Memorandum

Planning Division
Community & Economic Development Department

To: Historic Landmark Commission

From: Janice Lew, Senior Planner

Date: December 27, 2012

Re: **Petition PLNPCM2009-00013 - Demolition Provisions of the H Historic Preservation Overlay District**

Purpose

At this time, the Planning Division is processing changes to the demolition provisions of the H Historic Preservation Overlay District. The proposed alterations to the zoning ordinance are a response to a 1999 petition for amendments requested by the Planning Commission, a 2004 Legislative Action, the 2008 Citygate study of the planning processes, and the Community Preservation Plan. Many had expressed frustration that despite what was thought to be strict provisions to prevent demolition of contributing buildings and landmark sites a significant number of properties was being lost, particularly in the Central City Historic District. The purpose of this work session is to provide an initial opportunity for the Historic Landmark Commission (HLC) to review the existing ordinance provisions, and discuss proposed changes. The changes recommended are to improve this process both for the HLC and the applicant and assist both the HLC and the applicant to understand the requirements of determining economic hardship.

Existing Zoning Ordinance

The current zoning ordinance provisions require the HLC to base a request for a certificate of appropriateness for demolition on seven criteria when considering an application. If six (6) of the standards are met, the HLC must approve the request for demolition. If two (2) or less of the standards are met, the HLC shall deny the request. If the HLC finds that between three (3) to five (5) of the standards are met, the HLC will defer a decision for up to one year, during which time the applicant must conduct a bona fide effort to preserve the property. The seventh criteria concerns economic hardship. When permission to demolish a property is denied, property owners may challenge that decision. This involves a separate process in which a review panel is selected to determine if denying a request for demolition would entail an economic hardship. The panel consists of three (3) members: a representative for

the applicant, a representative chosen by the HLC, and a third party agreed upon by the other two members. The review panel completes an evaluation of the application and forwards a written report with its findings and conclusions to the HLC. In this case, the HLC is acting as a judge and must accept the findings of the panel. The only way that the HLC cannot accept the findings is if the review panel acted in an arbitrary manner or if the report was based on an erroneous finding of fact. Even in these scenarios there must be a three-quarter majority vote of the quorum present to reverse the review panel's determination.

Economic Hardship

"Economic hardship" is a concept common to many local preservation laws. Economic hardship provisions operate as a "safety valve," to prevent the land use regulation of private property from becoming so burdensome as to approach a "taking" without adequate compensation, made illegal under the Fifth Amendment of the U.S. Constitution. Economic hardship provisions provide assurance to property owners that relief is available in situations where the impact of a particular action (in this case, denial of demolition) proves to be especially harsh.

The ordinance provides that to support an application for relief on economic hardship grounds, the applicant must submit information sufficient to enable the decision-making body to render a decision. The type of information required is spelled out in the ordinance. The burden of obtaining and presenting sufficient information is on the applicant. Establishing economic hardship requires the property owner to demonstrate that he or she has been denied all reasonable beneficial use of, or return on, the property as a result of the denial of a certificate of appropriateness for demolition. It is important to clarify that economic hardship relates to the property not the property owner. The particular circumstances of the owner, independent of the property, should be irrelevant to the question of whether the property can realize a reasonable return on investment, or whether a viable use of the property remains.

Issues

Salt Lake City routinely amends the zoning ordinance when it finds that provisions are difficult to use or may not be achieving their intended propose. It is then beneficial to make changes that lead to clear and consistent planning processes. Issues identified during previous discussions regarding the demolition and economic hardship provisions of the ordinance are listed below.

- Some comments received during the development of the Community Preservation Plan suggested that the current demolition provisions of the ordinance (including the economic hardship process) are too complex.
- The standards for determination of economic hardship have not contributed to a clear and consistent process for landowners and applicants.
- The current provisions make it difficult to balance the goals of historic preservation with other goals of the City.
- The economic hardship review panel's makeup of three people is difficult to achieve. The three person panel is supposed to consist of a representative of the HLC, a representative of the applicant and a third party neutral expert. It is difficult

to find a third party that meets the qualifications and is also willing to volunteer their time to review large amounts of complicated documentation.

- The three-person economic review panel is not a fair representation of either the applicant or the HLC, is a cumbersome process for everyone, and confusing to both the applicant and the public.

Summary of Recommended Changes:

- Clarify and better define key terms
- Modify standards for a certificate of appropriateness for demolition of a landmark site and contributing principal building or structure (subsection J & K)
- Allow the HLC final authority in determinations of economic hardship and eliminate the Economic Hardship Review Panel (subsection N)
- Establish criteria to determine economic hardship (subsection N)
- Allow the HLC and planning staff to solicit expert advice (subsection N)
- Only allow the issuance a CoA for demolition simultaneously with the appropriate approval and permits for the replacement building (subsection P)
- Create a preservation fund (subsection P)
- Set limitations on approvals
- Outline documentation requirements if demolition is approved (subsection Q)
- Require salvage efforts if demolition is approved (subsection Q)
- Establish a process for Special Merit Exceptions (subsection O)

Attachment A includes a more detailed report on the specific code changes.

Attachments

A. Draft – Language proposed to be deleted is ~~stricken~~. Proposed wording is underlined. Notes are in red.
B. Background Material

Attachment A

ZONING ORDINANCE CHAPTER 21A.34.020 Demolition

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:

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 site, principal building or structure declaring an economic hardship shall be made within ~~one hundred twenty (120)~~ ninety (90) days following receipt of a ~~completed~~ 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 ~~L~~K 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 site, principal building or structure may be deferred for up to one year pursuant to subsections ~~L~~K and ~~M~~L 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.~~

(4) Written notice of the decision of the historic landmark commission on the application, including a copy of the findings of fact, shall be 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 2, 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 ~~L~~K and ~~M~~Lof 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 possible to accurately recover the historical appearance in form and detailing as an integral part of a renovation project. The loss of the site's historic appearance is not due to the willful or negligent acts that have caused the deterioration of the site or principal structure or building, 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 structure if vacant.

The building official should retain the authority to approve the demolition of hazardous structures or buildings without going through the process of obtaining a certificate of appropriateness. Existing language already provides for this exception. (See Section 21A.34.020T)

This also takes into account whether the loss of historic integrity was "self created."

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

Under typical economic hardship procedures, an applicant may apply for a "certificate of economic hardship" after the preservation commission has denied his or her request to demolish a historic property.

~~L~~K. **Standards For Certificate Of Appropriateness For Demolition Of A Contributing Site or Principal Structure Or Building 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 C~~2~~10b of this section is no longer evident nor it is possible to recover the historical appearance of the site as an integral part of a renovation project;

b. The streetscape within the context of the H historic preservation overlay district would not be negatively affected.

c. The demolition would not diminish the concentration of historic resources used to define the boundaries of the district.

~~c~~d. The demolition would not adversely affect ~~the H historic preservation overlay district due to the surrounding noncontributing structures~~ relationships to other distinctive buildings, sites, or areas which are eligible for preservation based on historic, cultural or architectural characteristics.

~~d~~e. ~~The base zoning of the site is incompatible with reuse of the structure;~~ The current use is not consistent with any adopted policy set forth in the citywide, community, and/or small area master plan and future land use map applicable to the site;

~~e. The reuse plan is consistent with the standards outlined in subsection H 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 ~~M~~L of this section.

~~M~~L. 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 structure or building. 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. Prior to making an offer to sell or lease, an owner shall first file a statement with the planning division, identifying the property, the offering price or rent and the date the offer to sell or lease shall begin.

2. Filing an application for alternative funding sources for preservation, such as federal or state preservation tax credits, Utah H~~h~~eritage Foundation revolving fund loans, redevelopment loans, ~~etc.;~~ and in consideration of other currently available 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 in historic rehabilitation detailing the ~~actual~~ estimated costs to rehabilitate the property to meet minimum International Building Code for Existing Buildings standards.

~~N~~M. Final Decision For Certificate of Appropriateness For Demolition Following ~~One Year~~ Deferral Period: Upon the completion of the ~~one year~~ deferral period and if the applicant provides all evidence of a continuing bona fide, reasonable and unsuccessful effort to find a way to preserve, rehabilitate or restore the building or structure ~~preservation effort~~, 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 P of this section.~~

~~K~~N. ~~Definition And~~ **Determination Of Economic Hardship:** ~~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.~~ The owner and/or owner's representative may, within thirty (30) calendar days upon denial of a certificate of appropriateness for demolition of a landmark site or contributing principal structure or building within a H historic preservation overly district, submit a request 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. A certificate of economic hardship shall be approved if the applicant presents facts clearly demonstrating to the satisfaction of the historic landmark commission that there are no feasible measures that can be taken which would enable the owner to make a reasonable beneficial use of the property and/or derive a reasonable economic return from the property either in its current form or if rehabilitated.

1. Application For Determination Of Economic Hardship: An application for a determination of economic hardship shall be made on a form prepared by the planning director and shall be submitted to the planning division. The application must include photographs, information pertaining to the historical significance of the landmark site or contributing principal structure or building, and all information necessary to make findings on the standards. The burden of proof is on the owner or owner's representative to prove that all reasonable beneficial use and/or economic return has been denied as a result of a denial of a certificate of appropriateness for demolition. 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 is not sufficient.

Denial of all reasonable use and return is the constitutional standard for a regulatory taking.

2. ~~Standards~~ Evidence For Determination Of Economic Hardship: ~~The historic landmark commission shall apply the following standards and make findings concerning economic hardship.~~ The historic landmark commission may at its sole discretion solicit expert testimony and require that the applicant make submission concerning any or all of the information set forth below before it makes a determination on the application. 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, the applicant's knowledge of the condition of the property at time of purchase and the applicant's plans for the property at time of purchase~~;~~.

An applicant's expectation of demolishing a historic property subject to a preservation ordinance at the time of purchase, or likely to be subject to a preservation ordinance, would not be reasonable. 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.

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 an appraiser from the City's Property Management Department's list of approved appraisers. Also Aall 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 H 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,~~

The argument often presented by the applicant is that they are entitled to the highest and best use of their property, and that anything less than this constitutes a taking. However, extensive case law exists that support anti-demolition ordinances, and that taking occurs only when an owner is totally deprived of all use of his/her property.

This also addresses the inflated land values that may be paid by an applicant to assemble property.

(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 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, 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 rent 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 demonstrated experience in rehabilitation of older structures and buildings as to the structural soundness of any structures on the property and their suitability for rehabilitation,

(2) An ~~E~~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~~,

(3) The ~~E~~estimated market value 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. Testimony should be solicited from an architect, developer, real estate consultant, appraiser, or any other professional experienced in rehabilitation of older structures and buildings.

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 City building code, and information as to the cause of the building's current condition.

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 governmental 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.

a. Review Of Evidence: The historic landmark commission shall consider an application for determination of economic hardship within 90 days from receipt of a complete 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 for such public hearing shall be in accordance with chapter 21A.10, "General Application And Public Hearing Procedures", subsection 21A.10.020E and section 21A.10.030 of this title.~~

Throughout the country, requests for relief on economic hardship grounds are typically decided by historic preservation commissions. Under current provisions, the Economic Review Panel was difficult to administer because it was hard to find qualified volunteers that would be willing to spend the time necessary to evaluate the evidence and reach a conclusion.

~~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 demonstrated clear and convincing evidence supporting an unreasonable economic hardship if the application for a certificate of appropriateness for demolition is denied, ~~application of the standards setforth 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 any reasonable beneficial use or economic return cannot be obtained, the applicant must show that:

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

(a) the property, structure or building currently is not capable of providing any reasonable return. Reasonable rate of return does not mean highest rate of return;

(b) bona fide efforts to sell or lease the property, structure or building have been unsuccessful; and

(c) the cost required to rehabilitate the property, structure or building is such that any reasonable return on such an investment is not achievable taking into account any financial incentives available for rehabilitation.

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

(a) the property, structure or building cannot now be put to any beneficial use in its present condition or if rehabilitated;

(b) bona fide efforts to sell or lease the property, structure or building have been unsuccessful; and

(c) it is not economically feasible to rehabilitate the property, structure or building taking into account any financial incentives available for rehabilitation.

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 of two (2) years 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.

d.~~(2)~~ Denial Of A Certificate Of Economic Hardship: If the historic landmark commission finds that the applicant has failed to provide information that proves 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 certificate of economic hardship shall be denied.

(1) No further 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 the limitation if 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) It shall be the responsibility of the owner to stabilize and maintain the property so as not to create a structurally unsound, hazardous or dangerous structure or building as determined by the building official.

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

~~(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.~~

O. Special Merit Exception: The planning commission may authorize issuance of a certificate of appropriateness for demolition as part of a special merit exception at the request of any applicant, including the City itself. A special merit exception shall be processed in accordance with the following procedures:

1. Application: An application shall be made to the zoning administrator on a form or forms provided by the office of the zoning administrator, which shall include at least the following information:

a. General Information:

(1) The applicant's name, address, telephone number and interest in the property;

(2) The owner's name, address and telephone number, if different than the applicant, and the owner's signed consent to the filing of the application;

(3) The street address and legal description of the subject property;

(4) The zoning classification, zoning district boundaries and present use of the subject property;

(5) A vicinity map with north arrow, scale, and date, indicating the zoning classifications and current uses of properties within eighty five feet (85') (exclusive of intervening streets and alleys) of the subject property;

(6) The proposed title of the project and the names, addresses and telephone numbers of the architect, landscape architect, planner or engineer on the project; and

(7) A signed statement that the applicant has met with and explained the proposed special merit exception to the appropriate neighborhood organization entitled to receive notice pursuant to title 2, chapter 2.62 of this code.

b. Development Plan: A development plan at a scale of twenty feet (20') to the inch or larger, unless otherwise approved by the zoning administrator, setting forth at least the following, unless waived by the zoning administrator:

(1) The location, dimensions and total area of the site;
(2) The location, dimensions, floor area, type of construction and use of each proposed building or structure;
(3) The number, the size and type of dwelling units in each building, and the overall dwelling unit density;

(4) The proposed treatment of open spaces and the exterior surfaces of all buildings and structures, with sketches of proposed landscaping, buildings and structures, including typical elevations;
(5) Architectural graphics, if requested by the zoning administrator, including typical floor plans and elevations, profiles and cross sections;
(6) The number, location and dimensions of parking spaces and loading docks, with means of ingress and egress;
(7) The proposed traffic circulation pattern within the area of the development, including the location and description of public improvements to be installed, including any streets and access easements;
(8) A traffic impact analysis;
(9) The location and purpose of any existing or proposed dedication or easement;
(10) The general drainage plan for the development tract;
(11) The location and dimensions of adjacent properties, abutting public rights of way and easements, and utilities serving the site;
(12) Significant topographical or physical features of the site, including existing trees;
(13) Soils and subsurface conditions, if requested;
(14) The location and proposed treatment of any historical structure or other historical design element or feature;
(15) One copy of the development plan colored or shaded (unmounted) for legibility and presentation at public meetings; and
(16) A reduction of the preliminary development plan to eight and one-half by eleven inches (81/2x 11"). The reduction need not include any area outside the property lines of the subject site.

2. Fees: The application for a special merit exception shall be accompanied by the fee shown on the Salt Lake City consolidated fee schedule. Applications filed by the City shall not require the payment of any fees.

3. Determination Of Completeness: Upon receipt of an application for a special merit exception, the zoning administrator shall make a determination of completeness pursuant to section 21A.10.010, "General Application Procedures", of this title.

4. Staff Report: A staff report evaluating the special merit application shall be prepared by planning staff.

5. Historic Landmark Commission Public Hearing: The historic landmark commission shall schedule and hold a public hearing on the completed application in accordance with the standards and procedures for conduct of the public hearing set forth in chapter 21A.10, "General Application And Public Hearing Procedures", of this title.

6. Historic Landmark Commission Recommendation: Following the public hearing, the landmark commission shall recommend approval, approval with modifications or denial of the proposed special merit exception.

7. Planning Commission Hearing: The planning commission shall schedule and hold a public hearing to consider the proposed special merit exception in accordance with the standards and procedures for conduct of the public hearing set forth in chapter 21A.10, "General Application And Public Hearing Procedures", of this title.

8. Planning Commission Decision: Following the hearing, the planning commission may approve the proposed special merit exception, approve the proposed special merit exception with modifications, or deny the proposed special merit exception.

a. In making its decision concerning a proposed certificate of appropriateness for demolition as part of a special merit exception, the planning commission should consider the following factors:

(1) Evidence of the alternatives to demolition which were considered, as well as detailed information concerning why the various alternatives were rejected including the redesign of the development to include the subject landmark site or contributing building, structure or site.

(2) Whether the structure or building can be moved to an alternative site.

(3) Whether the project is of exceptional design, utilizing the highest quality of exterior materials in a manner compatible with the surrounding streetscape, area and district;

(4) Whether the project will provide significant public and civic benefits including, without limitation, social or other benefits which are a high priority to the community and particularly desirable at the location proposed. Such benefits must substantially outweigh the loss of the affected landmark site or contributing structure(s) or building(s) in a district. Factors common to all projects would not be considered "special"; and

(5) Whether specific features of the proposed development promote the purposes, goals, objectives, and policies of the city as stated through its various adopted planning documents and exceed the minimum requirements of the zoning ordinance.

9. Limitations on Special Merit Exception: Subject to an extension of time granted by the planning commission, no special merit exception shall be valid for a period longer than one year unless a building permit has been issued or complete building plans have been submitted to the division of building services and licensing within that period and is thereafter diligently pursued to completion, or unless a certificate of occupancy is issued and a use commenced within that period, or unless a longer time is requested and granted by the planning commission. Any request for a time extension shall be required not less than thirty (30) days prior to the twelve (12) month time period. The approval of a proposed special merit exception by the planning commission shall authorize only the particular project for which it was issued.

P. Certificate of Appropriateness for Demolition: No certificate of appropriateness for demolition shall be issued unless the structure or building to be demolished is to be replaced with a new principal structure or building that meets the following criteria:

1. The replacement structure or building satisfies all applicable zoning and H historic preservation overlay district standards; and

2. The certificate of appropriateness for demolition is issued simultaneously with the appropriate approvals and permits for the replacement structure or building.

3. Once the replacement plans are approved a fee as shown on the Salt Lake City consolidated fee schedule shall be assessed for the demolition based on the approved replacement plan square footage. The fee must be paid in full prior to issuance of any permits and shall be deposited into an account as directed by the City Council for the benefit and rehabilitation of local historic resources. Fees shall be as follows and are in addition to any fees charged by the City:

a. 0 – 2,500 square feet = $2,000.00

b. 2,501 – 10,000 square feet = $5,000.00

c. 10,001 – 25,000 square feet = $10,000.00

d. 25,001 – 50,000 square feet = $20, 000.00

e. Over 50,000 square feet = $30,000.00

San Antonio's fee schedule

~~OO.~~ ~~**Recordation**~~ **Requirements For Certificate Of Appropriateness For Demolition:** Upon approval of a certificate of appropriateness for demolition of a landmark site or a contributing principal structure or building, the historic landmark commission shall require the applicant to provide ~~archival quality photographs, plans or elevation drawings, as available, necessary to record the structures(s) being demolished~~ all of the following before the certificate of appropriateness for demolition is issued. The historic landmark commission may require that the applicant return to the full commission or may delegate review authority to planning staff:

1. Construction Waste Management Plan: A construction waste management plan shall be submitted with all new construction and demolition permits and shall describe how at least fifty-five percent (55%), by weight, of new construction waste materials and demolition waste will be recycled or reused. The construction waste management plan shall also describe:

a. Steps that will be taken to reduce the amount of waste created by the project;

b. How subcontractors and employees will be trained to ensure material will be reused or recycled to the maximum extent possible;

c. On-site collection system for waste, including any separation required. Hazardous waste must be kept separate for proper handling;

d. Names of facilities which will receive or process construction and demolition waste material.

These provisions were created by the City's Division of Sustainability and Environment and are currently under consideration by the City Council.

2. Issued approvals and permits for the new construction.

3. Financial proof as demonstrated to the planning director of the owner's ability to complete any replacement project on the property, which may include but not be limited to a valid and binding commitment or commitments from financial institutions sufficient for the replacement structure or building or other financial resources that are sufficient (together with any valid and binding commitments for financing) and available for such purpose.

4. Documentation of the landmark site or contributing structure or building in a historic district as specified by a documentation committee consisting of historic landmark commission members. Documentation may include any or all of the following as determined by the documentation committee following a site inspection, if necessary, of the subject property:

a. Drawings. A full set of measured drawings that includes the following:

(1) 1/16″ = 1′0″site plan showing the location of the building and its access;

(2) 1/8″ = 1′0″ scale, dimensioned and labeled floor plans;

(3) 1/8″ = 1′0″ scale, dimensioned and labeled building elevations and sections (two perpendiculars) with reference to building materials;

(4) Landscape plan, including walkways, retaining walls, fountains and pools, trees and plantings, statues, and other decorative elements, such as light posts, railings, etc.

(5) Ceiling plans with architectural features such as skylights and plaster work;

(6) Interior plans with architectural features;

(7) Building sections; and/or

(8) Specific architectural, structural, mechanical and electrical details;

b. Photographs. Digital or print photographs that meet the standards of the National Register of Historic Places for National Register nominations. Views should include:

(1) Interior and exterior views;

(2) Close-ups of significant interior and exterior features;

(3) views that show the relationship of the primary structure to the overall site, accessory structures and/or site features.

c. Written Data. History and description with specific information that is unique to the building, structure or site and the context of the building in Salt Lake City history.

PR. ~~**Review Of Postdemolition Plan For New Construction Or Landscape Plan And Bond Requirements For Approved Certificate of Appropriateness For Demolition:**~~ **Revocation Of The Designation Of A Landmark Site:** ~~Prior to approval of any certificate of appropriateness for demolition the historic landmark commission shall review the postdemolition plans to assure that the plans comply with the standards of subsection H of this section. If the postdemolition plan is to landscape the site, a bond shall be required to ensure the completion of the landscape of the landscape plan approved by the historic landmark commission. The design standards and guidelines for the landscape plan are provided in section 21A.48.050 of this title.~~ If a landmark site is approved for demolition, the landmark site designation shall be removed after the property has been demolished, but not before.

~~1. The bond shall be issued in a form approved by the city attorney. The bond shall be sufficient to cover the estimated cost, to: a) restore the grade as required by title 18 of this code; b) install an automatic sprinkling system; and c) revegetate and landscape as per the approved plan.~~

~~2. The bond shall require installation of landscaping and sprinklers within six (6) months, unless the owner has obtained a building permit and commenced construction of a building or structure on the site.~~

S. **Issuance of Certificate of Occupancy:** Prior to the issuance of a certificate of occupancy, the applicant shall submit a construction waste audit performed by the company (or companies) contracted to remove waste and recyclables. The audit receipt shall include information such as pictures and an itemized list of material contained in each load, the makeup of the waste stream and the percentage (by weight) of the materials recycled, reused or otherwise diverted from the landfill.

QT. **Exceptions Of Certificate Of Appropriateness For Demolition Of Hazardous Structures:** A hazardous structure shall be exempt from the provisions governing demolition if the building official determines, in writing, that the building currently is an imminent hazard to public safety. ~~Hazardous~~

~~structures demolished under this section shall comply with subsection P of this section.~~ Prior to the issuance of a demolition permit, the building official shall notify the planning director of the decision. (Ord. 20-11: Ord. 69-09 §§ 6,7, 2009: §§ 4, 5 1996: Ord. 70-96 § 1, 1996: Ord. 88-95 § 1 (Exh. A), 1995: Ord. 26-95 § 2(17-1), 1995

Definitions

Special Merit Exception – A project having significant benefits to Salt Lake City or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services.

Unreasonable Economic Hardship – Failure to issue a certificate of appropriateness for the demolition of a landmark site or contributing principal building or structure would amount to a regulatory taking of the owner's property without just compensation.

Related Sections

21A.06.030 PLANNING COMMISSION

8. 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.

21A.06.050 HISTORIC LANDMARK COMMISSION

12. Make recommendations to the planning commission regarding special merit exceptions as defined in subsection 21A.34.020B.

Attachment B

NATIONAL TRUST FOR HISTORIC PRESERVATION®

Preservation Law Educational Materials . . .

ASSESSING ECONOMIC HARDSHIP CLAIMS UNDER HISTORIC PRESERVATION ORDINANCES

Historic preservation ordinances in effect around the country often include a process for administrative relief from preservation restrictions in situations of "economic hardship." Under typical economic hardship procedures, an applicant may apply for a "certificate of economic hardship" after a preservation commission has denied his or her request to alter or demolish a historic property protected under a preservation ordinance. In support of an application for relief on economic hardship grounds, the applicant must submit evidence sufficient to enable the decisionmaking body to render a decision. The type of evidence required is generally spelled out in preservation ordinances or interpreting regulations. The burden of proof is on the applicant.

The exact meaning of the term "economic hardship" depends on how the standard is defined in the ordinance. Under many preservation ordinances economic hardship is defined as consistent with the legal standard for an unconstitutional regulatory taking, which requires a property owner to establish that he or she has been denied all reasonable beneficial use or return on the property as a result of the commission's denial of a permit for alteration or demolition.

Requests for relief on economic hardship grounds are usually decided by historic preservation commissions, although some preservation ordinances allow the commission's decision to be appealed to the city council. In some jurisdictions, the commission may be assisted by a hearing officer. A few localities have established a special economic review panel, comprised of members representing both the development and preservation community.

Economic Impact

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 owner, has risen to the level of economic hardship. Thus, the first and most critical step in understanding economic hardship is to understand how to evaluate economic impact.

Commissions should look at a variety of factors in evaluating the economic impact of a proposed action on a particular property. Consideration of expenditures alone will not provide a complete or accurate picture of economic impact, whether income-producing property or owner-occupied residential property. Revenue, vacancy rates, operating expenses, financing, tax incentives, and other issues are all relevant considerations. With respect to income-producing property, economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return. This approach allows a commission to focus on the "bottom line" of the transaction rather than on individual expenditures.

In addition to economic impact, the Supreme Court has said that "reasonable" or "beneficial use" of the property is also an important factor. Thus, in evaluating an economic hardship claim based

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on the constitutional standard for a regulatory taking, commissions will need to consider an owner's ability to continue to carry out the traditional use of the property, or whether another viable use for the property remains. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the landmark decision upholding the use of preservation ordinances to regulate historic property, the Supreme Court found that a taking did not arise because the owner could continue to use its property as a railroad station.

The Supreme Court has also said that the applicant's "reasonable investment-backed expectations" should be taken into consideration. Although the meaning of this phrase has not been delineated with precision, it is clear that "reasonable" expectations do not include those that are contrary to law. Thus, an applicant's expectation of demolishing a historic property subject to a preservation ordinance at the time of purchase, or likely to be subject to a preservation ordinance, would not be "reasonable." 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. Under takings law, government is not required to compensate property owners for bad business decisions. Nor is the government required to guarantee a return on a speculative investment.

Commissions may also be able to 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 allowed the building to deteriorate.

Application of the takings standard in the context of investment or income-producing property is usually fairly straightforward. The issue can be more complex, however, in situations involving hardship claims raised by homeowners. In the context of home-ownership, it is extremely difficult for an applicant to meet the standard for a regulatory taking, that is, to establish that he or she has been denied all reasonable use of the property. Even if a commission insists that houses be painted rather than covered with vinyl siding, and windows be repaired rather than replaced, the applicant can still live in the house. The fact that these repairs may be more costly is not enough. Even if extensive rehabilitation is required, the applicant must show that the house cannot be sold "as is," or that the fair market value of the property in its current condition plus rehabilitation expenditures will exceed the fair market value of the house upon rehabilitation. *See City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996). 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.

In addressing hardship claims involving historic homes, commissions must be careful to be objective and consistent in their approach. Otherwise, a commission may undermine the integrity of its preservation program and raise due process concerns as well. Ideally, grant money, tax relief, and other programs should be made available to historic homeowners who need financial assistance.

Special standards for economic hardship may apply to nonprofit organizations. Because these entities serve charitable rather than commercial purposes, it is appropriate to focus on the beneficial use of their property, rather than rate of return, taking into account the particular circumstances of the owner (i.e., the obligation to serve a charitable purpose.) In such situations, hardship analysis generally entails looking at a distinct set of questions, such as: the organization's charitable purpose; whether the regulation interferes with the organization's ability to carry out its charitable purpose; the condition of the building and the need and cost for

repairs; and whether the organization can afford to pay for the repairs, if required? (Note, however, that while consideration of financial impact may be appropriate, a non-profit organization is not entitled to relief simply on the basis that it could raise or retain more money without the restriction.)

The Proceeding

Under a typical hardship process, the applicant will be required to submit specific evidence in support of his or her claim. Once a completed application has been filed, a hearing will be scheduled, at which time the applicant generally presents expert testimony in support of the economic hardship claim on issues such as the structural integrity of the historic building, estimated costs of rehabilitation, and the projected market value of the property after rehabilitation. Once the applicant has presented its case, parties in opposition or others may then present their own evidence. The commission may also bring in its own expert witnesses to testify. As noted above, the burden of proof rests on the property owner.

In hearing economic hardship matters, commissions must be prepared to make a legally defensible decision based on all the evidence presented. In the event of conflicting expert testimony, which is often the case in economic hardship proceedings, the commission must be prepared to weigh the evidence, making specific findings on the relative credibility or competency of expert witnesses.

In evaluating the evidence, the commission should ask itself five distinct questions:

1) **Is the evidence sufficient**? Does the commission have all the information it needs to understand the entire picture, or is something missing. The application is not complete unless all the required information has been submitted. If additional information is needed, ask for it.

2) **Is the evidence relevant**? Weed out any information that is not relevant to the issue of economic hardship in the case before you. Commissions may be given more information than they need or information on issues that are not germane to the issue, such as how much money the project could make if the historic property were demolished. The property owner is not entitled to the highest and best use of the property.

3) **Is the evidence competent**? Make an assessment as to whether the evidence establishes what it purports to show.

4) **Is the evidence credible**? Consider whether the evidence is believable. For example, ask whether the figures make sense. A commission will need to take into consideration the source of the evidence and its reliability. (If the evidence is based on expert testimony, the commission should determine whether the expert is biased or qualified on the issue being addressed. For example, it may matter whether a contractor testifying on rehabilitation expenditures actually has experience in doing historic rehabilitations.)

5) **Is the evidence consistent**? Look for inconsistencies in the testimony or the evidence submitted. Request that inconsistencies be explained. If there is contradictory evidence, the commission needs to determine which evidence is credible and why.

In many instances the applicant's own evidence will fail to establish economic hardship. However, in some situations, the question may be less clear. The participation of preservation organizations in economic hardship proceedings can be helpful in developing the record. Commissions should also be prepared to hire or obtain experts of their own. For example, if a

property owner submits evidence from a structural engineer that the property is structurally unsound, the commission may need to make an independent determination, through the use of a governmental engineer or other qualified expert, as to the accuracy of that information. It may be impossible to evaluate the credibility or competency of information submitted without expert advice.

The record as a whole becomes exceedingly important if the case goes to court. Under most standards of judicial review, a decision will be upheld if it is supported by substantial evidence. Thus, in conducting administrative proceedings, it is important that evidence provides a true and accurate story of the facts and circumstances and that the commission's decision is based directly on that evidence.

EVIDENTIARY CHECKLIST

The following checklist is a useful tool for local commissions and other regulatory agencies considering economic hardship claims:

1. **Current level of economic return**
   - Amount paid for the property, date of purchase, party from whom purchased, and relationship between the owner of record, the applicant, and person from whom property was purchased;
   - Annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years, and depreciation deduction and annual cash flow before and after debt service, if any, during the same period;
   - Remaining balance on the mortgage or other financing secured by the property and annual debt-service, if any, during the prior three years;
   - Real estate taxes for the previous four years and assessed value of the property according to the two most recent assessed valuations;
   - All appraisals obtained within the last two years by the owner or applicant in connection with the purchase, financing, or ownership of the property;
   - Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other;
   - Any state or federal income tax returns relating to the property for the last two years.
2. **Any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents regarding:**
   - Any real estate broker or firm engaged to sell or lease the property;
   - Reasonableness of price or rent sought by the applicant;
   - Any advertisements placed for the sale or rent of the property.
3. **Feasibility of alternative uses for the property that could earn a reasonable economic return:**
   - Report from a licensed engineer or architect with experience in rehabilitation as to the

structural soundness of any buildings on the property and their suitability for rehabilitation;

- Cost estimates for the proposed construction, alteration, demolition, or removal, and an estimate of any additional cost that would be incurred to comply with the requirements for a certificate of appropriateness;
- Estimated market value of the property: (a) in its current condition; (b) after completion of the proposed alteration or demolition; and (c) after renovation of the existing property for continued use;
- Expert testimony or opinion on the feasibility of rehabilitation or reuse of the existing structure by an architect, developer, real estate consultant, appraiser, and/or other real estate professional experienced in historic properties and rehabilitation.

4. **Any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property.**

5. **Knowledge of landmark designation or potential designation at time of acquisition.**

6. **Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.**

PRESERVATION LAW REPORTER

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Providing for Economic Hardship Relief in the Regulation of Historic Properties

by Julia H. Miller*

This article is the first in a three-part series on the issue of economic hardship. Part 1, published below, provides an overview on the economic hardship review process, highlighting basic questions such as why should economic hardship provisions be included in a historic preservation ordinance, and what does "economic hardship" mean. Part 2, to be published early next year, will discuss alternative standards for measuring economic hardship and offer guidance on how to evaluate those standards, with particular emphasis on the constitutional standard for a regulatory taking. Finally, Part 3, to be published in mid-1997, will focus on the process for considering economic hardship claims. It will explore fundamental issues such as who should consider economic hardship claims, the importance of building a record, and who has the burden of proof.

PART 1. Administrative Relief From Economic Hardship: An Overview

Preservation of historic resources, whether an individual building, historic neighborhood, or archaeological site, has come to be viewed as an important community objective. In an era marked by rapid change, the need to protect familiar buildings and other visual links to the past has never been more apparent. Historical, architectural, cultural and archaeological structures and sites play a key role in helping a community define what it is, and what it would like to be.

While alternative forms of preservation may exist, protection of historic resources is primarily achieved by regulating privately-owned property through local ordinances. These laws generally provide for the identification or designation of important resources, accompanied by specific controls limiting how those properties may be changed. Permission to alter or demolish designated resources is generally conferred by a historic preservation commission or other review board in the form of a

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"certificate of appropriateness."[1]

Protecting historic resources has consistently been upheld as a legitimate use of governmental authority, commonly referred to as "the police power."[2] In *Penn Central Transportation Co. v. City of New York*, the U.S. Supreme Court observed that protection of historic, architectural, and culturally significant structures and areas through historic preservation controls is "an entirely permissible governmental goal."[3] Numerous studies have shown that the regulation of historic properties through local ordinances often benefits individual communities through increased property values, tourism, and overall economic stability.[4]

On the other hand, historic preservation laws, as with other forms of land use regulation, directly affect individual property owners. Historic preservation laws generally impose restrictions on changes to property, which can result in increased expenditures or foregone opportunities. While many historic property owners benefit from local preservation laws, in some cases the impact of a specific action may be so severe that administrative relief should be provided. This is especially true when a constitutional "taking" might otherwise result.[5]

This article focuses on the situation where the impact of historic preservation controls on a particular piece of property is unfairly burdensome. It attempts to explain how local communities can address hardship claims, and at what point relief from historic preservation controls should be made available. It explores a range of issues such as: how to assess the economic impact of the regulation on the property; when does economic impact result in "economic hardship;" how should "economic hardship" be defined; how and when should economic hardship claims be considered; who has the burden of proving hardship; and what opportunities should be made available to the community to alleviate hardship once established.

[1]*See, generally,* Tersh Boasberg, Thomas A. Coughlin and Julia H. Miller, *Historic Preservation Law and Taxation,* Ch. 7 (Matthew Bender 1986); Richard A. Roddewig, "Preparing a Historic Preservation Ordinance," *PAS Report No. 374* (American Planning Ass'n 1983).

[2]A survey of state court decisions in this area is set out at 10 PLR 1117 (1991).

[3]438 U.S. 104, 129 (1978).

[4]*See, generally,* Donovan D. Rypkema, *The Economics of Historic Preservation: A Community Leader's Guide* (National Trust for Historic Preservation 1994); Government Finance Research Center, *Government Finance Research Center, The Economic Benefits of Preserving Community Character: Case Studies from Fredericksburg, Virginia and Galveston, Texas* (National Trust for Historic Preservation 1991); and *Virginia's Economy and Historic Preservation: The Impact of Preservation on Jobs, Business and Community* (Preservation Alliance of Virginia 1995).

[5]Note, however, that the U.S. Supreme Court stated in *Penn Central* that the fact that a landmarks law may have "a more severe impact on some landowners than others" does not mean, "in itself . . . that the law effects a 'taking.'" 438 U.S. at 133.

I. Affording Administrative Relief

All property owners are protected from overly burdensome regulations through the Fifth Amendment to the U.S. Constitution, made applicable to the states under the Fourteenth Amendment (and through corresponding state provisions). The Fifth Amendment prohibits the taking of private property for public use without just compensation.[6] Commonly referred to as the "takings clause" or the "just compensation clause," this provision has been interpreted by the U.S. Supreme Court to require compensation when a regulation goes so far as to deny an owner the "economically viable use of his property."[7]

Economic hardship provisions provide assurance to property owners that relief is available in situations where the impact of a particular action proves to be especially harsh.

So why should relief from "economic hardship" be provided at the administrative level? Despite the protection afforded individual property owners through the federal and state constitutions, a steadily increasing number of jurisdictions are opting to incorporate "economic hardship procedures" into individual laws, including historic preservation ordinances. The reasons for this are fairly straightforward.

First, administrative proceedings addressing economic hardship concerns help to avoid litigation. They offer an opportunity for communities and property owners to hammer out the issues and resolve any differences in a less formal and inherently less expensive forum that is not hindered by rules of evidence and procedural limitations. Economic hardship provisions enable communities to address fundamental issues of fairness on an individual basis.

A second and related reason is that economic hardship review helps to assuage concerns expressed by property owners over the potentially adverse impact of historic preservation regulation. Economic hardship provisions provide assurance to property owners that relief is available in situations where the impact of a particular action proves to be especially harsh.

Economic hardship review also provides communities with the opportunity to put alternative plans together. In the event that a property owner is able to demonstrate economic hardship, a community can explore alternative actions to alleviate that hardship. A community may be able to provide relief through tax incentives, zoning variances, and other means. Demolition would proceed only if an acceptable alternative could not be

[6]The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."

[7]*Agins v. City of Tiburon,*447 U.S. 255, 260 (1980); *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S. Ct. 2378, 2388 (1987). For a detailed discussion of the takings standard articulated by the U.S. Supreme Court, see J. Kayden, "Historic Preservation and the New Takings Cases; Landmarks Preserved," 14 PLR 1235 (1995).

developed.[8]

Fourth, consideration of hardship concerns at the administrative level can enhance a local community's ability to protect individual properties if challenged in court. Courts generally afford review boards considerable deference in reviewing administrative decisions. Under most administrative review acts, judicial review is limited to the record made at the administrative hearing, and a decision must be upheld if supported by "substantial evidence."[9] If there is a reasonable basis in the record for the decision then it must be permitted to stand.[10]

Correspondingly, economic hardship review helps to limit the number of cases ultimately decided under constitutional grounds. The general rule of thumb is that takings claims may not be considered until a decision is final.[11] Thus, a property owner is required to utilize the economic hardship process before challenging the constitutionality of a particular action in court.[12]

This is important for at least two reasons. First, economic hardship review at the administrative level can help to avoid the payment of compensation, assuming that a taking would otherwise have been found if the issue had been litigated in court. Second, it allows reviewing courts to resolve challenged actions on statutory rather than constitutional grounds, thereby limiting the impact of potentially damaging decisions.[13]

II. Assessing Economic Impact

Assuming that a process for considering economic hardship should be made available, the question then becomes: at what point do the economic *impacts* of local preservation laws rise to the level of economic *hardship*? The first and most critical step in answering this question is to understand fully what is meant by "economic impact." In other words, how does one measure the true impact of a particular action on a particular piece of property in objective terms?

Economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return.

Experts in this area most frequently look at the individual factors addressed by real estate developers, appraisers, and lenders in valuing property or a particular investment. Consideration of expenditures alone will not provide a complete or accurate picture of the overall impact of a specific course of action. Revenue, vacancy rates, operating expenses, financing, tax incentives and other issues are all relevant considerations.[14]

Economic impact is generally measured by looking at the effect of a particular course of action on a property's overall value or return.[15] Alternative courses of action are then evaluated by comparing anticipated "rates of return." This methodology allows the administrative review body to focus on the "bottom line" of a proposed transaction rather than individual expenditures. It also provides a useful gauge for measuring the appropriateness of a particular action by comparing the expected rate of return with long-term investment rates, such as the going rate for U.S.

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[8]In Chicago, for example, a finding of economic hardship must be accompanied by a plan to relieve economic hardship. Sections 21-88 through 92 of the Chicago Municipal ordinance provides that the plan—

> may include, but is not limited to, property tax relief, loans or grants from the City of Chicago or other public or private sources, acquisition by purchase or eminent domain, building code modifications, changes in applicable zoning regulations including a transfer of development rights, or relaxation of provisions of this ordinance sufficient to allow reasonable beneficial use or return from the property.

If the economic hardship relief plan developed by the Chicago Landmarks Commission, and reviewed and modified, as necessary, by the Finance Committee of the City Council, is not approved within 30 days, the plan will be deemed denied and the applicant's permit will be approved.

[9]Most jurisdictions require either the application of a "rational basis" or "substantial evidence" standard of review. However, in practice, the distinction between the two standards are often blurred.

[10]*See, e.g. International College of Surgeons v. City of College*, No. 91 C 1587 (N.D. Ill. Dec. 30, 1994)[14 PLR 1087 (1995)], in which a federal district court, addressing both a takings claim and economic hardship claim, reviewed the takings claim under a *de novo* standard of review and reviewed the economic hardship claim in accordance with the standard of review set forth under the Illinois Administrative Review Act. This standard asks whether the contested action was "arbitrary or capricious" or "against the manifest weight of the evidence." *See, also, Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)[substantial evidence supported the local agency's determination that the owner had failed to establish "unreasonable economic hardship."]

[11]"As applied" takings claims are not ripe for review until all avenues of administrative relief have been pursued. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986).

[12]Economic hardship provisions can also help to obviate facial challenges since a permit must be granted under the ordinance if the owner would be denied any viable economic use for his or her property.

[13]In *BSW Development Group v. Dayton Board of Zoning Appeals*, No. 13218 (Ohio Ct. App. May 7, 1993)[12 PLR 1065], the Ohio Court of Appeals elected to resolve a challenge to the denial of permission to demolish a historic warehouse on administrative rather than constitutional grounds, stating that "it is well established that a court is not permitted to pass upon the constitutionality of a statute unless such a determination is necessary to its decision."

[14]For a detailed discussion on the factors which are typically considered in evaluating real estate opportunities, *see* Donovan Rypkema, "The Economics of Rehabilitation," *Information Series* No. 53 (National Trust for Historic Preservation 1991).

[15]Property value is derived from four sources: cash (net proceeds from rents after expenses), appreciation (ability to sell property for amount greater than paid), amortization (reduction of debt/increased equity in property), and tax savings (through mortgage deductions, depreciation, deferred income, tax credits and other incentives available to historic property owners). *Id.* at 1.

Treasury bonds.[16]

"Reasonable" or "beneficial" use is also a critical factor. Historically, economic impact has been measured in such situations by looking at the owner's ability to continue and carry out the traditional use of the property[17] or whether a "viable use" for the property remains.[18] Thus, for example, it may be difficult to establish economic hardship in situations where a house may continue to serve as a personal residence, or be converted into office space.[19]

A number of other factors frequently are taken into consideration in addressing the issue of economic impact in the context of historic property regulation. It may be appropriate to consider what efforts have been undertaken to sell or rent the property at issue or the feasibility of alternative uses.[20] The owner's prior knowledge of the restrictions[21] (actual or constructive) are sometimes factored in along with the reasonableness of the owner's "investment-backed expectations."[22] The fact that the hardship alleged has been "self-created" may also be deemed relevant.[23]

Special considerations also come into play in assessing the impact of a particular regulatory action on non-profit organizations. Because these entities serve charitable rather than commercial purposes, it becomes appropriate to look at beneficial use rather than reasonable return and to take into consideration the individual circumstances of the property owner. For example, a hardship analysis will generally entail looking at a distinct set of factors such as: what is the organization's charitable purpose, does landmark designation interfere with the organization's ability to carry out that purpose, what is the condition of the building and the need and cost for repairs, and finally, can the organization afford to pay for the repairs, if required.[24] Note, however, that while consideration of the financial impact of a particular action on a non-profit organization may be appropriate, a non-profit organization is not entitled to relief simply on the basis that it would otherwise earn more money.[25]

Economic hardship is not synonymous with economic impact.

III. Defining Economic Hardship

Once the nature and degree of the impact is understood, the next step is to determine whether that impact is so severe that it amounts to "economic hardship." Economic hardship is not synonymous with economic impact. The term economic hardship is purely legal. Its meaning is derived from statutes and cases interpreting those statutes. In some jurisdictions the term "economic hardship" may be the equivalent of the

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[16]Richard J. Roddewig, "Responding to the Takings Challenge," *PAS Report No. 416* (National Trust for Historic Preservation/American Planning Ass'n 1989), pp. 16-17.

[17]In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978), the fact that the owner could continue to use the property as a railroad terminal weighed heavily in the court's analysis on the issue of whether New York's denial of permission to construct an office tower on the landmarked building resulted in an unlawful taking.

[18]*See, e.g., Shubert Organization, Inc. v. Landmarks Preservation Commission*, 570 N.Y.S.2d 504 (1991), *appeal dismissed*, 78 N.Y.2d 1006 (1991), *cert. denied*, 112 S.Ct. 2289 (1992)[11 PLR 1071]("no prohibition against [the owners] receiving economic benefit from continuing use of the buildings as theaters.")

[19]The issue can become more complicated, for example, in situations where the condition of the property is so poor that extensive renovations are required to make the property habitable. In such instances, it may be necessary to consider both "economic feasibility" and "viable use" in evaluating a hardship claim. For example, in *City of Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086], the owners (albeit unsuccessfully) had sought to overturn a commission decision denying permission to demolish a historic house on the grounds that the cost of renovation would exceed the fair market value of the house.

Note also that some communities have been successful in alleviating potential economic hardship concerns by rezoning historic residential property to allow limited office use or by preventing property from falling into disrepair through "demolition by neglect" provisions. For further discussion on this issue, see "Oliver Pollard, "Minimum Maintenance Provisions: Preventing Demolition by Neglect," 8 PLR 2001 (1989).

[20]*See, e.g., Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086].

[21]*Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1080]; *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)[14 PLR 1197].

[22]*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[23]*Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1085](owner paid more than fair market value for property and failed to obtain estimate for renovation costs prior to purchase.)

[24]Section 25-309a(2)(c) of New York City's landmark preservation ordinance, for example, provides that hardship may be established by demonstrating, among other things, that the structure at issue "has ceased to be adequate, suitable, or appropriate for use for carrying out both (1) the purposes to which it had been devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes." The judicial equivalent of this statutory standard was upheld by the U.S. District Court for the Southern District of New York in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 1103 (1991).

[25]*See, e.g. Rector, Warden, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990)[10 PLR 1041].

constitutional standard for a regulatory taking.[26] In other jurisdictions, the term may mean something entirely different.[27] In a few jurisdictions, a term other than "economic hardship" may be used,[28] but in all situations it is important to understand that economic hardship applies to the property not the property owner.[29] The particular circumstances of the owner independent of the property in question should be irrelevant to the question of whether the property at issue can realize a reasonable return on investment, or whether a viable use of the property remains.[30]

The term "economic hardship," or its equivalent, can mean whatever a local jurisdiction has prescribed it to mean, subject to state enabling law.[31] As a general rule, however, a high showing of hardship is required

[26]In Chicago, for example, an applicant may apply for an economic hardship exception on the basis that the denial of the permit to construct, alter or demolish property protected under the ordinance will result in "the loss of all reasonable and beneficial use of or return from the property." Chicago, Ill. Municipal Code § 21-68.

[27]In New York City, the term "reasonable return" is defined as "a net annual return of six per centum of the valuation of an improvement parcel" where "net annual return" includes "the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year." Mortgage interest and amortization is specifically excluded from the calculation, but a 2 percent allowance for depreciation of the assessed value of the property may be included, unless the property in question has already been fully depreciated. The test year is generally the most recent full calendar or fiscal year. *See generally*, New York City Landmarks Preservation Ordinance § 25-302v.

[28]For example, Portland, Maine, provides relief from "economic hardship" (Portland City Code, ch. 14, art. IX § 14-660), while St. Louis, Missouri, affords protection against "unreasonable beneficial use or return." St. Louis, Mo. Ordinance § 24.12.440.

[29]Note, however, that with respect to non-profit organizations, an alternative standard may apply, making it appropriate to look at the special circumstances of the property owner.

[30]Local jurisdictions may provide alternative forms of relief, unrelated to "economic hardship" claims, to assist property owners in individual cases where maintenance of historic properties imposes exceptional burdens on a property owner with special needs or economic circumstances. Relief, for example, may be provided through direct financial aid, "in kind" assistance, or income or property tax abatement. For example, it may be appropriate to provide an elderly historic homeowner with assistance in painting or otherwise maintaining his or her property.

[31]The enabling statute for local landmark ordinances in Illinois provides, for example:

> The denial of an application for a building demolition permit by reason of the operation of this Division, or the denial of an application for a building permit to add to, modify, or remove a portion of any building by reason of the operation of this Division, or the imposition of any regulation solely by reason of the provisions of this Division . . . shall not constitute a taking or damage for a public use of such property for which just compensation shall be ascertained and paid, unless the denial of a permit application or imposition of a regulation, as the case may be, deprives the owner of all reasonable beneficial use or return. 24 Ill. Rev. Stat. § 11-48.2-5.

to justify overriding a commission determination. The impact must be substantial.[32] Otherwise, the application of the historic preservation ordinance could become administratively infeasible, and the underlying objectives of the preservation ordinance—to save historic resources—would not be met.

As a result, hardship claims generally arise only when permission for major alterations or the demolition of historic property has been denied.[33] While lesser alterations may have an economic impact on a property owner (aluminum siding, rear addition, re-roofing), it is unlikely that the resulting impact will rise to the level of a legally cognizable economic hardship.

IV. Other Miscellaneous Issues

A number of other issues relate to the question of economic hardship, apart from the issue of what constitutes economic hardship. For example, when should economic hardship claims be considered and upon which party should the burden of proof lie? Set forth below is a brief overview of some of the concerns raised in addressing these issues. Further discussion will follow under Part 3 of this article, to be published in 1997.

While property owners often raise economic issues at the time of designation, communities should resist the temptation to consider economic hardship at that time.

Timing. Economic hardship claims may arise at any time, but when should they be considered? While property owners often raise economic issues at the time of designation, communities should resist the temptation to consider economic hardship at that time. The reasons for this are readily apparent. The economic impact of

[32]The D.C. Court of Appeals reiterated the high burden of proof placed on property owners to establish economic hardship in *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. App. 1995)[14 PLR 1197]. Quoting from *900 G Street Assocs. v. Department of Housing & Community Dev.*, 430 A.2d 344 (D.C. 1982)[1 PLR 3001], the court explained economic hardship as follows:

> [I]f there is a *reasonable* alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if "higher" or "more beneficial" uses of the property have been proscribed.

[33]In the District of Columbia, economic hardship is considered only in the context of applications for demolition. Section 5-1005(f) of the District of Columbia's historic preservation law provides: "No permit [to demolish a historic landmark] shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner."

the regulation is purely speculative at this point. Economic hardship must be established by "dollar and cents" proof,[34] in the context of a specific proposal for alterations or demolition. Although it is occasionally argued that designation alone gives rise to immediate and real impacts, those impacts generally do not rise to the level of economic hardship under the applicable legal standards.[35]

Consideration of economic claims at the designation stage also tends to cloud the issue at hand: whether the property meets the criteria for designation. Preservation commissions or other review boards must be careful to base their decisions on actual criteria in the ordinance. Moreover, it would be a waste of administrative resources to consider economic hardship claims at each stage of the administrative review process. As will be discussed in further detail under Parts 2 and 3 of this article, economic hardship review generally requires full consideration of the economic viability of the property in its present condition, along with various alternative proposals.

The burden of establishing economic hardship generally rests on the property owner.

Many experts advise that the economic hardship issue should be addressed in a separate proceeding after a permit application has been denied on the merits. Where there is no clear differentiation of the two issues (appropriateness versus economic hardship), economic impacts that would not otherwise meet the criteria for "hardship" may improperly affect the outcome of the permit application.

Burden of Proof. The burden of establishing economic hardship generally rests on the property owner.[36] The owner must be able to demonstrate that denial of the requested action will result in "economic hardship" as defined under the prevailing statute. The evidence that must be provided in consideration of an economic hardship claim will vary from jurisdiction to jurisdiction. For example, a number of communities, such as Pittsburgh and Chicago, require a property owner to establish, among other things, that the property cannot be sold.[37] The general rule of thumb, however, is to require the submission of evidence sufficient for the reviewing body to analyze a hardship claim.[38]

Note that, while the burden of proof rests on the applicant, a reviewing court will often look at the "record as a whole" to determine if substantial evidence supports the commission's determination, or whether the commission's decision was "arbitrary or capricious." Thus, it is important to ensure that a complete record is developed.[39] Economic hardship procedures should generally provide commissions with the opportunity to develop the record by hiring its own experts[40] and hearing evidence presented by both the property owner as well as interested organizations.

Providing Relief. As previously noted above, economic hardship provisions typically offer communities a second chance to save a building by allowing the local government to develop a relief package once hardship

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[34]In consideration of a takings claim, the New York Court of Appeals stated in *De St. Aubin v. Flacke*, 68 N.Y.2d 66, 76-77, 496 N.E.2d 879, 885, 505 N.Y.S.2d 859, 865 (1986), "the property owner must show by *'dollar and cents'* evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return, the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue."

[35]A number of courts have ruled that historic designation does not result in an unconstitutional taking. *See, e.g., Estate of Tippett v. City of Miami*, 645 So.2d 533 (Fla. App. 1994)(takings claim at designation stage is premature)[13 PLR 1179]; *Canisius College v. City of Buffalo*, 629 N.Y.S.2d 886 (App. Div. 1995)("failed to present evidence that the designation physically or financially prevents or seriously interferes with the carrying out of its charitable purpose"); *Shubert Organization, Inc. v. Landmarks Preservation Commission*, 570 N.Y.S.2d 504 (App. Div. 1991), *appeal dismissed*, 78 N.Y.2d 1006 (1991), *cert. denied*, 112 S.Ct. 2289 (1992)[11 PLR 1071]. (Broadway theater owners failed to carry burden of proof that landmark designation denied them "essential use of their property"); *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, *cert. denied*, 107 S.Ct. 574 (1986)[5 PLR 3017](claim that historic designation effects unlawful taking not ripe for review); *United Artists Theater Circuit, Inc. v. City of* Philadelphia, 635 A.2d 612 (Pa. 1993)[12 PLR 1165](historic designation is not a taking requiring compensation).

[36]*See, e.g.* West Palm Beach, Fla. Ordinance No. 2815-95 § 15(b). ("The applicant has the burden of proving by competent, substantial evidence, that the denial of a permit has caused or will cause an Unreasonable Economic Hardship to the owner of the property.")

[37]Note that some courts have ruled that a property owner must demonstrate that the property could not be sold to establish a regulatory taking. *See e.g. Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) and *City of Pittsburgh Historic Review Commission v. Weinberg*, 676 A.2d 207 (Pa. 1996)[15 PLR 1086].

[38]This may require the submission of detailed information such as the price paid for the property, the value of the property before and after the proposed action, the amount of debt service/equity in the property, historical levels of income and expenses, the ownership structure and income tax position, the condition of the property and feasibility for renovation, and so forth. *See, generally*, Richard J. Roddewig, "Preparing a Historic Preservation Ordinance", *PAS Report No.* 374 (American Planning Ass'n 1983), pp. 25-28.

[39]In *Indianapolis Historic Partners v. Indianapolis Historic Preservation Commission*, No. 49D01-9107-CCP-0813 (Ind. Sup. Ct. Sept. 15, 1992)[11 PLR 1139], for example, the court ruled that the owner had established by "clear and convincing" evidence that an office building could not "be put to any reasonable economically beneficial use for which it is, or may be reasonably adapted without approval of demolition" where the evidence in the record almost entirely reflected the owner's position. In ruling against the commission in this case, the court found the owner's experts to be especially convincing where the commission had made no attempt to refute the evidence or offer any support for its position that alternative uses may be feasible.

[40]*See, e.g.* section 15(a) of the West Palm Beach Ordinance authorizing its historic preservation board to solicit expert testimony or require that the applicant submit specific information.

has been established. The process and form of relief available to property owners upon demonstration of economic hardship will necessarily vary from property to property and from jurisdiction to jurisdiction.[41] Examples range from substantial modification of a current proposal to property tax abatement to direct financial support through a combination of grant money and favorable loans so as to make renovation an economically viable option.

[41]New York City, for example, requires the formulation of a plan for relief upon a "preliminary" finding of hardship, while Chicago provides for the development of a plan after an actual finding of hardship has been made. Some experts suggest that the New York approach places a community in a stronger bargaining position and allows more time for development of an acceptable proposal for relief. An actual finding of hardship is made only upon a determination that adequate relief is not available. Both the New York and Chicago approach will be discussed in greater detail in Part 3 of this article.

L'Enfant's favor and to enter judgment in favor of ABM on L'Enfant's claim for indemnity and in favor of L'Enfant on ABM's claim for indemnity.

So ordered.

KALORAMA HEIGHTS LIMITED PARTNERSHIP, Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, Respondent,

and

Sheridan–Kalorama Historical Association, Intervenor.

No. 92–AA–727.

District of Columbia Court of Appeals.

Argued Feb. 10, 1994.
Decided March 16, 1995.

Developer petitioned for review of decision of District of Columbia Department of Consumer and Regulatory Affairs, challenging decision of Mayor's Agent under Historic Landmark and Historic District Protection Act denying developer's application for demolition permit for historic building. The Court of Appeals, Ferren, J., held that: (1) developer failed to establish that its project had social or other benefits that differed from those of any other condominium projects, or that developer had considered reasonable alternatives to complete demolition and, thus, Mayor's Agent's decision finding no "special merit" was not erroneous, and Mayor's Agent was not required to weigh historic value of property against proposed benefits of condominium project; (2) developer failed to demonstrate "unreasonable economic hardship" in denial of permit; and (3) criterion for showing "special merit" in support of application for demolition permit for historic building, that proposed project will confer "social and other benefits having a high priority for community services," is not unconstitutionally vague.

Affirmed.

1. Health and Environment ⇐25.5(8)

Applicant has burden of proving entitlement to demolition permit under Historic Landmark and Historic District Protection Act; in meeting that burden, applicant must show that he considered alternatives to total demolition of historic building and that those alternatives were not reasonable. D.C.Code 1981, § 5–1004(e).

2. Health and Environment ⇐25.5(8)

Developer seeking demolition permit for property protected under Historic Landmark and Historic District Protection Act failed to establish that its project had social or other benefits that differed from those of any other condominium projects, or that developer had considered reasonable alternatives to complete demolition and, thus, Mayor's Agent's decision finding no "special merit" was not erroneous, and Mayor's Agent was not required to weigh historic value of property against proposed benefits of condominium project. D.C.Code 1981, §§ 5–1002(11), 5–1004(e).

See publication Words and Phrases for other judicial constructions and definitions.

3. Health and Environment ⇐25.5(8)

Mayor's Agent is not required to carry out balancing analysis weighing historical significance of property protected under Historic Landmark and Historic District Protection Act against benefits of proposed project unless Agent finds that project has "special merit." D.C.Code 1981, §§ 5–1002(11), 5–1004(e).

4. Health and Environment ⇐25.5(8)

To justify demolishing historic building based on project's "special merit," applicant must show that it has considered alternatives to complete demolition. D.C.Code 1981, §§ 5–1002(11), 5–1004(e).

5. Health and Environment ⇐25.5(8)

Applicant for permit to demolish historic building on ground of "unreasonable economic hardship" resulting from denial of demolition permit has burden of proving that no reasonable alternative economic use for property exists and, thus, applicant must show that it would be deprived of all viable economic uses of property without demolition permit. D.C.Code 1981, §§ 5–1002(14), 5–1004(e).

6. Health and Environment ⇐25.5(8)

Developer seeking demolition permit for historic building in order to proceed with condominium project failed to demonstrate "unreasonable economic hardship" in denial of permit, as it failed to show that value of building had declined from time of purchase or that no other economically viable use existed; prior to purchasing building, developer knew that there was strong preservationist trend in area and its own counsel had advised that there was only 50 percent chance of obtaining required zoning variances for condominium project, and while argument that renovation of property as a single-family structure would be unprofitable was accepted, various chanceries had made unsolicited offers for building, and one of developer's partners had testified that he believed developer could recover its purchase price by spending "a little bit of money." D.C.Code 1981, §§ 5–1002(14), 5–1004(e).

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Courts ⇐1064

Although developer arguably waived claim that statutory definition of "special merit," which developer was required to show in order to obtain demolition permit for historic building, was unconstitutionally vague by failing to present argument before Mayor's Agent, developer's challenge was not procedural and was not barred by state law and, thus, Court of Appeals was not precluded from considering it, and would choose to do so, as record was adequate and parties had joined issue. D.C.Code 1981, § 5–1002(11).

8. Constitutional Law ⇐278.2(1)
Health and Environment ⇐25.5(2)

Criterion for showing "special merit" in support of application for demolition permit for historic building, that proposed project will confer "social and other benefits having a high priority for community services," is not unconstitutionally vague; provision was not standardless, given purposes of Historic Landmark and Historic District Protection Act, context in which Act was applied to developer seeking to demolish historic building in order construct condominium project, and judicial decisions clarifying meaning of provision. U.S.C.A. Const.Amend. 14; D.C.Code 1981, § 5–1002(11).

9. Constitutional Law ⇐251.4

Constitutional sufficiency of seemingly ambiguous terms cannot be judged in vacuum; context in which they arise is crucial. U.S.C.A. Const.Amend. 14.

10. Health and Environment ⇐25.5(8)

For purposes of criterion for "special merit" in support of issuance of demolition permit for historic building, requiring "social and other benefits having a high priority for community services," project such as office buildings or luxury condominiums, while generally beneficial to community, more specifically benefit occupants and cannot, as such, be viewed as adequate compensation for historic building taken away from community as whole but, rather, something more is required; Historic Landmark and Historic District Protection Act is intended to benefit general population and, thus, project to replace historic building must similarly offer community-wide benefits, and phrase "high priority for community services" make it clear that offered benefits must be for community at large. D.C.Code 1981, § 5–1002(11).

See publication Words and Phrases for other judicial constructions and definitions.

11. Health and Environment ⇐25.5(8)

Proposed project featuring benefits to occupants of new buildings, coupled with general benefits to district, such as increased tax revenues or increased housing stock, are not sufficiently special to come within clause

of Historic Landmark and Historic District Protection Act identifying "special merit" justifying issuance of demolition permit as "social or other benefits having a high priority for community services." D.C.Code 1981, § 5-1002(11).

Benny L. Kass, with whom Michael H. Haberman, Washington, DC, was on the brief, for petitioner.

Lutz Alexander Prager, Asst. Deputy Corp. Counsel, with whom John Payton, Corp. Counsel at the time, Charles L. Reischel, Deputy Corp. Counsel, were on the memorandum in lieu of brief, Washington, DC, for respondent.

Samuel M. Forstein, with whom Alfred H. Moses, Washington, DC, was on the brief, for intervenor.

Before FERREN * and TERRY, Associate Judges, and GALLAGHER, Senior Judge.

FERREN, Associate Judge:

Petitioner seeks review of an order of the Mayor's Agent under the Historic Landmark and Historic District Protection Act of 1978, D.C.Code §§ 5-1001 *et seq.* (1994 Repl.) (the Act), denying its application for a demolition permit for "Moses House," the former French Embassy in Northwest Washington. Petitioner challenges (1) the Mayor's Agent's finding that petitioner's proposed project was not one of "special merit," *id.* §§ 5-1002(10), -1002(11), -1004(e); (2) his finding that denial of the permit did not cause petitioner to suffer "unreasonable economic hardship," *id.* §§ 5-1002(14), -1004(e); and (3) the "special merit" provision of the Act itself, *id.* § 5-1002(11), as unconstitutionally vague. Finding no error and no constitutional infirmity, we affirm.

I.

Facts and Proceedings

Petitioner, Kalorama Heights Limited Partnership (KHLP), purchased "Moses House," located in the Sheridan-Kalorama Area at 2129 Wyoming Avenue, N.W., for $1,045,000 in January 1989.[1] KHLP planned to demolish Moses House and to develop the site as a twelve-family luxury condominium apartment building with underground parking. On June 13, 1989, KHLP filed an application for a demolition permit with the Department of Consumer and Regulatory Affairs.

Meanwhile, on February 13, 1989, the Sheridan-Kalorama Historical Association (the Association) had filed an application with the Historic Preservation Review Board (the Review Board) for designation of the Sheridan-Kalorama area as an Historic District. On August 16, 1989, the area was so designated and listed on the District of Columbia Inventory of Historic Sites. Subsequently, when the National Register of Historic Places recognized the Sheridan-Kalorama Historic District, Moses House was noted as a contributing structure in that Historic District.

Before purchasing Moses House, KHLP had been aware that its proposed condominium project would require substantial zoning variances.[2] Its lawyers had advised, moreover, that there was only a fifty percent chance these variances would be granted. KHLP's lawyers also had informed KHLP

* Former *Associate Judge* SULLIVAN was a member of the division that heard oral argument in this case. After his departure from the court, *Associate Judge* FERREN was selected by lot to replace him.

1. Moses House, consisting of a main house with a smaller carriage house in the rear, was constructed in 1892 in the Queen Anne style and was redesigned in 1925 to its current neo-classical appearance. Moses House served as the French Embassy and Consulate from the 1940s until 1984. It has been vacant since 1984 and has physically deteriorated.

2. KHLP's proposed development consisted of a six story, twelve unit multi-family luxury condominium building with a height of 60 feet, an underground parking garage for 26 or 27 cars, a lot occupancy of 48 percent, and a rear lot line setback of 20 feet. This development would require substantial zoning variances from regulations in the Sheridan-Kalorama area that permit development of a single family detached dwelling with a maximum height of three stories/40 feet, a maximum lot occupancy of 40 percent, and a rear lot line setback of 25 feet.

that "preservationist impulses in the [Sheridan–Kalorama] area [were] quite strong." [3]

On April 25, 1990, several months after designation of the Sheridan–Kalorama area as an Historic District, KHLP's application for a demolition permit was referred to the Review Board. The Board's staff recommended denial.[4] On July 18, 1990, the Review Board held a meeting to address KHLP's application at which the Board heard oral presentations and received written submissions. The Review Board subsequently adopted the staff's recommendation against demolition.

KHLP then requested a public hearing before the Mayor's Agent. Hearings were held on October 18 and November 1, 1990, and on March 6, 1991, the Association participated as a party in opposition. During these hearings, fifteen witnesses appeared and 31 exhibits were admitted in evidence. In addition, at the direction of the Mayor's Agent, an expert structural engineer inspected Moses House on November 29, 1990 and filed a report finding it structurally sound though in need of substantial repair. For its own part at the hearings, KHLP presented two arguments: that its proposed condominium project qualified as one of "special merit," D.C.Code § 5–1002(11), and that KHLP would suffer "unreasonable economic hardship," *id.* § 5–1002(14), if a demolition permit were not granted.[5]

On May 19, 1992, the Mayor's Agent issued a decision and order denying the requested permit. In his findings of fact and conclusions of law, he noted that KHLP had not explored "alternatives other than the existing residence or [KHLP's] proposed 12 unit building." He concluded that, as a consequence, KHLP had not met its burden of proving entitlement to a demolition permit as grounds of "special merit" or "unreasonable economic hardship." KHLP appeals this decision.

II.

Standard of Review and Statutory Framework

We must uphold the Mayor's Agent's decision if the findings of fact are supported by substantial evidence in the record considered as a whole and the conclusions of law flow rationally from these findings. D.C.Code § 1–1510(a)(3)(E) (1992 Repl.); *District of Columbia Preservation League v. Department of Consumer & Regulatory Affairs*, 646 A.2d 984, 989 (D.C.1994); *MB Assocs. v. D.C. Dep't of Licenses, Investigation & Inspection*, 456 A.2d 344, 345 (D.C.1982); *900 G Street Assocs. v. Department of Housing & Community Dev.*, 430 A.2d 1387, 1391 (D.C. 1981). Moreover, when an agency's—and, correlatively, the Mayor's Agent's—decision is based on an "interpretation of the statute and regulations it administers, that interpretation will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute." *Nova Univ. v. Educational Inst. Licensure Comm'n*, 483 A.2d 1172, 1190 (D.C.1984) (citation omitted), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1759, 84 L.Ed.2d 822 (1985). In making the necessary findings, a Mayor's Agent is "not required to explain why [he or she] favored one witness' testimony over another, or one statistic over another." *Don't*

3. Since 1985, residents of the Sheridan–Kalorama district had been exploring the possibility of Historic District status for the neighborhood. In 1987, the Sheridan–Kalorama Historical Association, created as a result of many community meetings, received a grant from the District of Columbia government to undertake a comprehensive survey of Sheridan–Kalorama structures as a preliminary step towards applying for designation of the area as an Historic District. In 1988 and 1989, several public civic group and neighborhood meetings were held to discuss Historic District designation for Sheridan–Kalorama.

4. The Staff noted that KHLP's proposal would introduce "an inappropriate scale and mass" to the property that would "adversely dominate its site and surroundings." The Staff accordingly concluded that KHLP's plan was inconsistent with the Act and "would irreversibly damage the integrity of the Historic District."

5. KHLP also argued before the Mayor's Agent that one of the reasons the project had "special merit" was its "exemplary architecture." D.C.Code § 5–1002(11). We do not address the Mayor's Agent's finding that the project did not constitute exemplary architecture, however, because KHLP does not challenge this finding on appeal.

Tear It Down, Inc. v. D.C. Dep't of Housing & Community Dev., 428 A.2d 369, 378 (D.C. 1981) (citation omitted).

According to the Act, the Mayor's Agent may not issue a demolition permit unless he or she finds that [A] "issuance of the permit is necessary in the public interest, or that [B] failure to issue a permit will result in unreasonable economic hardship to the owner." D.C.Code § 5–1004(e). "Necessary in the public interest" is defined as "consistent with the purposes of this subchapter as set forth in § 5–1001(b)" (primarily referring to enhancement of historic landmarks and other structures in historic districts) or—of relevance to this case—"necessary to allow the construction of a project of special merit." D.C.Code § 5–1002(10). "Special merit" is defined, in turn, as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of [1] exemplary architecture, [2] specific features of land planning, or [3] social or other benefits having a high priority for community services." D.C.Code § 5–1002(11). Finally, "unreasonable economic hardship" is equated with "a taking of the owner's property without just compensation." D.C.Code § 5–1002(14).

[1] The applicant has the burden of proving entitlement to a demolition permit. *See MB Assocs.*, 456 A.2d at 345; *900 G Street Assocs.*, 430 A.2d at 1391. In meeting this burden, the applicant must show that it considered alternatives to the total demolition of the historic building and that these alternatives were not reasonable. *See Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Housing & Community Dev.*, 432 A.2d 710, 718 (D.C.) ("A developer should be required to show that all reasonable alternatives were considered"), *cert. denied*, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed.2d 590 (1981); *Don't Tear It Down, Inc.*, 428 A.2d at 379–80 ("an applicant may not reject plans which it reasonably should have considered, neglect to bring such plans to readiness, and at [the] hearing use the delay in completing such plans as a basis for rejecting the same; nor can 'necessary' be equated with 'least expensive' and all viable alternatives which are more costly than the one proposed by the applicant, be summarily rejected").

III.

Special Merit

[2] KHLP contends that its project "is necessary in the public interest," D.C.Code 5–1004(e), as "a project of special merit," *id.* § 5–1002(11). KHLP then stresses that the Mayor's Agent erred in his "special merit" analysis because he failed to weigh the historical significance of Moses House against the benefits that KHLP's project would confer upon the District. *See Citizens Comm. to Save Historic Rhodes Tavern*, 432 A.2d at 716 ("the Act implicitly requires that, in the case of demolition, the Mayor's Agent [must] balance the historical value of the particular landmark against the special merit of the proposed project").

[3] It is important to make clear at the outset that the Mayor's Agent is not required to carry out such a balancing analysis unless the Agent finds that the project has "special merit." *Committee of 100 on the Federal City v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 571 A.2d 195, 203 (D.C.1990) ("the balancing of the historic value of the Woodward Building against the special merits of the project could not proceed until the Mayor's Agent found that the amenities proposed by [applicant] were sufficient to constitute a project of special merit"). In KHLP's case, the Mayor's Agent concluded that the proposed luxury condominium project did not have "special merit." [6]

6. In the hearings before the Mayor's Agent, KHLP contended that its proposed project would constitute a plan of "special merit" because it would confer "social or other benefits having a high priority for community services." D.C.Code § 5–1002(11). As proof of "special merit," KHLP said the condominium project would (1) generate increased tax revenues, (2) increase the stock of luxury condominiums within the District, and (3) prevent the building from being used as a diplomatic chancery.

After considering all the special merit factors offered by KHLP, the Mayor's Agent concluded that KHLP had failed to satisfy its burden of proof. Specifically, the Mayor's Agent found that KHLP's projection of increased taxes was based on expected sale prices of the condomini-

Accordingly, unless this conclusion does not flow rationally from substantial evidence of record, we cannot say that the Mayor's Agent erred in failing to undertake the balancing analysis KHLP would require.[7]

[4] It is clear that a "special merit" project of the kind at issue here, defined by reference to the third § 5–1002(11) criterion—"social or other benefits"—must provide benefits that have a "high priority" in community services. *Id.* Accordingly, we have noted that "[f]actors which are common to all projects are not considered as special merits." *Id.* at 200 (quoting REPORT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON HOUSING AND URBAN DEVELOPMENT ON BILL 2–367, "THE HISTORIC LANDMARK AND HISTORIC DISTRICT PROTECTION ACT OF 1978," at 6 (October 5, 1978)). Furthermore, to justify demolishing an historic building based on a project's "special merit," the applicant must show that it has considered alternatives to complete demolition. *See Don't Tear It Down, Inc.*, 428 A.2d at 379–80. In this case, KHLP has neither shown that its project has social or other benefits that differ from those of other condominium projects nor demonstrated that KHLP considered reasonable alternatives to complete demolition. We therefore cannot say that the Mayor's Agent's decision finding no "special merit" is erroneous. Consequently, contrary to KHLP's contention, the Mayor's Agent was not required to weigh the historic value of Moses House against the proposed benefits of KHLP's condominium project.

IV.

Unreasonable Economic Hardship

KHLP also challenges the Mayor's Agent's determination that KHLP would not suffer "unreasonable economic hardship" upon denial of the demolition permit. It contends that (1) the Mayor's Agent misapplied the law; (2) his decision was not based on substantial evidence of record; and (3) he failed to inquire into the cost of revitalizing the building.

Because "unreasonable economic hardship" is defined to mean a "taking of the owner's property without just compensation,"

ums and that these prices were uncertain. He therefore found that KHLP had not shown with certainty that there would be an increase in tax revenues. The Mayor's Agent also noted that the prospect of increased revenues was "not in and of itself a 'special merit' within the meaning of D.C.Code § 5–1002(11)."

With respect to the project's increasing the stock of luxury housing, the Mayor's Agent found that KHLP had failed to show there were no other alternatives—such as maintaining the facade of Moses House and converting the interior into a multi-family dwelling—to meet this need. In addition, the Mayor's Agent found that KHLP's argument that the condominium project would increase the housing stock did not show "special merit" because, under KHLP's reasoning, "any residential highrise with more units than the historical building it replaced would be meritorious."

Finally, the Mayor's Agent found that KHLP had failed to show that the only two alternatives available for redeveloping the Moses House property were a multi-story condominium building and a chancery. The Mayor's Agent noted that, although the zoning laws of the area prohibited construction of the condominium project, the District of Columbia Comprehensive Plan Amendments of 1989, D.C.Law 8–129, cited by KHLP to support its project as having "special merit," only discouraged chanceries in residential areas; they were not prohibited. The Mayor's Agent further noted that the community had made clear it would prefer a chancery to a condominium project.

7. The Association contends that the Mayor's Agent did, in fact, weigh the historical significance of Moses House against the benefits of KHLP's project. The Association points out that before analyzing KHLP's proposed project and determining that it lacked special merit, see *supra* note 6, the Mayor's Agent had concluded from the record that "the evidence presented confirms that the history of the Building (its cultural value), including its alteration made in the 1920s, makes it an artifact of the historical period for which the Sheridan–Kalorama area was designated an Historical District" and that it "has been, and continues to be, deemed a contributing structure to the Historic District." The Association contends that, in making these two determinations, the Mayor's Agent necessarily weighed the virtues of the building against KHLP's project. *See Don't Tear It Down Inc.*, 428 A.2d at 379 ("where we can sift the findings from the restatement of evidence and still have findings on the material contested issue(s), we will not set the findings aside"); *cf. Citizens Comm. to Save Historic Rhodes Tavern*, 432 A.2d at 716–17 (court gleaned from record that Mayor's Agent had implicitly balanced special merits of project against historical significance of building).

D.C.Code § 5–1002(14), a determination of unreasonable economic hardship presupposes a finding that denial of a demolition permit would amount to a deprivation of property without due process.

[5] We have defined the standard for "unreasonable economic hardship" in *900 G Street Assocs.* as follows:

[I]f there is a *reasonable* alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if "higher" or "more beneficial" uses of the property have been proscribed.

430 A.2d at 1390 (emphasis in original). The permit applicant, therefore, has the burden of proving that no reasonable alternative economic use for the property exists. *See MB Assocs.*, 456 A.2d at 345; *900 G Street Assocs.*, 430 A.2d at 1391. It follows that, to prove unreasonable economic hardship, the applicant must show that it would be deprived of "all viable economic uses of the property" without a demolition permit. *Weinberg v. Barry*, 604 F.Supp. 390, 398 (D.D.C.1985).

[6] The Mayor's Agent applied the *900 G Street Assocs.* "no reasonable alternative economic use" rule to KHLP's proposal for Moses House and concluded that KHLP had not met its burden.[8] The Mayor's Agent specifically found that, although KHLP had demonstrated that "it would be unprofitable to renovate the property as a single family home," KHLP had not shown that other alternative uses of the property could not reasonably be found. The Mayor's Agent noted, for example, that KHLP had received unsolicited offers for Moses House from several chanceries. The Mayor's Agent also pointed out that, although KHLP had not tried to market Moses House, the latest assessed value of the property "was over a quarter of a million dollars more than the price at which it was purchased two years ago." The Mayor's Agent accordingly found that KHLP had not shown the value of Moses House had declined since KHLP purchased it.

KHLP maintains that the Mayor's Agent erred in applying the "no reasonable alternative economic use" rule to its project because, unlike the applicant in *900 G Street Assocs.*, KHLP had bought Moses House before it was designated an historic landmark. KHLP points out that, in *900 G Street Assocs.*, this court acknowledged that the predictable difficulty of obtaining a demolition permit for a property already subject to historic landmark status must have played into the applicant's calculation of the price it paid for the building, and we specifically noted that we were not considering a case "in which it [was] relevant to determine the reasonable expectations of profit which the owner or purchaser of a property entertained when purchasing the property before the government imposed restrictions." *Id.* at 1390. Focusing on this latter quoted observation, KHLP accordingly argues that the Mayor's Agent, in determining whether KHLP would suffer an unreasonable economic hardship, should have found the *900 G Street Assocs.* rule inapplicable and, instead, conducted a fact-specific inquiry focusing on the impact of the Historic District designation on KHLP's "distinct investment-backed expectations" in purchasing the property before that designation occurred. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *see also Lucas v. South Carolina Coastal Comm'n*, — U.S. —, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

KHLP, however, ignores the fact that the *900 G Street Assocs.* rule has been applied in cases, such as *MB Assocs.*, 456 A.2d at 345, and *Weinberg*, 604 F.Supp. at 398, where—as in this case—historical designation took place after the owner purchased the property. More significantly, and contrary to KHLP's assertions, the Mayor's Agent did address the argument that KHLP's "reasonable ex-

8. Before making his decision, the Mayor's Agent gave the parties 30 days to study the feasibility of other plans for Moses House that would avoid complete demolition. Although the Association offered to meet with KHLP to discuss alternatives, KHLP told the Association that "a meeting would not be required." The record establishes that although the lawyers for the parties met to work out reasonable alternatives, the parties themselves did not do so.

pectations of profit" in purchasing Moses House should be considered in determining whether denial of a demolition permit would constitute a "taking." The Mayor's Agent noted that KHLP could not reasonably have expected to construct and profit from the proposed condominium project because, before purchasing Moses House, KHLP knew that (1) there were strong preservationist trends in the area and that (2) according to KHLP's own counsel, there was only a fifty percent chance of obtaining required zoning variances to build the condominium project. The Mayor's Agent called KHLP's Moses House acquisition a "speculative investment" tantamount to a "gamble." The Mayor's Agent therefore concluded, based on evidence KHLP either supplied or has not refuted, that even considering KHLP's "investment-backed expectations" KHLP had failed to justify an exception to the *900 G Street Assocs.* rule.

KHLP also contends that the Mayor's Agent either failed to inquire into whether it was commercially feasible to renovate Moses House, or arbitrarily discounted the evidence demonstrating that renovation was not economically possible.[9] *See District of Columbia Preservation League*, 646 A.2d at 990 ("When the applicant relies on the 'unreasonable economic hardship' exception ... an inquiry into the cost of revitalizing a building is not only relevant but required").

At the hearings before the Mayor's Agent, there was conflicting testimony about the cost of renovating Moses House; estimates ranged from $800,000 to $3,000,000. In his findings of fact, the Mayor's Agent credited the estimate of KHLP's expert, who had opined that, "to repair the building—doing a 'middle range repair'—would cost approximately 1.5 million dollars." Contrary to KHLP's assertion, therefore, the Mayor's Agent did not arbitrarily discount evidence that renovation would not be economically feasible; the record shows that he accepted KHLP's argument that it "would be unprofitable to renovate the property as a single family structure."

The Mayor's Agent also noted, however, that KHLP had not shown it could not "sell Moses House in its current condition at a fair price" or that there was no other economically feasible use for the property than the proposed condominium project. According to the record, in fact, various chanceries had made unsolicited offers for Moses House, and a KHLP partner had testified about his personal belief that KHLP could recover its purchase price by spending "a little bit of money." The Mayor's Agent, therefore, considered whether renovation was reasonably feasible and concluded that even if it was not, KHLP had ways of avoiding loss short of obtaining a demolition permit.

In short, the record shows that KHLP failed to meet its burden of demonstrating unreasonable economic hardship, because it did not show that the value of Moses House had declined since the time of KHLP's purchase or that no other economically viable use existed. The Mayor's Agent's finding that KHLP did not show "unreasonable economic hardship," therefore, is supported by substantial evidence in the record.[10]

V.

Unconstitutional Vagueness

[7, 8] Finally, KHLP challenges the statutory definition of "special merit," D.C.Code § 5–1002(11), claiming that the term is unconstitutionally vague and contending that its application unfairly deprived KHLP of an opportunity to know what factors the Mayor's Agent considered important in making

9. KHLP maintains that the Mayor's Agent confined his inquiry relating to the renovation of the building to whether it was physically possible to renovate the existing structure and not whether it was economically feasible to do so.

10. The Supreme Court's recent decision in *Lucas*, — U.S. at —, 112 S.Ct. at 2896, on which KHLP heavily relies, is distinguishable. In *Lucas*, the court relied upon the agency's finding that the challenged state regulation—prohibiting any construction on beach-front property—rendered Lucas' property valueless. In this case, no such finding has been made. To the contrary, the Mayor's Agent found that KHLP received a few unsolicited offers for Moses House and that the assessed value of the property had increased since the time KHLP purchased it.

his determination.[11] Specifically, KHLP contends that the words comprising the third "special merit" criterion at issue here—"social and other benefits having a high priority for community services," D.C.Code § 5–1002(11)—are too imprecise to guide the Mayor's Agent in making a decision.

[9] In a due process vagueness challenge, the inquiry is "whether the statute provides explicit standards so that the law gives 'the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and prevents 'arbitrary and discriminatory applications.'" *Nova Univ.*, 483 A.2d at 1188 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222 (1972)). Whether the statute is sufficiently precise will "depend[ ] in [large] part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). Moreover, the constitutional sufficiency of seemingly ambiguous terms cannot be judged in a vacuum: the context in which they arise is crucial. *See Nova Univ.*, 483 A.2d at 1172. Finally, the meaning of a statute can be clarified by turning to "regulations [that] amplify[ ] the statutory standard" and to "judicial and administrative interpretations [that] have elaborated its text." *LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 902 (D.C.1985).

[10] The part of the "special merit" definition which KHLP challenges—namely, the alleged vagueness of the provision requiring "social or other benefits having a high priority for community services," D.C.Code § 5–1002(11)—must be viewed in the context of the Act's purposes. The Act aims at preserving historic landmarks and districts for "the health, prosperity and welfare of the people of the District of Columbia." *Id.* § 5–1001(a). Because the Act is intended to benefit the general population of the District, it follows that a project to replace an historic building must similarly offer community-wide benefits. Moreover, the phrase "high priority for community services," *id.* § 5–1002(11), makes clear that the offered benefits must be for the community at large, not primarily for a subset of privileged persons. Thus, according to reasonably clear inferences from the statutory language itself, projects such as office buildings or luxury condominiums, while generally beneficial to the community, more specifically benefit the occupants and cannot, as such, be viewed as adequate compensation for historic buildings taken away from the community as a whole; something more is required.

This court's interpretations of the "special merit" provision of the Act have enhanced understanding of the statute. These interpretations provide guidance to parties in applying for a demolition permit, and inform and assist the Mayor's Agent in deciding the case. More specifically, in *Committee of 100*, 571 A.2d at 200, we noted that, because the purpose of the statute as a whole is to preserve historic properties "as distinctive elements of the city's ... history" before "per-

11. The Association contends that, because KHLP failed to make this argument before the Mayor's Agent, KHLP should not be allowed to make it on appeal. *See Abolaji v. D.C. Taxicab Comm'n*, 609 A.2d 671, 672 (D.C.1992) (failure to raise procedural points below left appellate court an insufficient record with which to evaluate validity of petitioner's procedural arguments); *Hughes v. D.C. Dep't of Employment Servs.*, 498 A.2d 567 (D.C.1985) (failure to object to late issuance of an order during administrative proceeding meant court need not consider this objection on appeal); *see also Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 397–99, 110 S.Ct. 688, 699–701, 107 L.Ed.2d 796 (1990) (affirming California court's holding that taxpayer's failure to raise constitutional claims with agency, when California law allowed court review of only matters that had been brought up before the agency, left court without jurisdiction to consider these claims on appeal). KHLP replies that it could not have been expected to raise a constitutional objection before the Mayor's Agent because it had no way of anticipating the need for such an argument until the Mayor's Agent issued his decision. We agree with the Association that KHLP, in recognizing the need to demonstrate it had a project of special merit, should have presented all available arguments, attacking the questionable "special merit" criterion itself in addition to attempting to demonstrate satisfaction of that criterion at the hearings or on motion for reconsideration. Thus, KHLP arguably has waived its vagueness claim. Nonetheless, we note that KHLP's challenge is not procedural, as in *Abolaji*, and is not barred by state law, as in *Jimmy Swaggart Ministries*. Accordingly, we are not precluded from considering it, and we choose to do so since the record is adequate and the parties have joined issue.

manent loss and demolition of such [ ] valuable structure[s],.... the Preservation Act demands [that they] be replaced with something sufficiently 'special' " and that "[f]actors which are common to all projects are not considered special merits." *See id.* at 200–201 (new office building that merely would provide more parking than building it would replace, and would increase rent and tax revenue, is not of "special merit"); *MB Assocs.*, 456 A.2d at 346, (proposed office building was not project of special merit because proposed contribution was common to all downtown development plans).[12]

[11] We do not preclude the possibility that an office building or an apartment complex may have "special merit" if it provides particular "social or other benefits" that can be said to offer "community services" for persons other than those who primarily inhabit or work in the buildings. For example, in *Citizens Comm. to Save Historic Rhodes Tavern*, the Mayor's Agent found "special merit" in a proposed shopping complex on the basis of the "exemplary architecture," since the project would maintain facades of two historic buildings while demolishing a third historic building; but this court also noted that, because the project would provide jobs for over 2,000 persons, of whom 50 percent would be of low or moderate income, and also would provide $2 million in tax revenues, these benefits were additional factors militating in favor of the "special merit" finding. 432 A.2d at 717 n. 13. This possibility, however, does not diminish the central point applicable here: projects featuring benefits to the occupants of new buildings (such as the purchasers of KHLP's condominiums), coupled with general benefits to the District (such as increased tax revenues or increased housing stock), are not "special" enough to come within the clause identifying "special merit" as "social or other benefits having a high priority for community services."

The challenged provision of the Act is not standardless given the purposes of the Act, the context in which the Act is applied here, and the judicial decisions clarifying its meaning. Our case law, in particular, has given substantial content to the meaning of the "social or other benefits" criterion defining "special merit" under the Act. We therefore must reject KHLP's contention that the "special merit" provision of the Landmark and Historic District Protection Act is unconstitutionally vague.

VI.

Conclusion

KHLP failed to meet its burden of showing that the proposed luxury condominium project had special features that distinguished it from other luxury condominium projects and that it would benefit the community in general (not merely the residents of the condominiums). KHLP also failed to consider the feasibility of reasonable alternatives to complete demolition of Moses House. The Mayor's Agent, therefore, did not err in concluding that KHLP's proposed condominium project did not have "special merit." Furthermore, KHLP failed to meet its additional burden of showing that, without complete demolition, there could be no viable economic use for the property, or that the value of Moses House had decreased significantly

12. In fact, the record shows that KHLP was aware that its proposed "special merit" factors would probably not be accepted as such under the standards established by previous court decisions. At the conclusion of the November 1, 1991 hearing the following discussion took place between the Mayor's Agent and counsel for KHLP:

> MAYOR'S AGENT: ... But I'm just suggesting to you at this point that I haven't heard any evidence that would meet the burden of special merit.
> [KHLP'S COUNSEL]: You're rejecting the idea of additional tax revenue for the city? You're rejecting the idea of preserving the Comprehensive Plan of staying away from embassies and putting housing stock in the District of Columbia as no special merit?
> MAYOR'S AGENT: ... it's a very high burden to meet when we're talking about special merit.... [y]ou would need to go back and refer me to some other cases to support your position because I'm not trying to create any new law. I'll let the courts do that....
> [KHLP'S COUNSEL]: *I think this is new law.*
> MAYOR'S AGENT: Well, the court will have to make new law.
> [Emphasis added.]

from the time it was designated a contributing structure in the Historic District. The Mayor's Agent, therefore, also did not err in concluding that KHLP would not suffer "unreasonable economic hardship" upon denial of the demolition permit. Finally, as we have elaborated, the third criterion under the "special merit" provision of the statute is not unconstitutionally vague.

Affirmed.