

ESTABLISHING A HISTORIC PRESERVATION COMMISSION

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Municipal agencies, including historic preservation commissions, are creatures of statute and their powers are those Enabled by the Municipal Land Use Law ("MLUL"). In re Estate of Neuberger v. Middletown Tp., 215 N.J. Super. 375 (App. Div. 1987).

In some communities, the historic preservation commission ("HPC" or "commission") is created by ordinance to spearhead initial planning efforts to evaluate properties eligible for historic designation. In other communities, the planning board engages in these studies by identifying historic resources in the master plan. The MLUL does not dictate the process but allows flexibility for a municipality to engage in planning to designate and regulate historic sites and districts and provide design guidelines.

MLUL REQUIREMENTS FOR HISTORIC PRESERVATION ORDINANCES

In 1985, the Legislature first empowered municipalities to adopt historic preservation ordinances through the MLUL and imposed important planning requirements on such efforts. To address concerns of arbitrary designations of properties as historic, the MLUL mandates that historic sites and districts be identified in the master plan before adopting a regulatory ordinance.

The 1991 amendments to the MLUL require that the historic preservation or other master plan element indicate the location and significance of historic sites and districts, identify the standards used to assess worthiness and analyze the impact of each component element of the master plan on preservation of resources.

The definition of the term "historic site" reaches beyond architectural and historic importance and includes natural objects of historical, archeological, cultural or scenic significance. Recent municipal and state efforts have attempted to designate industrial properties as historic due to their association with a community's cultural history. The success of this expanded approach is yet to be tested.

Initially, the MLUL required listing historic sites in the master plan before a regulatory ordinance could be adopted. The 1991 adoption of N.J.S.A. 40:55D-65.1 creates a procedure for an exception parallel to that applicable to land use ordinances and allows an ordinance to be adopted without this planning support, provided that the governing body provides a statement of reasons in a resolution, records the reasons in the minutes and passes the ordinance by a weighted majority.

Since enactment of the enabling provisions for historic preservation, there have been no reported cases in New Jersey in

which a municipality has designated a historic site or district without complying with N.J.S.A. 40:55D-65.1.

DESIGN CRITERIA AND GUIDELINES

When a municipality designates and regulates historic sites and districts, the ordinance must provide design criteria and guidelines in addition to the zoning designations. The guidelines can be inherently flexible to address the architectural mélange that often exists. Nadelson V. Township Of Millburn, 297 N.J. Super. 549 (Law Div. 1996) rejected a challenge to guidelines as impermissibly vague. The Nadelson decision contains an excellent overview of cases from other jurisdictions.

There are many examples of well-written and informative design guidelines that aid the commission and the regulated community in a constructive manner. Communities should adopt design guidelines with graphics and other design tools to promote preservation.

It is also advisable to implement a tiered system of review. The first tier of review is to exempt activities that constitute ordinary maintenance and repair. A well-written ordinance should contain a definition of "ordinary maintenance and repair" to allow the repair and replacement of deterioration, wear or damage to a structure with material and workmanship of the same quality and appearance. Submission

requirements must be included in accordance with this definition. If a designated and knowledgeable local official certifies that the work to be performed meets this definition, then no permit should be required.

The second tier of review is to allow a minor application. The MLUL permits a preservation ordinance to define a minor application that the chairman of the commission can approve. For example, fences, lighting and requests for field changes that comply with the design guidelines can efficiently be placed in this category. A monetary threshold for minor work is not recommended.

The third tier of review is to require a permit pursuant to N.J.S.A. 40:55D-111.

An ordinance should also provide a mechanism for emergency repairs. Emergency review is necessary to qualify for Certified Local Government status under the National Historic Preservation Act. A well-crafted ordinance should provide for emergency review to protect resources that may be damaged by natural disasters or fires and to prevent further damage.

These types of provisions encourage preservation yet relieve property owners of unnecessary administrative review.

HYBRID NATURE OF AN HPC

N.J.S.A. 40:55D-109 specifies the powers and duties of historic preservation commissions. These powers are often

described as "hybrid" since an HPC has both land use and construction related functions. The MLUL spells out these distinct powers -- one being the function of commissions with respect to planning and development applications and the other being the permit review function. These hybrid powers are frequently misunderstood.

An HPC is authorized to perform planning activities by preparing a survey of historic sites and by coordinating with the planning board regarding the master plan. An HPC can also recommend the inclusion of historic sites in the capital improvement program. Broad advisory, educational and informational functions are authorized. In addition to these planning functions, the HPC advises the planning board and board of adjustment on applications for development.

N.J.S.A. 40:55D-110 provides for the commission's purely advisory role regarding development applications and applies regardless of whether the historic resource is specifically regulated in the ordinance. Advisory review of applications applies to all sites or districts identified on the official map or in any component element of the master plan.

Failure to refer the application to the commission does not invalidate the development application. The HPC may provide its advice by submitting a written report, but the MLUL specifies

that the advice must be conveyed orally by one of the HPC members or staff, even if a written report is submitted.

The hybrid aspect of the commission is its power to report on permits **not approved by an application for development.**

N.J.S.A. 40:55D-111 addresses applications for permits pertaining to historic properties and imports a new function into the MLUL. If the ordinance regulates historic sites or districts, the governing body **shall** provide for referral of permits to the commission for a written report regarding "any of those aspects of the change proposed, which aspects were not determined by approval of an application for development by a municipal agency." This power can relate to permits required by other statutes even if no land use application is required.

The report generated by the HPC in the permit review process is commonly referred to as a "certificate of appropriateness." Although not specifically defined in the MLUL, N.J.S.A. 40:55D-18, which pertains to enforcement, authorizes a governing body to require "specified permits, certificates or authorizations" prior to construction, alteration, repair, remodeling, removal, destruction and other activities."

The permit review function can apply to an activity such as demolition or construction of an addition that does not require approval of an application for development, i.e., where there is

no MLUL involvement. It can also apply to those aspects of an application not approved by the planning or zoning board, it being the Legislature's assumption that land use boards do not regulate architectural style.

A common example of the permit review function when no land use application is involved is for an addition to a single-family house that is a designated historic site or located in a historic district. If the addition conforms to the zoning ordinance, no variances are required. As a single-family house, no site plan review is required. N.J.S.A. 40:55D-37a. As a freestanding pre-existing lot, no subdivision approval is required. See definition of subdivision in N.J.S.A. 40:55D-7. Because the house is regulated by the historic preservation ordinance, review by the HPC is required.

Another instance of a permit that has no land use component is demolition. The construction official issues the permit under the Uniform Construction Code and the official is required to refer the permit to the HPC for its report. The review of a permit for demolition is within the exclusive jurisdiction of the HPC under the MLUL, subject to possible appeal to the zoning board of adjustment pursuant to N.J.S.A. 40:55D-70a. Planning and zoning boards have no authority to act on demolition permits since none of the standards of a subdivision or site plan ordinance allow either board to consider demolition. If a

municipality seeks to restrict demolition of historic structures, it must do so through historic preservation.

STRONG OR WEAK COMMISSION

In connection with permit review, a municipality can create a strong or a weak commission. A strong commission reports directly to the administrative officer; a weak commission reports to the planning board, which in turn reports to the administrative officer. The report of the commission, or the planning board, as the case may be, is binding on the administrative officer.

The permit review function provides that the commission, or the planning board in the case of a weak commission, shall report to the administrative officer within 45 days of referral of the application to the commission. If the commission recommends against the permit or recommends conditions, the administrative officer must deny the permit or include the conditions. Failure to report within the 45-day period constitutes a favorable report without conditions.

The MLUL does not authorize proceedings before a commission to be treated as applications for development. There is no provision for maintaining a verbatim record, for determining completeness or incorporating other procedural features applicable to applications for development. Since the HPC

speaks through the administrative officer, there is a *de novo* appeal from the decision pursuant to N.J.S.A. 40:55D-70a.

INVERSE CONDEMNATION CONCERNS

A municipality is not allowed to zone property into idleness by restraint against all reasonable use. Kozesnik v. Montgomery Township, 24 N.J. Super. 154, 182 (App. Div. 1957) As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 N.J. 393 (1922). See also the oft-cited decision in Pennsylvania Central Transportation Co. v. New York, 438 U.S. 104 (1978). Case law recognizes that when historic properties cannot feasibly and reasonably be developed, demolition is appropriate. In re Register of Historic Places Act, 408 N.J. Super. 54 (App. Div. 2009).

Some municipalities have incorporated a hardship provision into their ordinances to provide relief for historic properties seeking approval for demolition or adaptive reuse. The issue arises when slate roofs, siding or other expensive historic features are to be replaced. An attorney general's opinion finds that hardship procedures are not authorized by the MLUL.

Properly implemented, historic preservation ordinances can advance important environmental goals.