the governmental action in dispute and whether the governmental regulation substantially advances a legitimate public purpose. In *Penn Central*, the Supreme Court recognized that preserving historic resources is “an entirely permissible goal” and the imposition of restrictions on historic property through historic preservation ordinances is an “appropriate means of securing that purpose.”

Economic Impact

In some takings cases, such as *Penn Central*, reviewing courts simply analyze the past use or uses of the property to see if any or all such uses can continue unaffected by the regulation. The courts have noted that “our cases have long established that mere diminution in the value of property or the loss of possible future profits, however serious, is insufficient to demonstrate a taking.” Both federal and state courts have ruled that government actions under historic preservation laws that prevent landowners from realizing the highest and best use of their property are not unconstitutional. The standard is not whether the present owner can profitably use the building or even secure a return on its investment, since the takings clause has never been understood to compensate property owners for bad business decisions. Nor is the government required to guarantee a return on a speculative investment. Commissions must consider whether the owner is able to continue to use the property affected in the same manner as before the imposition of the regulatory requirement. Because most preservation ordinances allow owners to continue to use protected properties in their condition, the City Attorney’s Office has expressed doubt that the denial of a certificate of appropriateness for demolition would result in a “taking where it is

possible to continue the use.”¹ Several courts have also ruled that a property owner must establish that the building cannot be sold “as is” or upon rehabilitation. Commissions should also take into account whether the alleged hardship is “self created.” Clearly relevant is whether the value of the property declined or rehabilitation expenses increased because the owner failed to provide proper maintenance and allowed the building to deteriorate.² If the property retains some economic value in the marketplace, a taking claim will likely fail, or at least the economic impact factor will not help the claimant.

Investment-Backed Expectations

In order to prove a taking, the landowner also must show that the regulation in question has interfered with “distinct investment- backed expectations.” Although the meaning of this phrase has not been defined with precision, it is clear that “reasonable” expectations do not include those that are contrary to law. Thus, it seems unlikely that an applicant’s expectation of demolishing a historic property subject to a preservation ordinance would be deemed “reasonable” because approval of a demolition request is not guaranteed. In other words, the property owner must show that at the time the property was acquired, the regulatory program would not have prohibited the proposed development activity, and that he reasonably relied on that fact. Where an individual is aware of, or should reasonably be aware of, the regulatory burden, no reasonable investment expectation will generally be found. Also pertinent is whether the owner’s objectives were realistic given the condition of the property at the time of purchase, or whether the owner simply overpaid for the property. It is also important to note that “investment-backed expectations” are different in the context of home ownership; owners often invest in home improvements or renovations without the expectation of recouping the full cost of the improvement in the form of increased property value.³

Attachments

- A. Ordinance
- B. Public Comment

¹ As indicated by Paul Nielson of the City Attorney’s Office in a recent conversation.

² Assessing Economic Hardship Claims Under Historic Preservation Ordinances, National Trust for Historic Preservation, 2009.

³ Assessing Economic Hardship Claims Under Historic Preservation Ordinances, National Trust for Historic Preservation, 2009.

Attachment A

**ZONING ORDINANCE CHAPTER 2.62 Recognized or Registered Organization
Notification Procedures**

2.62.040: PARTICIPATION IN PLANNING PROCESS

D. ~~The Salt Lake City planning division staff shall encourage all special merit exception applicants to meet with affected recognized organizations to discuss and receive input on the petition or application proposal prior to scheduling the matter for consideration by the historic landmark commission. A report of the discussions with the affected recognized organizations and applicant shall be contained in the historic landmark commission staff report.~~

ZONING ORDINANCE CHAPTER 21A.06 Decision Making Bodies and Officials

21A.06.050: HISTORIC LANDMARK COMMISSION

B. Jurisdiction And Authority: The historic landmark commission shall:

3. Review and approve or deny applications for the demolition of buildings, structures or sites in the H historic preservation overlay district pursuant to chapter 21A.34 of this title;

12. Authorize issuance of a certificate of appropriateness for demolition as part of an approved special merit exception pursuant to the procedures and standards set forth in section 21A.34.020 of this title.

**ZONING ORDINANCE CHAPTER 21A.34.020 H Historic Preservation Overlay
District**

B. Definitions

11. Special Merit Exception: A project having significant benefits to the City or to the community by virtue of exemplary architecture, special features of land planning, and social or other benefits having a high priority for community amenities (See subsection O of this section).

12. Economic Hardship: Failure to issue a certificate of appropriateness for the demolition of a landmark site, or contributing principal building or structure would likely amount to a regulatory taking of the owner's property without just compensation. (See subsection N of this section).

F. Procedure For Issuance Of Certificate Of Appropriateness

2. Historic Landmark Commission: Certain types of construction, demolition and relocation shall only be allowed to be approved by the historic landmark commission subject to the following procedures:

a. Types Of Construction: The following shall be reviewed by the historic landmark commission:

- (1) Substantial alteration or addition to a landmark site or contributing structure/site;
- (2) New construction of principal building in H historic preservation overlay district;
- (3) Relocation of landmark site or contributing building, structure or site;
- (4) Demolition of landmark site or contributing building, structure or site;
- (5) Applications for administrative approval referred by the planning director;
and
- (6) Installation of solar energy collection systems that may be readily visible from a public right of way, as described in and pursuant to chapter 21A.40 of this title.

c. Materials Submitted With Application: The requirements for the materials to be submitted upon application for a certificate of appropriateness shall be the same as specified in subsection F1c of this section. ~~Applications for a certificate of appropriateness for demolition shall also submit a reuse plan for the property.~~

g. Review And Decision By The Historic Landmark Commission: The historic landmark commission shall make a decision at a regularly scheduled meeting, within sixty (60) days following receipt of a completed application, except that ~~a review and decision on consideration of~~ an application for a certificate of appropriateness for demolition of a landmark site or ~~contributing principal building or~~ structure declaring an economic hardship shall be made within ~~one hundred twenty (120) ninety (90)~~ days following receipt of ~~an~~ application.

(1) After reviewing all materials submitted for the case, the recommendation of the planning division and conducting a field inspection, if necessary, the historic landmark commission shall make written findings of fact based on the standards of approval as outlined in this subsection F through subsection LQ of this section, whichever are applicable.

(2) On the basis of its written findings of fact the historic landmark commission shall either approve, deny or conditionally approve the certificate of appropriateness. A decision on an application for a certificate of appropriateness for demolition of a ~~contributing principal building or~~ structure may be deferred for up to one year pursuant to subsections LK and ML of this section.

(3) The decision of the historic landmark commission shall become effective at the time the decision is made. ~~Demolition permits for landmark sites or contributing structures shall not be issued until the appeal period has expired.~~ Appeals of a decision of the historic landmark commission on an application for a certificate of appropriateness for demolition of a landmark site or contributing principal building or structure shall stay consideration of a reuse plan for new construction until the appeals hearing officer makes a determination.

(4) Written notice of the decision of the historic landmark commission on the application, including a copy of the findings of fact, shall be made pursuant to the provisions of section 21A.10.030 of this title, sent by first class mail to the applicant within ten (10) working days following the historic landmark commission's decision.

h. Appeal Of Historic Landmark Commission Decision To Appeals Hearing Officer:

The applicant, any owner of abutting property or of property located within the same H historic preservation overlay district, any recognized or registered organization pursuant to title 7, chapter 2.62 of this code, the Utah State Historical Society or the Utah Heritage Foundation, aggrieved by the historic landmark commission's decision, may object to the decision by filing a written appeal with the appeals hearing officer within ten (10) calendar days following the date on which a record of decision is issued. The filing of the appeal shall stay the decision of the historic landmark commission pending the outcome of the appeal, except that the filing of the appeal shall not stay the decision of the historic landmark commission if such decision defers a demolition request for up to one year pursuant to the provisions of subsections LK and ML of this section.

J. Standards For Certificate Of Appropriateness For Demolition Of A Landmark Site:

In considering an application for a certificate of appropriateness for demolition of a landmark site, the historic landmark commission shall only approve the application upon finding that the project fully complies with one of the following standards:

1. ~~The demolition is required to alleviate a threat to public health and safety pursuant to subsection Q of this section or~~ The physical integrity of the site as defined in subsection C10b of this section is no longer evident nor is it reasonable to accurately re-establish the historical appearance in form and detailing as an integral part of a rehabilitation project. The loss of the site's historic appearance is not due to the willful or negligent acts of the past or current owners that have caused the deterioration of the site or principal building or structure, as evidenced by the following:
 - a. Failure to perform normal maintenance and repairs;
 - b. Failure to diligently solicit and retain tenants; and/or
 - c. Failure to secure and board the building if vacant.

~~2. The demolition is required to rectify a condition of economic hardship, as defined and determined pursuant to the provisions of subsection 4 of this section.~~

LK. Standards For Certificate Of Appropriateness For Demolition Of A Contributing Principal Building Or Structure In A H Historic Preservation Overlay District: In considering an application for a certificate of appropriateness for demolition of a ~~contributing structure~~, the historic landmark commission shall determine whether the project substantially complies with the following standards:

1. Standards For Approval Of A Certificate Of Appropriateness For Demolition:

- a. The physical integrity of the site as defined in subsection C210b of this section is no longer evident nor it is reasonable to re-establish the historical appearance of the site as an integral part of a rehabilitation project;
- b. The streetscape within the context of the H historic preservation overlay district would not be negatively affected.
- ~~c. The demolition would not adversely~~ affect the concentration of historic resources used to define the boundaries of the district.
- ~~ed. The demolition would not adversely affect the H historic preservation overlay district due to the surrounding noncontributing structures~~ the nature or concentration of historic resources used to define or maintain the eligibility for designation as a historic district as defined in subsections C10 and 11 of this section.
- ~~de. The base zoning of the site is incompatible with reuse of the building or structure;~~
- ~~e. The reuse plan is consistent with the standards outlined in subsection 11 of this section.~~
- f. The site has not suffered from willful neglect by past or current owners of the property, as evidenced by the following:
 - (1). Willful or negligent acts that have caused the deterioration of the structure,
 - (2) Failure to perform normal maintenance and repairs,
 - (3) Failure to diligently solicit and retain tenants, and/or
 - (4) Failure to secure and board the structure if vacant.

~~g. The denial of a certificate of appropriateness of demolition would cause an economic hardship as defined and determined pursuant to the provisions of subsection K of this section.~~

2. Historic Landmark Commission Determination of Compliance With Standards Of Approval: The historic landmark commission shall make a decision based upon compliance with the requisite number of standards in subsection ~~L~~K1 of this section as set forth below.
 - a. Approval Of Certificate Of Appropriateness For Demolition: Upon making findings that at least ~~six (6)~~ five (5) of the standards are met, the historic landmark commission shall approve the certificate of appropriateness for demolition.
 - b. Denial Of Certificate Of Appropriateness For Demolition: Upon making findings that two (2) or less of the standards are met, the historic landmark commission shall deny the certificate of appropriateness for demolition.
 - c. Deferral Of Decision For Up To One Year: Upon making findings that three (3) to ~~five (5)~~ four (4) of the standards are met, the historic landmark commission shall defer a decision for up to one year during which the applicant must conduct a bona fide effort to preserve the site pursuant to subsection ~~ML~~ML of this section.

ML. Bona Fide Preservation Effort: Upon the decision of the historic landmark commission to defer the decision of a certificate of appropriateness for demolition for up to one year, the applicant must undertake bona fide efforts to preserve the principal building or structure. The ~~one year deferral period~~ shall begin only when the bona fide effort has commenced. A bona fide effort shall consist of all of the following actions:

1. Marketing the property for sale or lease, including without limitation, posting a sign on the property indicating that the property is available and providing notice to local realtors and preservation organizations. Prior to making an offer to sell or lease, an owner shall first file a statement with the planning director, identifying the property, the offering price or rent and the date the offer to sell or lease shall begin. Documentation of the reasonableness of the price sought by the applicant shall be provided and may include:
 - a. A market analysis of at least three (3) comparables prepared by a licensed real estate broker or agent.
 - b. Assessed value of the property according to the two (2) most recent assessed valuations by the Salt Lake County assessor.
 - c. An appraisal, no older than six months, conducted by a MAI certified appraiser licensed within the State of Utah.

2. ~~Filing an application for~~ Filing and providing proof of a denial or approval of an application for alternative funding sources for preservation, such as federal or state preservation tax credits, Utah Heritage Foundation revolving fund loans, redevelopment agency loans, etc.; and other currently available economic incentives;
- 3 Filing an application for alternative uses if available or feasible, such as conditional uses, special exceptions, etc.; and other currently available incentives; and
4. Obtaining two (2) written statements from licensed building contractors or architects with ~~experience~~ experience in historic rehabilitation detailing the ~~actual~~ actual estimated costs to rehabilitate the property to meet the minimum ~~applicable~~ applicable City adopted construction codes.

~~NM.~~ NM. Final Decision For Certificate of Appropriateness For Demolition Following One Year Deferral Period: ~~Upon the completion of the one-year period and if the applicant provides all evidence, in accordance with subsection L above, of a continuing bona fide, reasonable and unsuccessful effort to find a way to retain and preserve the building or structure preservation effort, then the historic landmark commission shall make a final decision approve for the certificate of appropriateness for demolition pursuant to subsection F2 of this section. The historic landmark commission shall approve the certificate of appropriateness for demolition and approve, approve with modifications or deny the certificate of appropriateness application for the reuse-plan for new construction pursuant to subsection F2, H or I of this section.~~

~~KN.~~ KN. Definition And Determination Of Economic Hardship Exception: ~~The determination of economic hardship shall require the applicant to provide evidence sufficient to demonstrate that the application of the standards and regulations of this section deprives the applicant of all reasonable economic use or return on the subject property. Upon denial of a certificate of appropriateness for demolition of a landmark site, or contributing principal building or structure, the owner and/or owner's representative will have thirty (30) calendar days from the end of the appeal period as described in section 21A.06.04 of this title, to submit an application for a certificate of economic hardship. The owner and/or owner's representative shall attend a pre-application conference with representatives of the planning division for the purpose of discussing the review process, outlining the application requirements and providing information on incentives that may be available to the applicant.~~

1. Application For Determination Of Economic Hardship: An application for a determination of economic hardship shall be made on a form ~~prepared~~ prepared ~~provided~~ provided by the planning director and shall be submitted to the planning division. As outlined in subsection N3 below, the application must should include photographs, information pertaining to the historical significance of the landmark site or contributing principal building or structure, and all information necessary to make findings on the standards set forth in subsection N4b of this section.

2. Standards Evidence For Determination Of Economic Hardship: The historic landmark commission shall apply the following standards and make findings concerning economic hardship. The burden of proof is on the owner or owner's representative to provide sufficient evidence to demonstrate that the application of the standards and regulations of this section deprives the applicant of all economically viable use of the subject property either in its current form or if rehabilitated. Any finding in support of economic hardship shall be based solely on the hardship of the property, not conditions personal to the landowner. Simply showing some effect on value or purchasing the property for substantially more than market value at the time of purchase and considering its historic designation shall not be considered sufficient information to make this determination. Such material may include, but is not limited to:

- a. The applicant's knowledge of the landmark designation at the time of acquisition or whether the property was designated subsequent to acquisition. Knowledge of the condition of the property at time of purchase and the applicant's plans for the property at time of purchase;
- b. The current level of economic return on the property as considered in relation to the following:
 - (1) The amount paid for the property, the date of purchase, and party from whom purchased, including a description of the relationship, if any, between the owner of record or applicant, and the person from whom the property was purchased,
 - (2) The annual gross and net income, if any, from the property for the previous three (3) years; itemized operating and maintenance expenses for the previous three (3) years; and depreciation deduction and annual cash flow before and after debt service, if any, for the previous three (3) years,
 - (3) Remaining balance on any mortgage or other financing secured by the property and annual debt service, if any, during the previous three (3) years,
 - (4) Real estate taxes for the previous four (4) years and assessed value of the property according to the two (2) most recent assessed valuations by the Salt Lake County assessor,
 - (5) An appraisal, no older than six months at the time of application for determination of economic hardship conducted by a MAI certified appraiser licensed within the State of Utah. Also All appraisals obtained within the previous two (2) years by the owner or applicant in connection with the purchase, financing or ownership of the property,
 - (6) The fair market value of the property, taking into consideration the regulations of the Historic preservation overlay district, and the inherent

~~assumptions that a principal structure or building might not be allowed to be demolished. Assembled lots shall be considered individually and not as a whole; property immediately prior to its designation as a landmark site and the fair market value of the property as a landmark site at the time the application is filed;~~

- (7) Form of ownership or operation of the property, i.e., sole proprietorship, for profit corporation or not for profit corporation, limited partnership, joint venture, etc., and
 - (8) ~~Any~~ For income producing properties, ~~any~~ state or federal income tax returns on or relating to the property for the previous two (2) years;
- c. The marketability of the property for sale or lease, as determined by ~~considered in relation to~~ any listing of the property for sale or lease, and price asked and offers received, if any, within the previous two (2) years. This determination can include testimony and relevant documents regarding:
- (1) Any real estate broker or firm engaged to sell or lease the property,
 - (2) Reasonableness of the price or rent sought by the applicant, and
 - (3) Any advertisements placed for the sale or rental of the property,
- d. The infeasibility of alternative uses that can earn a reasonable economic return in the case of income producing uses, for the property as considered in relation to the following:
- (1) A report from a licensed engineer or architect with experience in rehabilitation of older buildings and structures as to the structural soundness of any structures on the property ~~and their suitability for rehabilitation,~~
 - (2) ~~An~~ Estimate of the cost of the proposed construction or alteration, including the cost of demolition ~~or~~ and removal, ~~and an estimate of any additional cost that would be incurred to comply with the decision of the historic landmark commission concerning the appropriateness of proposed alterations-potential cost savings for reuse of materials,~~
 - (3) The ~~E~~stimated market values of the property in the current condition, after completion of the demolition ~~and proposed new construction;~~ and after renovation of the existing property for continued use, and
 - (4) The testimony of an ~~architect-developer, real estate consultant, appraiser, or other professional experienced in~~ two of the following as to the economic feasibility of rehabilitation or reuse of the existing structure or building on the property: an ~~architect, developer, real estate consultant, appraiser, or any~~

other professional experienced in rehabilitation of older structures and buildings and licensed within the State of Utah.

- e. Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.
 - f. Description of past and current use.
 - g. An itemized report that identifies what is deficient if the building does not meet minimum City building code standards, and that includes City code violations.
 - h. Consideration of conditional use options, variances or financial incentives to alleviate hardship.
 - i. The City and the applicant may submit additional evidence relevant to the issue and determination of economic hardship for the review and consideration of the historic landmark commission.
3. Procedure For Determination Of Economic Hardship: ~~the historic landmark commission shall establish a three (3) person economic review panel. This panel shall be comprised of three (3) real estate and redevelopment experts knowledgeable in real estate economics in general, and more specifically in the economics of renovation, redevelopment and other aspects of rehabilitation. The panel shall consist of one person selected by the historic landmark commission, one person selected by the applicant, and one person selected by the first two (2) appointees. If the first two (2) appointees cannot agree on a third person within thirty (30) days of the date of the initial public hearing, the third appointee shall be selected by the mayor within five (5) days after the expiration of the thirty (30) day period. The Planning Director may appoint an expert or expert team to evaluate the application and provide advice and/or testimony concerning the value of the property and whether or not the denial of demolition could result in a regulatory taking of the property. The expert(s) should have considerable experience in at least two of the following: appraising historic properties, real estate development, economics, accounting, finance or law. The historic landmark commission may also at its sole discretion solicit expert testimony.~~
- a. Review Of Evidence: The historic landmark commission shall consider an application for determination of economic hardship within 90 days from receipt of an application. All of the evidence and documentation presented to the historic landmark commission shall be made available to and reviewed by the economic review panel. The economic review panel shall convene a meeting complying with the open meetings act to review the evidence of economic hardship in relation to the standards set forth in subsection K2 of this section. The economic review panel may, at its discretion, convene a public hearing to receive testimony by any interested party, provided, that notice be

such public hearing shall be in accordance with chapter 21A.10, "General Application And Public Hearing Procedures", subsection 21A.10.020, and section 21A.10.050 of this title:

- b. ~~Report Of Economic Review Panel: Within forty-five (45) days after the economic review panel is established, the panel shall complete an evaluation of economic hardship, applying the standards set forth in subsection K2 of this section and shall forward a written report with its findings of fact and conclusions to the historic landmark commission:~~
- c. ~~Historic Landmark Commission Determination of Economic Hardship: At the next regular historic landmark commission meeting following receipt of the report of the economic review panel, the historic landmark commission shall reconvene its public hearing to take final action on the application.~~

- b. (1) Finding Of Economic Hardship: If after reviewing all of the evidence, the historic landmark commission finds that the applicant has presented sufficient information supporting a determination of economic hardship if the application for a certificate of appropriateness for demolition is denied, application of the standards set forth in subsection K2 of this section results in economic hardship, then the historic landmark commission shall approve a certificate of economic hardship demolition. The Historic Landmark Commission shall make findings concerning economic hardship for each separate property proposed for demolition. In order to show that all beneficial use and/or reasonable economic return cannot be obtained, the applicant must show that:

(1) For demolition of an income-producing property:

(a) the site, building or structure currently cannot be used or rented at a reasonable rate of return in its present condition or if rehabilitated taking into consideration any available incentives. Reasonable rate of return does not mean highest rate of return; and

(b) bona fide efforts to sell or lease the site, or building or structure at a reasonable price have been unsuccessful.

(2) For demolition of a non-income producing property:

(a) the site, building or structure cannot now be put to any beneficial use in its present condition or if rehabilitated taking into consideration any available incentives; and

(b) bona fide efforts to sell or lease the site, building or structure at a reasonable price have been unsuccessful.

c. Certificate Of Economic Hardship: The certificate of economic hardship shall be valid for a period of one (1) year unless a certificate of appropriateness for demolition is issued within that time. The planning director may approve extensions of this one (1) year period, not to exceed a total period of two (2) years from the original approval of the certificate of economic hardship, provided that a written request by the applicant is received prior to the expiration date of the certificate of economic hardship that shows circumstances beyond the control of the applicant. If a certificate of economic hardship expires, a new certificate must first be obtained before a certificate of appropriateness for demolition may be issued.

(2.d.) Denial Of A Certificate Of Economic Hardship: If the historic landmark commission finds that the applicant has failed to prove an unreasonable economic hardship, the application of the standards set forth in subsection K2 of this section does not result in economic hardship then the application for a certificate of economic hardship shall be denied.

(1) No further Certificate of Economic Hardship applications may be considered for the subject property of the denied certificate of economic hardship for three (3) years from the date of the final decision. The historic landmark commission may waive this restriction if the historic landmark commission finds there are changed circumstances sufficient to warrant a new hearing other than the re-sale of the property or those caused by the negligence or intentional acts of the owner.

(2) Any owner adversely affected by a final decision of the historic landmark commission on an application for a certificate of economic hardship may appeal the decision to the appeals hearing officer in accordance with the provisions of chapter 21A.16 of this title. The filing of an appeal shall stay the decision of the historic landmark commission pending the outcome of the appeal.

(3) Consistency With The Economic Review Panel Report: The historic landmark commission decision shall be consistent with the conclusions reached by the economic review panel unless, based on all of the evidence and documentation presented to the historic landmark commission, the historic landmark commission finds by a vote of three-fourths (3/4) majority of a quorum present that the economic review panel acted in an arbitrary manner, or that its report was based on an erroneous finding of a material fact.

**Attachment B
Public Input**

Incentives for Historic Preservation 3/30/10

Submitted to the Salt Lake City Council by Cindy Cromer (3cinslc@live.com)

Estimated costs are those associated with staff time as well as direct costs for grants, loans, and waivers. Current City staff members could develop all of the tools/changes listed without the services of outside consultants.

Low/No Cost to City

- expedited review process for applications in historic districts or individual Register sites to offset additional processes required
- waiver of permit fees
- density bonuses in single family and multiple-family zoning districts
- relaxed requirements for off-street parking
- access to a Planned Development process to deal with noncomplying setbacks and height
- applying incentives to buildings designated as "contributory" only, or recognizing more than one level of historic resources
- using open space zoning to protect historic resources
- allowing a wider range of commercial uses in multiple-family districts
- allowing a district with only one building
- allow residential uses in an industrial zone

Mid-price Development Costs

- Conservation Districts (also more expensive to administer)
- Transfer of Development Rights (TDRs)
- development of an overlay to protect the transitional areas around historic districts
- easements on City and RDA properties with funding for administration of the easement

More Expensive to Develop

- ad valorem tax relief (applied to the value of improvements)
- reduction in property taxes with transfer to future owners
- use of an Historic Building Code
- waiver of sales tax on construction materials
- grants
- low interest loan program associated with housing and/or small businesses
- support from the RDA with low/no interest loans in RDA areas

Next steps: Some of these incentives such as density bonuses and exceptions for setback requirements are available in other communities and have been for years. It would be worthwhile to get outcome data on their effectiveness in promoting historic preservation in those communities.

(Also presented at the UHF Annual Conference, April 29, 2010)

Incentives for Historic Preservation
Meeting with Planners, 1/11

Issue of public process: sustainability ordinances, esp. accessory dwelling units

Tools: Incentives for Historic Preservation

See Portland's Incentives for Historic Preservation (transmitted electronically)
Suggestions would apply initially to ALL City Register Sites and Districts. National Register Sites and Districts could become eligible on a phased basis if there was public support and if funding for Planning and Permitting staff became available. Of course, the phasing in of additional eligible properties assumes that the process is running smoothly.

Allow historic properties to use a **PUD PROCESS REGARDLESS OF ACREAGE**, similar to the TC zone now. It is absurd to tell the owner of an historic building, constructed before Salt Lake even had a zoning ordinance, to obtain a variance. The irregular setbacks of the historic structures are defining characteristics of the streetscape. They are in my view, part of what we should be preserving.

Restrict **ACCESSORY DWELLING UNITS** initially to historic properties (either as stand alone Register sites or in City Register Districts) located in multiple family zoning districts. Focus on RMF-30 and RMF-35 zones especially in the Capitol Hill, Avenues, and Central City Districts. Rationale: These zones are established for multiple unit occupancy. The current residents and property owners EXPECT tenants as neighbors. The Landmarks Commission is currently doing an excellent job of implementing the design guidelines and ordinances that are available. The regulatory process for infill in historic districts is working far better than the compatible infill ordinances for single family zoning districts. Structures in historic districts have higher maintenance costs and would benefit from the additional income that accessory dwelling units could provide. The majority of the City's surviving carriage houses are concentrated in the historic districts and on stand alone Register sites

Provide **DENSITY BONUSES** for property owners who are reinvesting in historic Districts and stand alone historic sites. (This would be one way the City could create incentives for protecting excellent historic buildings that would qualify for stand alone status but are not surrounded by the critical mass of surviving historic buildings to be in a District).

TRANSFER OF DEVELOPMENT RIGHTS: We need to have this tool, mostly for use in emergencies where a building is threatened with demolition. I have thought a great deal about the logistics as they would apply in Salt Lake and reviewed the comprehensive survey that Kirk Huffaker did. I do not see TDR's as the most useful tool in terms of number of applications, but they are a critical tool to have in the portfolio because of their applicability when property owners are claiming economic hardship. I came to the conclusion that density bonuses are easier to administered, more likely to be used, and will result in more direct investment into buildings in need of investment. IF TDR's are developed for Salt Lake's residential areas, they need to include a provision that the building providing the development rights will receive reinvestment in addition to the building receiving the rights. In other words, no fair allowing a delapidated building to become more delapidated.

The City could offer short-term **WAIVERS FOR INCREASED PROPERTY TAXES** for property taxes which increase following reinvestment in historic structures. Other communities do this for property taxes. I visited an adaptive reuse of a mill in Covington, Ga., where the local municipality rolled back the increase in property tax for 5-years and the developer could transfer that benefit to the purchasers of the condos after using it during the marketing phase. (The marketing phase was so short that this was not much of a benefit to the developer except that it probably contributed significantly to the rapid sale of the units.)

ACCELERATED PROCESSING OF APPLICATIONS: In 2005, I had \$60,000 which I could invest in a building in the Central City Historic District tax free, as long as I did so within 180 days. It seemed do-able. The building needed everything but the most urgent needs were on the exterior. The City's

regulation was so burdensome that I was only able to spend \$20,000 within the 180 days AND I found myself doing projects that were NOT urgent because I could proceed with them without the City's permission. Time is money. That is especially true in the Central City Historic District where so many of the properties are multiple units, commercial, and institutional. Typically, no one is getting the benefit of using them while waiting for the City to say "yes."

I have been particularly annoyed by the City's decision to allow LEED projects to go to the front of the line, meaning that my preservation project has to wait in line longer. Why is a project seeking LEED certification "better" for the City than a preservation effort that reuses an existing structure and complies with the Department of Interior Standards for doing so as well as all of the City's ordinances and guidelines? At no cost, the City could allow preservation projects to receive accelerated processing. Certainly, that incentive would be consistent with the established public policy of preserving the structure/district. In all likelihood, it would be consistent with the very real need to concentrate development in the City's core instead of allowing it to sprawl away from Downtown. I will spare you the reference to "The greenest building is the

Summary of Incentives for Historic Preservation

Salt Lake City draft Preservation Plan

-mentioned in the Plan but NOT in the section on incentives: conditional use process for offices, B & B's, etc. in Register sites. Note that the current conditional use process does **not** allow greater density in a residential zone.

-not mentioned in the Plan and under development: an incentive to expedite the review process for projects which reuse historic structures near the North Temple TRAX line

-listed in the Plan but not discussed (p. 49, 52)

Expedited review process for applications

RDA-sponsored incentives

Incentives through the City's Housing programs

Density bonuses

Tax waivers or deferrals

Waiver or postponement of permit fees

Relief from zoning or code requirements

-discussed in the Plan

Conservation District overlay (pp. 49-50)

Transfer of Development Rights or TDRs (p. 51)

State and Federal tax incentives (p. 52 and Appendix C)

Low-interest Loans (p. 52 and Appendix C)

Portland, Oregon

Not all incentives are available to every historic resource.

-Transfer of density and floor area ratio (TDRs)

-Density bonus for landmarks in single-family zones

-Density bonus for landmarks in multiple dwelling zones

-Daycare allowed in residential zones without a conditional use

-Shorter process for conditional use applications

-Exemption from minimum density requirements

-wider range of non-residential uses through an Historic Preservation Incentive Review (esp. for churches, meeting halls, and commercial storefronts)

-increased rights and conditional uses for landmarks in Employment and Industrial zones

-increased rights and conditional uses for landmarks in the Central City District (office and retail)

-increased opportunities for office and retail sales in the Guild's Lake Industrial Sanctuary District

Citizen's Proposal for Salt Lake City

-Access to a Planned Development process regardless of acreage (similar to current TC zone)

-Density bonus through accessory dwelling units beyond the permitted density (with HLC review)

-Transfer of Development Rights, TDR's

-Waivers for increased property taxes

-Accelerated processing of applications (similar to current LEED projects)

Los Angeles Conservancy, California

-property tax relief (Mills Act), also used in Pasadena and San Diego

-use of the California Historical Building Code (1976) to provide flexibility

-City of Los Angeles Adaptive Reuse Provisions which streamline the permitting process for conversion of underutilized commercial buildings by waiving requirements regarding residential density, height, parking, floor area, ADA (private residences only), and setbacks

Los Angeles, California

-property tax relief (Mills Act, 1996 in L.A.)

-use of the California Historical Building Code available for any historic building eligible for designation

-limited commercial uses in residential zones

- relaxed requirements for off-street parking
- references to incentives in other cities: waiver of permit fees (Chicago); waiver of sales tax on construction materials (Boulder, CO); grants (Boulder, CO & Elgin, ILL); revolving fund programs (Sacramento, CA); Exterior Rehabilitation/Conservation Easement Purchase Program (Phoenix AZ) funded by capital improvement bonds

Monterey, California

- two zones, H-1 and H-2, with H-1 being for the most significant buildings
- density bonus considered in single family historic zone
- office uses considered in the multi-family historic zone, and retail commercial uses considered in the commercial office historic zone
- use of the State Historic Building Code instead of standard Building Code
- availability of City grants for designated buildings in addition to State and Federal grants
- reduction in property taxes
- permit fees (listed but not otherwise described)

Bridgeport, Connecticut

- use of an historic overlay to identify properties near, but not within, a district

Greenwich, Connecticut

- use of an historic overlay on individual properties to promote adaptive reuse

Ridgfield, Connecticut

- flexibility in building and lot requirements
- adaptive reuse of buildings in certain areas
- tax relief proposed as an option (not otherwise explained)
- listing on the State Register in addition to National and Local Historic designations

Stamford, Connecticut

- Eligibility for historic status may be determined independently from the National Register or the State Register using the standards for the State Register.
- "bonus uses" not otherwise allowed in the zoning district including industrial zoning
- waiver for parking requirements under specific conditions
- waivers for yard, height, lot coverage, dwelling unit density or floor area ratio depending on zone
- residential uses allowed in industrial zoning

Miami, Florida

- transfer of development rights (TDRs)
- ad valorem tax relief (2007): applied to the value of improvements to historic properties and affects taxes levied by the City
- waiver for up to 20% of the code requirements for setbacks, lot size, green space, and loading
- waiver for up to 100% of the off-street parking requirement
- waiver for continued use of historic signs
- exemption for use: B & B's allowed in residential zones (transects)

Monroe County, Indiana

- historic district may contain a single building

Berks County, Pennsylvania

- authority to protect historic buildings outside of a formal district (Article VII-A of the MPC, 2000)
- broader range of uses allowed than permitted by zoning

Chester County, Pennsylvania

- uses for historic structures not limited to those allowed in the zone
- allowing an additional dwelling unit (via density bonus or not counting the historic resource)
- allowing historic resources in the open space zoning

- making the preservation of historic resources a priority in determining the location of open space
- modification of area and bulk regulations through conditional use to promote preservation
- two classifications of historic resources (Class I and II); both eligible for incentives

South Carolina Department of Archives and History

- local preservation overlay zoning protects the value of the properties

Piedmont Environmental Council, Virginia

- Virginia's Main Street Program, initiated by the National Trust for Historic Preservation

Summary of Portland Historic Resources Zoning Regulations

- **Record of its time.** The historic resource will remain a physical record of its time, place, and use. Changes that create a false sense of historic development, such as adding conjectural features or architectural elements from other buildings will be avoided;
- **Historic changes.** Most properties change over time. Those changes that have acquired historic significance will be preserved;
- **Historic features.** Generally, deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement, the new feature will match the old in design, color, texture, and other visual qualities and, where practical, in materials. Replacement of missing features must be substantiated by documentary, physical, or pictorial evidence;
- **Historic materials.** Historic materials will be protected. Chemical or physical treatments, such as sandblasting, that cause damage to historic materials will not be used;
- **Archaeological resources.** Significant archaeological resources affected by a proposal will be protected and preserved to the extent practical. When such resources are disturbed, mitigation measures will be undertaken;
- **Differentiate new from old.** New additions, exterior alterations, or related new construction will not destroy historic materials that characterize a property. New work will be differentiated from the old;
- **Architectural compatibility.** New additions, exterior alterations, or related new construction will be compatible with the resource's massing, size, scale, and architectural features. When retrofitting buildings or sites to improve accessibility for persons with disabilities, design solutions will not compromise the architectural integrity of the historic resource;
- **Preserve the form and integrity of historic resources.** New additions and adjacent or related new construction will be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic resource and its environment would be unimpaired; and
- **Hierarchy of compatibility.** Exterior alterations and additions will be designed to be compatible primarily with the original resource, secondarily with adjacent properties, and finally, if located within a historic or conservation district, with the rest of the district. Where practical, compatibility will be pursued on all three levels.

IV. Zoning Code Preservation Incentives

Special zoning provisions, or incentives, encourage new historic designations and increase the potential for historic resources to be used, renovated, and preserved. When a preservation incentive is used, the owner usually must execute a covenant with the City affirming that they, and subsequent owners, agree to go through Demolition Review prior to demolishing the resource (see the following section on demolition of historic resources). Most of the incentives are described in section 33.445.610 Historic Preservation Incentives, but a few are contained, in whole or in part, in other sections of the code. Not all incentives are available to every type of resource.

- **Transfer of density and floor area ratio (FAR):** Transfer of unused density or FAR (sometimes called transfer of development rights, or TDRs) from a historic or conservation landmark to another location is allowed in certain Multi-Dwelling, Commercial, and Employment zones. Transfers from properties in districts are not allowed, unless they are also landmarks. Density or FAR may be transferred within the neighborhood where the landmark is located or to any site within two miles of the landmark. By allowing unused development potential to be transferred, redevelopment pressure on the landmark is lessened and a potential source of income is provided, as the owner may sell these rights to the owner or developer of the receiving site. Transfers are described in sections 33.445.610, 33.120.205.E, 33.130.205.C and 33.140.205.C.

Summary of Portland Historic Resources Zoning Regulations

- **Additional density in Single-Dwelling zones.** Historic and conservation landmarks in Single-Dwelling zones may be used as multi-dwelling structures, up to a maximum of one dwelling unit for each 1,000 square feet of site area. The landmark may be expanded only if the expansion is approved through Historic Design Review. This incentive provides an opportunity for more economic use of landmarks, for instance, by allowing an owner to add dwelling units to a single-family residence. For additional information, see Section 33.445.610 of the Zoning Code.
- **Additional density in Multi-Dwelling zones.** Historic and conservation landmarks located in Multi-Dwelling zones may be used as multi-dwelling structures, with no maximum density limits. The building may be expanded only if the expansion is approved through Historic Design Review. This incentive provides economic benefits for preserving a landmark by allowing the addition of dwelling units beyond what would normally be allowed—even if the structure were demolished and a new building constructed. This increases a property's income potential and discourages demolition.
- **Daycare in residential zones.** Daycare businesses are allowed in historic and conservation landmarks and contributing structures in historic districts in Residential zones without the uncertainties and expenses of the Conditional Use Review process that would normally be required.
- **Conditional uses in R, C, and E zones.** In Residential, Commercial and Employment zones, applications for conditional use permits in historic and conservation landmarks and contributing structures in historic districts are processed through a Type II procedure, rather than the more intensive and expensive Type III procedure usually required for these reviews. Examples of conditional uses would include group living situations and schools in zones where they are otherwise not allowed by-right.
- **Exemption from minimum density.** This incentive exempts historic and conservation landmarks and contributing structures in historic districts from all minimum housing density requirements, which sometimes require a density level that limits development options in historic structures and compromises a property's historic appearance and/or the neighboring environment. Development proposals are allowed to establish or reestablish residential densities lower than the current requirements. For instance, this provision would allow conversion of a historic commercial or institutional building in a multi-dwelling zone to residential use at a lower than normally required density, potentially reducing negative impacts to the historical character of the building and neighborhood (by, say, eliminating the need to construct a new addition, or simply redeveloping the site completely).
- **Nonresidential uses in the RX zone.** In historic and conservation landmarks and contributing structures in historic districts in the RX zone, up to 100 percent of the floor area of a structure may be approved for Retail Sales And Service, Office, Major Event Entertainment, or Manufacturing And Production, through a Historic Preservation Incentive Review process. This incentive provides a more flexible range of allowed land uses that substantially increase the development options and income potential for designated resources. The Historic Preservation Incentive Review process requires: consistency with neighborhood and area plans; no significant lessening of residential appearance or function of the area; physical compatibility; no significant livability impacts (e.g. noise, late night operations, privacy); and adequacy of services. For additional information, see code sections 33.445.610 and 33.846.050.
- **Nonresidential uses in the RH, R1 and R2 zones.** In historic and conservation landmarks and contributing structures in historic districts in the RH, R1 and R2 zones, up to 100 percent of the floor area of a structure may be approved for Retail Sales And Service, Office, or Manufacturing And Production through Historic Preservation Incentive Review. The last allowed use in the structure must have been



Summary of Portland Historic Resources Zoning Regulations

nonresidential; if part of the structure was in residential use, the proposal must include at least as many dwelling units as were part of the last allowed use or uses. Because nonresidential uses are sharply restricted in residential zones, historic buildings that do not lend themselves to renovation and reuse as dwellings, such as churches, meeting halls, and commercial storefront buildings, can suffer from disinvestment or demolition. This incentive encourages renovation and reuse by providing a more flexible range of allowed land uses that substantially increase the development options and income potential for these resources. See the previous incentive for a description of the required Historic Preservation Incentive Review.

- **Commercial allowances in Employment and Industrial zones.** Historic landmarks in Employment and Industrial zones have increased by-right and conditional use allowances for Office and Retail Sales and Services. The increased allowances recognize that some historic industrial buildings cannot economically accommodate modern industrial activities due to design inefficiencies or structural deficiencies and therefore are often underutilized, neglected and sometimes demolished. The incentive encourages their reuse by providing more development flexibility and higher income potential for historic landmarks in areas where non-industrial uses are otherwise tightly restricted. See Chapter 33.140, Employment and Industrial Zones in the Zoning Code.
- **Commercial allowances in the Central City IG1 Zone.** In the IG1 zone in the Central City Plan District, historic landmarks have increased by-right and conditional use allowances for Office and Retail Sales and Services. The conditional use approval criteria for larger office uses limit negative impacts on the transportation system and nearby industrial uses. The increased allowances encourage preservation and reuse of historic landmarks by providing additional development flexibility and higher income potential in an area where non-industrial uses are otherwise tightly restricted.
- **Incentives in the Guild's Lake Industrial Sanctuary District.** Historic landmarks in the IH zone in the Guild's Lake Industrial Sanctuary Plan District have increased allowances for Office and Retail Sales and Services. The increased allowances encourage preservation and reuse of historic landmarks by providing additional development flexibility and higher income potential in an area where non-industrial uses are otherwise tightly restricted. For additional information about this incentive, see Chapter 33.531 in the Zoning Code.

V. Demolition or Relocation of Historic Resources

Historic resource demolition regulations provide for a deliberative process prior to the permanent loss of a piece of the city's built heritage. Depending on the type of resource, one of two different processes, Demolition Delay Review or Demolition Review (or no review) is required when the City receives a request to demolish a designated historic resource. Relocation requests are also subject to these reviews. The table below summarizes their applicability.

Resource Type	Demolition Delay Review	No Review
Historic Landmark National Register		
Historic Landmark Local		
Conservation Landmark		
Contrib. in Conservation District		
Ranked in HRI		
Noncontrib. in Historic District		
Noncontrib. in Conservation District		
Unranked in HRI		

- **Demolition Delay Review**
Applicable to locally designated resources, this nondiscretionary administrative process requires a 120-day delay period to allow time for consideration of alternatives to demolition, such as restoration, relocation, or