

PHED Committee #1
June 8, 2009

MEMORANDUM

June 4, 2009

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz,  Legislative Attorney
SUBJECT: Historic Preservation Amendment 09-1

Background

On February 24, 2009 the Council introduced Historic Preservation Amendment (HPA) 09-1, sponsored by Councilmember Knapp. HPA 09-1 would comprehensively amend the Historic Preservation Ordinance. Councilmember Knapp believes that the current ordinance is not precise, concise, and decisive in its descriptions of processes and its delegations of authority. HPA 09-1 also includes a number of substantive changes.

HPA 09-1 would clearly establish responsibilities concerning the *Locational Atlas and Index of Historic Sites* (Atlas). The current historic preservation provisions are silent concerning the Council's role. This Ordinance would allow the Council to list a site in the Atlas and to remove a site under certain circumstances. Sites and districts that the Planning Board does not recommend for inclusion in the Master Plan for Historic Preservation would be removed from the Atlas. The current alternative procedures for demolition and building permits for an owner whose property is listed in the Atlas would be more clearly identified. The Historic Preservation staff would be obligated to inform the owners of Atlas properties of their status and their obligations every 5 years.

All of the criteria for the Planning Board to recommend designating a site would be retained except:

- 1) "High artistic value" would be removed as a criterion; and
- 2) If a property owner does not consent to the inclusion of his or her property in the Master Plan for Historic Preservation, then the proposed amendment would require a finding that the property satisfies at least 3 of the historic criteria, and the recommendation to designate must be approved by no less than 4 Planning Board members.

Sites or districts that the Planning Board does not recommend for inclusion in the Master Plan for Historic Preservation would not be submitted to the Council. The Ordinance would restate the Council's authority to amend the Planning Board's work program to consider particular properties

for inclusion in the Master Plan for Historic Preservation; any such site or district would be submitted for the Council’s consideration, even if the Planning Board recommends no change to the Master Plan.

This Ordinance would require leniency for granting a historic area work permit (HAWP) to alter a non-historic addition made before the property’s inclusion in the Master Plan for Historic Preservation or the Atlas. If the Historic Preservation Commission (HPC) determines that a permit must be granted to allow the owner some reasonable use of their property, then the permit would be granted without further delay.

The following table summarizes the changes proposed by HPA 09-1. Each row is a different activity; each column is for each decision making body involved in historic preservation.

	HPC	Planning Board	Council
Atlas	<i>No Change</i> Recommends to the Planning Board	<i>No Change from current practice</i> Atlas Manager- authority to add or delete	Directs additions or deletions by actions on Master Plan amendments
Atlas-permit applications for a substantial alteration	<i>No Change</i> Decision maker if owner opts for HAWP	<i>No Change</i> Recommends to Council if owner demands designation decision	<i>No Change</i> Approves/Disapproves Amendment - if approves then HAWP required
Master Plan Amendments	High artistic value removed as criterion Recommends to the Planning Board - as required by owner action, work program, or 3 rd party request	High artistic value removed as criterion Recommends to Council; if it recommends disapproval, then Council considers the amendment only if it changes the work program.	Considers the positive recommendations of the Planning Board Can require transmittal of any resource or district by work program change
Lack of consent by potential MP resource owner	<i>No change</i>	A positive Master Plan recommendation requires a finding of 3 criteria by 4 members	<i>No Change</i>
Historic Area Work Permit	Required leniency for non-historic additions; not required for landscaping; no delay to permit with finding of hardship	<i>No Change</i> No role	<i>No Change</i> No role

Executive Comments

On March 31, 2009 the Executive recommended that HPA 09-1 not be adopted as introduced:

While I appreciate the individual rights that it correctly recognizes and seeks to protect, as drafted the amendment tips the scale too heavily against the protection of historic resources and risks the permanent loss of assets for future generations.

Planning Board Comments

The Planning Board recommended against the adoption of HPA 09-1 as introduced in testimony submitted on March 31, 2009. The Board testified that requiring an extraordinary majority for it to recommend the designation of a historic resource without the consent of the owner is contrary to Article 28 and unwise policy. Under HPA 09-1 as introduced, the absence of a single Board member would require a unanimous decision of the Board members present to recommend the designation of a historic resource without the owner's consent. The Board also objected to a provision of HPA 09-1 that would allow only amendments recommended by the Planning Board to proceed to the Council. The Board would favor clarification of the HPC's and the Planning Board's roles with respect to the Atlas and the designation process. It favored granting the HPC the authority to maintain the Atlas.

HPC Comments

The Commission was concerned that HPA 09-1 may conflict with state law and that it lacks legally tested standards that qualify the County as a Certified Local Government. The Commission had specific recommendations concerning 5 topics:

- 1) Atlas - revise to grant the Commission full control over listing resources;
- 2) Owner's Consent – delete the proposed provision and retain the current process;
- 3) High Artistic Value Criterion – retain the criterion;
- 4) Non-Historic Additions – the proposed provision would be inconsistent with historic preservation practice;
- 5) Editorial Changes – support changes made to clarify Chapter 24A.

Public Hearing

On March 31, 2009 the Council held a public hearing on HPA 09-1.¹ The vast majority of the testimony submitted for the Council's consideration opposed HPA 09-1. The opposition concerned:

- 1) the authority delegated to the Planning Board over the Atlas and amendments to the Master Plan for Historic Preservation;
- 2) the additional obstacles to adding sites to the Master Plan for Historic Preservation without the owner's consent: 3 historic criteria and a Planning Board supermajority; and

¹ Councilmembers received copies of all testimony. All testimony is available to the public through the Office of Legislative Information Services. Staff only attached the testimony of the Maryland Historical Trust and the National Historical Trust to this memorandum.

- 3) removing “high artistic value” as a criterion for historic designation.

In the opinion of the testimony submitted in opposition to HPA 09-1, the substantive changes would be inconsistent with the best practices of historic preservation programs. The Maryland Historic Trust and the National Historic Trust submitted detailed comments that questioned the Council’s legal authority to adopt HPA 09-1 as introduced. A number of historic associations requested a rejection of HPA 09-1 and requested consultation with the historic community before the introduction of future legislation. Some testimony in opposition to HPA 09-1 generally supported revisions to Chapter 24A for the sake of clarity.

Those residents who testified in favor of HPA 09-1 cited abuses in the current process, from a property owner’s point of view. In particular, it is a problem to property owners when historic preservation is used as a tactic solely to stop redevelopment. Some owners thought that their private property rights should have a higher value than the public’s general interest in historic preservation.

Committee meeting

Staff will be prepared to guide the Committee through the issues raised by HPA 09-1. This will be an unnecessary exercise if the Committee recommends rejecting HPA 09-1 without a detailed review, as urged by testimony. Staff recommends amending the current ordinance to clearly assign responsibilities, codify current practice, modify current practice, and generally make the ordinance more concise, precise, and decisive.² The following outlines the issues in HPA 09-1.

Issue Outline

- 1) HPA 09-1’s Consistency with Law
- 2) Atlas
 - a) *Option 1* – Retain current process (the HPC recommends changes to Planning Board)
 - b) *Option 2* – HPC control of Atlas
 - c) Noticing property owners in the Atlas
- 3) Master Plan for Historic Preservation
 - a) When should Master Plan recommendations come to the Council?
 - b) What findings should be required by whom?
 - c) Specific historic criteria – high artistic value
 - d) Specific historic criteria – owner’s consent
- 4) Historic Area Work Permit
 - a) Ordinary maintenance
 - b) Landscaping
 - c) Leniency
 - d) Exclusion for farming
 - e) Environmental setting
 - f) Hardship approval

² “Don’t be afraid of opposition. Remember, a kite rises against, not with the wind.” Hamilton Wright Mabie, courtesy of Susan Mabie.

- 5) Regulations
- 6) State Tax Credits
- 7) Certified Local Government

Issues

- 1) HPA 09-1's Consistency with Law

It is staff's opinion that there are reasonable arguments to sustain HPA 09-1 as introduced, if it is challenged in court. Staff sent letters to the Maryland Historic Trust and the National Historic Trust to respond to the legal arguments presented in their testimony. A response from the National Trust is attached to this memorandum. The questions raised and staff's summary responses to those questions are provided at the end of this memorandum.

- 2) Atlas

An inventory of staff-recommended historic sites thought worthy of historic preservation was completed in 1976.³ It was not until 1979 that the Council adopted a historic preservation ordinance. The staff-developed inventory became the Atlas. The Atlas served as a starting point for sites and districts considered for inclusion in the Master Plan for Historic Preservation. The Atlas serves as a means of protecting sites before the Planning Board or the Council evaluates sites for inclusion in the Master Plan. After 30 years, there are still 160 sites and 16 districts in the Atlas. About half of Maryland jurisdictions do not have anything like the Atlas; for regulatory purposes, a property is or is not historic. The City of Rockville does not have an Atlas, but it is currently reviewing every demolition permit to determine if the site is worthy of historic preservation zoning.

Chapter 24A acknowledged the existence of the Atlas and authorized the Planning Board to update the Atlas.⁴ Chapter 24A also authorized the HPC to advise the Planning Board on amending both the Atlas and the Master Plan for Historic Preservation.⁵

The Planning Board is indirectly charged with publishing and maintaining the Atlas. Chapter 24A does not specifically authorize the addition and deletion of sites from the Atlas. There are no criteria to make such changes in the current ordinance. The Council has no role in approving sites in the Atlas. In recent Master Plan amendments, it instructed the Planning Board to make changes to the Atlas.

³ This has been described as a windshield survey of the oldest buildings in the County.

⁴ Chapter 24A §9(b):

If the historic resource is listed in the "Locational Atlas and Index of Historic Sites in Montgomery County, Maryland," or the microfilmed addenda to such atlas, published by the Maryland-National Capital Park and Planning Commission, the director shall advise the planning board which, after receiving the recommendation of the commission, shall conduct a public hearing to determine whether the historic resource will be designated as an historic site or historic district in the Master Plan for Historic Preservation.

⁵ Chapter 24A §5(b):

The commission has the following powers and duties...

To recommend to the planning board, as needed, any update to the inventory of historic resources which is contained in the "Locational Atlas and Index of Historic Sites in Montgomery County."

A decision to place a site in the Atlas has 3 possible consequences for any substantial alteration or demolition permit application:

- the HPC must approve a HAWP before the Department of Permitting Services (DPS) can approve a building permit;
- DPS may issue the permit if the Planning Board determines that the site will not be designated in the Master Plan for Historic Preservation; or
- DPS may issue the permit if no action has been taken on designating the site within 195 days from the date of the permit application.

If the Council approves the Planning Board's recommendation to place the resource in the Master Plan for Historic Preservation, the applicant must get a HAWP before proceeding. If the Council denies the Planning Board's recommendation to include the site in the Master Plan, then DPS may issue the permit.

Testimony from the Planning Board and the HPC recommended allowing the HPC to designate sites and districts in the Atlas. The HPC is the only body involved in the historic preservation process that is required to have members with historic preservation expertise.⁶

- a) *Option 1* – Retain current process (HPC recommends changes to Planning Board)

Article 24A describes the responsibilities for the Locational Alas in a number of subsections scattered throughout the chapter:

- §24A-5 The HPC is authorized to make recommendations to the Planning Board;
- §24A-9 Under demolition by neglect, the Planning Board must recommend, and the Council must include, the site in the Master Plan for Historic Preservation before requiring stabilization;
- §24A-10 Under moratorium on an alteration or demolition, the Planning Board must recommend, and the Council must include, the site in the Master Plan for Historic Preservation before requiring a HAWP.

HPA 09-1 clearly delegates the authority to the Planning Board to add and delete sites from the Atlas. HPA 09-1, as introduced, would also allow an action of the Council to amend the Atlas. If the Council agrees with this delegation, **staff recommends amendments to HPA 09-1 to only allow sites recommended for inclusion in the Master Plan for Historic Preservation to be added to the Atlas.** The research required to determine if a site, not currently listed in the Atlas, qualifies for inclusion in the Atlas should be sufficient to recommend the site for the Master Plan for Historic Preservation.

⁶ Chapter 24A §4(b):

Membership. The commission shall consist of 9 members appointed by the county executive with the confirmation of the county council. Each member must be a resident of the county. The 4 fields of history, architecture, preservation and urban design shall be represented by a minimum of 1 member qualified by special interest, knowledge or training. The remaining members of the commission shall, to the extent possible, be selected to represent the geographical, social, economic and cultural concerns of the residents of the county.

The Atlas provided a way to protect historic resources from the moment that Chapter 24A was adopted. Once the Council acted on designating a site, the site would either be protected under Chapter 24A or be unprotected. As the County now has a functioning system, listing properties in the Atlas without recommendations to include the properties in the Master Plan for Historic Preservation creates greater burdens on property owners. To those who favor historic preservation, additions to the Atlas offer protection of sites from new construction or demolition while research is completed.

b) *Option 2* – HPC control of Atlas

Authorizing the HPC to modify the Atlas can have benefits for both historic preservationists and property owners. If the HPC has the authority to add and remove sites and districts in the Atlas, then a decision to remove a site or not add a site is the end of any further consideration. If the County's appointed experts come to a negative conclusion based on historic criteria, residents promoting preservation could not appeal the decision to the Planning Board or the Council.

If the Council agrees with this alternative, staff would recommend amendments to:

- state the criteria to be used by the HPC to designate a project;
- only allow sites recommended for inclusion in the Master Plan for Historic Preservation by a Master Plan Amendment to be added to the Atlas;
- make a determination by the HPC to not include a site or district in the Master Plan for Historic Preservation non-reviewable by the Planning Board or the Council;
- remove from the Atlas any resource that the Council does not include in the Master Plan for Historic Preservation; and
- prohibit the reconsideration of any site within 10 years, unless a historic event occurs on the site within that period.⁷

With these changes, the HPC would use their historic preservation expertise to screen properties brought to their consideration. A property owner would have an opportunity to know if the property will be subject to historic regulations in the future without filing a demolition permit.

c) Noticing property owners listed in the Atlas

HPA 09-1 would require notice to property owners listed in the Atlas once every 5 years. The notice would advise them that their property is in the Atlas and the consequences of that status. This would add to HPC's responsibilities and the costs for mailing. There was no negative testimony on this provision of HPA 09-1. Staff recommends including the provision as introduced.

3) Master Plan for Historic Preservation

a) When should Master Plan recommendations come to the Council?

Under Article 28 §7-108(d), master plan amendments may only be initiated with the consent of the Council. Under Chapter 24A §9(b)(2), the Planning Board must initiate an amendment to the

⁷ As noted below, HPC staff believes that prohibiting reconsideration for 3 years is more appropriate.

Master Plan for Historic Preservation, if it finds a resource threatened by a demolition permit listed in the Atlas and the Planning Board deems the site worthy of protection.

HPC regulations allow for third parties to nominate a site for inclusion in the Master Plan for Historic Preservation. Some of the sites are not listed in the Atlas. These cases are currently matters heard by the Council only if the Planning Board makes a positive recommendation to designate the site. HPA 09-1 codifies the Council's practice. HPA 09-1 also requires the Council's consideration of a site if it amends the Planning Board's work program to review the site. The following describes the process for the Council to receive recommendations for various types of situations.

	For Resources in the Atlas	For Resources not in the Atlas
Third party request or property owner request: no pending permits	HPC recommendations made to the Planning Board at HPC's discretion; Planning Board now forwards positive and negative recommends to Council.	Same as if listed in Atlas; however, a positive recommendation by the Planning Board generally adds the resource to the Atlas.
Pending permit	Unless the permit goes through the HAWP process, HPC must make a recommendation to the Planning Board, and the Planning Board submits recommendations to designate to the Council.	No historic preservation decisions unless a third party nominates the site and HPC recommends a Master Plan amendment. If HPC acts, the resource proceeds as if it were listed in the Atlas.
In Comprehensive Plan	HPC recommends to Planning Board; Planning Board forwards all recommendations to the Council.	Same as if listed in the Atlas.

The Council may review every Master Plan amendment transmitted to it by the Planning Board if it chooses to do so; however, reviewing Master Plan amendments not recommended by the HPC would fail to use the HPC's expertise. The Council could review HPC-endorsed Master Plan amendments without regard to the Planning Board's recommendation. The Planning Board endorsed this approach.

Under Article 28 §7-108(d), master plan amendments may only be initiated with the consent of the Council. Under Chapter 24A, historic Master Plan amendments on Atlas sites are allowed as a matter of legislative consent. The Council could limit Master Plan amendments it receives outside of comprehensive master plans to those resources currently listed in the Atlas. This would limit the protection afforded newly recognized historic resources, but would avoid having a property owner be surprised by a last minute Master Plan request. **If the Master Plan amendments were requested in Council's approved work program or were the result of permit applications on sites listed in the current Atlas, then staff supports the concept that the Council should make the final determination on all Master Plan amendments recommended by the HPC.⁸ HPC should be required to make an annual report to the Council, including their proposed work**

⁸ This recommendation would require some type of affirmative amendment to the Master Plan for Historic Preservation even if it is to describe the site as property that should not be under historic preservation regulations.

program. The Council should specifically approve the work program for amendments to the Master Plan for Historic Preservation, except for amendments for Atlas sites triggered by applications made by the property owner.

Historic Master Plan amendments are the only master plan amendments that come to the Council by the actions of property owners, third parties, and the Planning Board. All other master plan amendments come by virtue of the Council's approved work program. For the past 30 years, there have been numerous additions and deletions to the Atlas. These sites should have the Council's attention before the addition of new sites. Some sites previously reviewed by the Council and rejected were recently resubmitted. **Sites considered but not included in the Master Plan for Historic preservation should not be reconsidered for 10 years, unless a historic event occurs on the site after it was considered for designation.** HPC staff would recommend limiting the period of non-review to 3 years, which is the same as denied zoning applications.

Chapter 24A defines a permit as a HAWP issued by the Director, authorizing work on a historic site or a historic resource located within a historic district. Applications for permits for sites in the Atlas can result in a Planning Board recommendation to amend the Master Plan. The Planning Board treated an application for a project plan as triggering a positive or negative recommendation to amend the Master Plan, even though it is not defined as a permit that requires that review. Not doing so could subject an applicant to a project plan approved by the Planning Board and a building permit that then triggers a historic Master Plan review. **Chapter 24A should be amended so that a project plan, preliminary plan, and site plan application for a property in the Atlas would trigger the process for designation in the Master Plan for Historic Preservation.**

b) What types of findings should be required by whom?

Chapter 24A requires the Planning Board to apply the criteria for historic preservation when recommending sites for the Master Plan for Historic Preservation.⁹ HPA 09-1, as introduced, does not reassign the Planning Board's authority. The criteria for the Planning Board's recommendation are essentially the Secretary of the Interior's criteria. The Planning Board is not the expert on historic preservation; the HPC is. The HPC uses the same criteria found in Chapter 24A for its recommendations for additions to the Master Plan by regulation.¹⁰ **Staff recommends authorizing the HPC to make findings on historic criteria.** There is no reason for the Planning Board or the Council to review a site that the experts in historic preservation believe is not historic.

The Planning Board must determine if a site will be included in the Master Plan for Historic Preservation.¹¹ This is different than applying historic criteria; it requires a judgment on how the Council will make its determination in the public interest for and against designation. The Council

⁹§ 24A-3(b):

In considering historic resources for designation as historic sites or historic districts, the planning board shall apply the following criteria....

¹⁰ COMCOR 24A.04.01.03 – 3.1(j):

Criteria. In formulating a recommendation on designation, the Commission shall utilize the criteria listed in 24A-3(b).

¹¹ §24A-10(c):

(1) Where the planning board determines that the historic resource will not be included in the Master Plan for Historic Preservation, the director shall forthwith issue the permit.
(2) Where the planning board determines that the historic resource in all likelihood will be included in the Master Plan for Historic Preservation....

is not bound to criteria under Chapter 33A in approving Master Plan amendments. The Council is bound to make planning and zoning decisions that promote the public welfare. In any event, the recommendations of the Planning Board should be more tailored to their area of expertise.

Staff recommends amending HPA 09-1 to require the:

- a) **HPC to apply historic criteria to recommend designation; and**
- b) **Planning Board to determine if the amendment:**
 - i) **is consistent with the comprehensive master plan; and**
 - ii) **would promote the general welfare of the County.**

This division of responsibilities is consistent with the unique responsibilities of the HPC and the Planning Board. The Planning Board can aid the Council decision by taking a broader perspective than that which includes only the historic criteria.¹² The Planning Board does not add value by reviewing historic criteria.

The Planning Board is generally charged with assuring a development's consistency with the adopted master plan and laws governing development. As a lay body with a broad perspective, the Planning Board's opinion that is based on the totality of circumstances would aid the Council's deliberations more than just confirmation of historic criteria.¹³

Specific historic criteria - high artistic value

The specific historic criteria in Chapter 24A mirror the Secretary of the Interior's standards for properties that are national register eligible. Removing high artistic value as a criterion would make the ordinance different; some have testified that the difference would make the ordinance inconsistent with the Secretary's standards. That issue is addressed as a legal issue in the appendix and in staff's letters to the Maryland Trust and the National Trust; "consistent with" does not mean "identical to".

HPA 09-1 eliminates high artistic value as a criterion for historic preservation. It is the most subjective of the historic criteria. An ordinance is unconstitutionally vague when adults of common intelligence must necessarily guess at its meaning.¹⁴ Public hearing testimony indicated that experts are clear on what has artistic value and when that artistic value is high. If only experts know what qualifies as having high artistic value, then the criterion is clearly unconstitutionally vague. People of common intelligence can disagree on what is or is not artistic. The consensus on what is artistic disintegrates when a conclusion must be reached on what is highly artistic. The high artistic value criterion is being challenged in the Illinois court system.¹⁵

¹² The Secretary of the Interior's criteria are obligatory on government actions. Only the County's local ordinance has an obligatory regulatory effect on private actions. Although historic preservation can promote the general welfare, the law and common sense bar the legislative discretion to designate or not designate properties.

¹³ Some historic preservation advocates would argue that the historic criteria should be the only findings required of the Planning Board and the Council. Staff disagrees. Historic preservation is not mandatory. Designating a site is a legislative use of the County's police power. The Council must determine that the designation will preserve or enhance the general welfare of the County. That finding requires a holistic view of all circumstances, not just historic attributes.

¹⁴ *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹⁵ "We believe that the terms "value," "important," "significant," and "unique" are vague, ambiguous, and overly broad." *Hanna v. City of Chicago*, Ill. App. LEXIS 98 (2009).

Testimony suggested that a piece of public art may warrant designation only because of its artistic value and meet no other criteria.¹⁶ There are 426 individual designated historic sites and 21 historic districts in the Master Plan for Historic Preservation. None of those historic resources met the criterion for high artistic value and no other criteria. In other words, if the criteria for historic designation excluded high artistic value in 1979, there would have been no change to the resources in the Master Plan for Historic Preservation.

Removing high artistic value as a criterion is not essential to updating Chapter 24A. The aesthetics of a particular style are significant to historic preservation, even if that is expressed in an excessively judgmental phrase. If the Council wants something more than high artistic value to designate a property, it could require that all new amendments satisfy at least 2 criteria.¹⁷

d) Specific historic criteria – owner’s consent

HPA 09-1 attempts to recognize the interests of the private property owner without requiring that owner’s consent to designation. Zoning requires the consent of the property owner for local map amendments and some zones applied by sectional map amendment.¹⁸ HPA 09-1 would continue to allow amendments to the Master Plan for Historic Preservation to be proposed by non-property owners.

HPA 09-1 would require a site to satisfy multiple historic criteria and a supermajority of the Planning Board to recommend the site for historic designation. HPA 09-1 would not require the Planning Board to defer to each property owner’s wishes during its deliberations. HPA 09-1 does not require heightened designation standards in the absence of owner consent. HPA 09-1 would require the Planning Board to use a higher threshold **to recommend designation** to the Council. The Council may continue to designate the property without the owner’s consent and with a finding of any one single criterion.

Opponents to HPA 09-1 do not find any comfort in the provision for the Council to demand a Master Plan Amendment without regard to the Planning Board’s recommendation. Without the immediate review of the Council, a permit could be issued solely on the Planning Board’s recommendation to not amend the Master Plan.

In the view of the County Attorney, the supermajority requirement of HPA 09-1 could be sustained with a change to state law. Staff already recommended having the Planning Board make a finding that historic designation would be in the interest of the County’s general welfare in order to recommend a site for designation. The owner’s consent would be part of that determination. **Staff would not recommend requiring a supermajority of the Planning Board to forward a positive recommendation to the Council.** If the Council wants to be more certain of any property’s historicity, it could require that all new additions to master plans satisfy at least 2 historic criteria.

¹⁶ Some testimony used the WPA mural in the Rockville Post Office as an example of art that could be protected; however, Article 28 only allows historic preservation for the exterior or structures.

¹⁷ Ibid, The Chicago Landmarks Ordinance currently requires designated properties and districts to satisfy 2 criteria.

¹⁸ See “Summary of legal issues” below.

4) Historic Area Work Permit

The owners of historic resources and the staff responsible for implementing Chapter 24A are aided by clear language concerning when a HAWP is required. Chapter 24A had some exceptions to the strict provisions of the approval process.

a) Ordinary maintenance

Under Chapter 24A, ordinary maintenance may take place without a HAWP. The definition of ordinary maintenance was left to regulations, which define it as follows:

Work on an historic site or an historic resource within a historic district which does not alter in any way the exterior features of the subject property, including the architectural style, design, and general arrangement of the exterior, as well as the nature, texture, details, and dimensions of building materials, windows, doors, siding, etc.¹⁹

Staff recommends putting the definition in Chapter 24A.

b) Landscaping

HPA 09-1 would not require a HAWP for any landscaping.²⁰ Currently, only landscaping that will have no material effect on the historic resource does not require a HAWP. HPC staff has interpreted this phrase to mean landscaping that does not involve changes to topography, adding artificial surfaces, or the removal of any tree, if the trunk of the tree is less than 6 inches in circumference, measured 4 feet from the base of the tree. **Staff recommends putting the HPC's interpretation in code.**

c) Leniency

Chapter 24A provides the following:

In the case of an application for work on an historic resource located within an historic district, the commission shall be lenient in its judgment of plans for structures of little historical or design significance or for plans involving new construction, unless such plans would seriously impair the historic or architectural value of surrounding historic resources or would impair the character of the historic district.²¹

HPA 09-1 would expand the application of that provision as follows:

The Commission must be lenient in its judgment of HAWP applications for:

¹⁹ 24A.04.01.01 Historic Area Work Permits, 1.1(f).

²⁰ §24A-6(b).

²¹ §24A-8(b).

- i) structures of little historical or design significance, or for plans involving new construction in a historic district or located on a historic site, unless the plans would seriously impair the historic or architectural value of surrounding historic resources or would impair the character of the historic district; or
- ii) altering a non-historic addition, if the addition was built before the property was identified in the Atlas or the Master Plan for Historic Preservation.

Staff recommends deleting paragraph ii) and revising paragraph i) to include structures and additions.

d) Exclusion for Farming

Testimony requested an exclusion of historic preservation regulations for farms. Retaining farming is a County goal equal to historic preservation. The farming community complained about the requirement for a permit to build fences. There is already an exemption for customary farming operations from the requirement for a HAWP.²² A call to HPC can answer any questions on this matter for a farmer. **Staff does not recommend including a list of the types of changes that are within the definition “customary farming operation” in the ordinance.**

e) Environmental setting

HAWPs are required for changes within the environmental setting of historic resources. In a recent zoning case, the Hearing Examiner was uncertain as to whether the environmental setting extended beyond a historic district when the historic district included part, but not all, of a property. **HPA 09-1 should be amended to clarify that HPC’s jurisdiction is limited to the boundaries of the historic district.**

f) Hardship approval

The Commission must order the DPS Director to issue a permit if it finds that a denial of the permit would prevent the reasonable use of the property or would impose undue hardship on the owner. HPA 09-1 would remove the provision that delays the issuance of such a permit for 120 days. Staff does not recommend any change from HPA 09-1.

5) Regulations

Staff recommendations would define “ordinary maintenance” and “landscaping”. If these terms were not defined, they would be the subject of regulations. Historic Preservation Commissions authorized under Article 66B have the authority to adopt regulations with the knowledge, but not consent, of the jurisdiction’s Council. This is similar to method 3 under the County code. Currently, HPC has the authority to adopt regulations under method 2, which requires the approval of the Council. If the Council adopts the additional definitions, then HPC should be allowed to adopt regulations under method 3.

²² §24A-6(b).

6) State Tax Credits

Testimony implied that state tax credits for the County's historic properties would be in jeopardy under HPA 09-1. A historic property can get a state tax credit if it is designated as a historic property under local law and determined by the State to be eligible for listing in the National Register of Historic Places.²³ Owners of historic resources who satisfy the state's criteria and make renovations consistent with the Secretary of the Interior's guidelines would still be eligible for state credits. Some permits allowed under Chapter 24A without amendments are not eligible for state tax credits; that would continue to be true under HPA 09-1. Non-historic additions allowed under HPA 09-1 may be more unlikely to meet state standards than additions allowed under Chapter 24A without amendments.

7) Certified Local Government

The Secretary of the Interior created a program so that local governments could become Certified Local Governments (CLGs) through state historic preservation programs. The Secretary requires that such governments have a historic preservation ordinance, an inventory of historic resources, a historic preservation commission, the intent to participate in the national register program, and satisfy additional requirements of the state historic preservation program.

The Maryland Historic Trust published a 47 page manual in 2004 describing the conditions for governments (counties and municipalities) to become CLGs, and requirements for maintaining a government's CLG status. Among other requirements for inclusion as Maryland CLGs, local governments:

must provide a legally enforceable method for the designation and protection of historic properties that is consistent with the Federal statutory definitions in Section 101(c)(4) of the National Historic Preservation Act, as amended, and with Article 66B, Section 8, Historic Area Zoning (Annotated Code of Maryland, as amended).²⁴

The Maryland Historic Trust has certified 18 local governments for this program, including Montgomery County. All CLGs may compete for state grants of up to \$25,000 per year and are consulted on sites considered for national historic register eligibility. The County has received \$21,000 in each of the past several years.

Testimony suggested that the adoption of HPA 09-1 would cause the Maryland Historic Trust to revoke the CLG status. The Maryland Trust did not indicate that it would do so in its testimony; however, the Trust's testimony indicated their opinion that HPA 09-1 was inconsistent with Article 66B and Article 28. The only way to absolutely assure retaining the County's status as a CLG is to:

- a) retain the processes and procedures currently described in Chapter 24A; or
- b) amend Chapter 24A to allow for historic preservation zoning consistent with Article 66B, and grant HPC greater authority to designate sites and districts, and to review HAWPs on its own terms.

²³ Article 5A-303, Maryland Code

²⁴ Maryland CLG Program Procedures Manual, September 2004.

Summary of legal issues

1) *Constitutional concerns*

Testimony suggested that requiring the consent of the owner violates procedural due process and equal protection standards. The 2 Supreme Court cases cited for this possibility involved laws that required the consent of the surrounding property owners to approve the actions of their neighbors.²⁵ HPA 09-1 does not require the consent of neighboring property owners and allows the designation of a historic property, even if the owner of the historic resource does not consent. It does add additional hurdles to the Planning Board's recommendation to designate non-consenting property owners.

2) *Article 28*

Testimony suggested that Article 28 only allows the County to adopt laws that are "not inconsistent with the criteria applicable to the Maryland Historical Trust under §5A-323 of the State Finance and Procurement Article."²⁶ The main thrust of the argument is that HPA 09-1 does not conform to the cited state article. Critics of HPA 09-1 did not note that the Council's authority is in a different provision of Article 28; that provision does not require consistency with the State Finance and Procurement Article.²⁷ Even if a consistency requirement does apply, the Court of Appeals determined that a statutory requirement for conformance means "in harmony with"; it does not mean strict compliance.²⁸ HPA 09-1 is in harmony with the State Finance and Procurement Article.

Testimony suggested that the requirement for a supermajority of the Planning Board to recommend the designation of a resource was beyond the Council's authority, under Article 28. Article 28 provides for supermajorities of the Council and the Board of Appeals for certain zoning and special exception decisions under specific circumstances. A similar requirement for a supermajority is absent for historic preservation decisions. The Court of Appeals has regularly held that where a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances.²⁹ When the Council required a supermajority of the Board of Appeals to approve a certain special exception, the Court of Appeals, in the *Mossburg* case, found that requirement to be beyond the Council's authority. HPA 09-1 is distinguishable from the *Mossburg* case. In that case, the Board of Appeals had decision-making authority. The Planning Board does not make the final decision on adding resources to the Master Plan for Historic Preservation. Even if the Planning Board does not recommend a site, the Council can demand that an amendment be transmitted for its consideration, without regard to the Planning Board's recommendation. Only the Council can approve an amendment to any master plan; a supermajority is not required for the Council's decision under HPA 09-1.

²⁵ *Eubank v. Richmond*, 226 U.S. 137 (1912); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

²⁶ Article 28 §7-108(e).

²⁷ Article 28 §8-101(c); The only qualifying condition to the Council's authority is that:

"...these regulations shall be reasonable and appropriate to the purpose of this section and are limited to the protection, preservation and enhancement of the exterior of the sites, structures or districts, and, if such action constitutes a taking of private property, provision shall be made for just compensation."

²⁸ *Trail v. Terrapin Run, LLC*, 403 Md. 523, 527 (2008); the Court made a statutory interpretation of Article 66B.

²⁹ *Mossburg v. Montgomery County*, 329 Md. 494 (1993).

3) *Police Powers and Owner Consent*

The government's authority to regulate historic resources is a portion of its responsibility to protect the health, safety, and welfare of its residents. These power are commonly referred to as police powers. Testimony argued that the Council's police powers cannot be delegated to an individual landowner, just as zoning does not require owner consent. There are 2 problems with this argument: 1) HPA- 09-1 does NOT require the consent of the owner to designate a historic resource; 2) the current zoning ordinance currently requires the consent of property owners to apply certain zones.³⁰ The Maryland Court of Appeals allowed a landowner to have options in zoning regulations.³¹ HPA 09-1 would not delegate the decision to be on or off the Master Plan for Historic Preservation to the landowner.

Generally, courts have invalidated laws where the neighbors are delegated the responsibility of approving an owner's plans. Where an owner's consent was required for historic designation, the court found that the enabling law in Oregon required counties to regulate the sites as a historic resource without any exceptions.³² This is the only case in the country involving a requirement that the owner consent to designation of their property as historic.

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³⁰ Montgomery County Zoning Ordinance § 59-H-7.2; "...the District Council may approve, **upon consent of the landowner**, a floating zone designation for a particular lot or parcel."

³¹ *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 717 (1977); "It is, as its designation implies, an optional method for developing property located in a CBD zone which has been legislatively predetermined to be compatible with uses within the zone; it may be utilized or not, at the option of the property owner."

³² *Department of Land Conservation & Dev. v. Yamhill County*, 99 Ore. App. 441 (1989).

Historic Preservation Amendment No. 09-1
Concerning: Historic Resources Preservation
- Amendments
Revised: 2/5/09 Draft No. 2
Introduced: February 24, 2009
Effective:
Sunset Date:
Ch. , Laws of Mont. Co.

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN
MONTGOMERY COUNTY, MARYLAND**

By: Councilmember Knapp

AN AMENDMENT to the Historic Resources Preservation Ordinance to:

- (1) amend definitions;
- (2) require periodic notice for properties included on the Locational Atlas and Index of Historic Sites;
- (3) amend the process for designating and a removing site or a district from the Locational Atlas and Index of Historic Sites;
- (4) amend the process for allowing building permits for activity for a site or in a district included on the Locational Atlas and Index of Historic Sites;
- (5) amend the criteria for designating a site or a district on the Master Plan for Historic Preservation;
- (6) amend the process for designating a site or a district on the Master Plan for Historic Preservation;
- (7) amend the criteria for approving historic area work permits; and
- (8) generally amend the historic resources preservation ordinance.

By amending all the sections of the Historic Resources Preservation Ordinance, Chapter 24A of the Montgomery County Code.

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Chapter 24A is amended as follows:**

2 **24A-1. Purpose.**

3 [It is the purpose of this chapter to provide for the identification, designation
4 and regulation, for purposes of protection, preservation and continued use and
5 enhancement, of] This Chapter establishes the method to identify, designate, and
6 regulate historic resources and to protect, preserve, use, and enhance those sites[,] or
7 structures with their appurtenances and environmental settings, and districts of
8 historical, archeological, architectural, or cultural value [in that portion of the county
9 which is within] in the Maryland-Washington Regional District. Its further purpose
10 is to preserve and enhance the quality of life in the [county] County, safeguard the
11 historical and cultural heritage of the [county] County, strengthen the local economy,
12 stabilize and improve property values in and around such historical areas, foster civic
13 beauty, and [to] preserve continued utilization and pleasure of the citizens of the
14 [county] County, the state, and the United States of America.

15 **24A-2. Definitions.**

16 [For the purposes of] In this Chapter, the following words and phrases have
17 the following meanings:

18 *Appurtenances and environmental setting:* The entire parcel, as of the date [on
19 which] when the historic resource is designated on the master plan, and structures
20 thereon, on which [is located an] a historic resource is located, unless reduced by the
21 District Council or the [commission] Commission, and to which it relates physically
22 and/or visually. Appurtenances and environmental settings [shall] must include[,] but
23 not be limited to,] walkways and driveways ([whether] paved or [not] unpaved),
24 vegetation (including trees, gardens, lawns), rocks, pasture, cropland, and waterways.

25 *Board:* The County Board of Appeals [of Montgomery County].

26 *Commission:* The [historic preservation commission of Montgomery County
27 as described hereinafter] County Historic Preservation Commission.

28 Council: The County Council, which sits as the District Council when
 29 approving or amending master plans.

30 *Demolition by neglect:* The failure to provide ordinary and necessary
 31 maintenance and repair to [an] a historic site or [an] a historic resource [within an] in
 32 a historic district, whether by negligence or willful neglect, purpose, or design, by the
 33 owner or any party [in possession of such] who controls a site, which results in any of
 34 the following conditions:

35 (a) The deterioration of exterior features, [so as to create or permit] creating or
 36 permitting a hazardous or unsafe condition to exist.

37 (b) The deterioration of exterior walls, roofs, chimneys, windows, the lack of
 38 adequate waterproofing or deterioration of interior features or foundations
 39 which will or could result in permanent damage[, injury] or loss of [or to] the
 40 exterior features.

41 *Director:* The Director of the Department of Permitting Services, or the
 42 Director's designee.

43 *Exterior features:* The architectural style, design, and general arrangement of
 44 the exterior of [an] a historic resource, including the color, nature, and texture of
 45 building materials, and the type of style of all windows, doors, light fixtures, signs, or
 46 other similar items found on or related to the exterior of [an] a historic resource.

47 Locational Atlas and Index of Historic Sites: The list of sites and districts that
 48 contribute to historic, architectural, archeological, or cultural values and may be
 49 included in the Master Plan for Historic Preservation in the future. Sites and districts
 50 on the Atlas are subject to regulations if the property owner applies for permits for
 51 demolition or substantial alternations. The Atlas is referred to as the Locational
 52 Atlas.

53 *Historic district:* A group of historic resources designated in the Master Plan
 54 for Historic Preservation [which are] that is significant as a cohesive unit and

55 [contribute] contributes to the historical, architectural, archeological, or cultural
 56 values [within] in the Maryland-Washington Regional District [and which has been
 57 so designated in the master plan for historic preservation].

58 *Historic resource:* A district, site, building, structure, or object, including its
 59 appurtenances and environmental setting, which is significant in national, state, or
 60 local history, architecture, archeology, or culture. This includes[, but is not limited
 61 to, all properties on the "Locational Atlas and Index of Historic Sites in Montgomery
 62 County."] any resource on the Locational Atlas or the Master Plan for Historic
 63 Preservation.

64 *Historic site:* Any individual historic resource designated in the Master Plan
 65 for Historic Preservation that is significant and contributes to the historical,
 66 architectural, archeological, or cultural values [within] in the Maryland-Washington
 67 Regional District [and which has been so designated in the master plan for historic
 68 preservation].

69 *Permit:* [An] A historic area work permit issued by the Director, authorizing
 70 work on [an] a historic site or [an] a historic resource located within [an] a historic
 71 district.

72 *Planning Board[;]:* The [Montgomery] County Planning Board [of the
 73 Maryland-National Capital Park and Planning Commission].

74 *Preservation easement [means an]:* An easement held by the County to
 75 protect, maintain, or otherwise conserve [an] a historic resource.

76 **[24A-3. Master plan for historic preservation; criteria for designation of historic**
 77 **sites or districts.**

78 (a) As part of the general plan for the physical development of that portion
 79 of the county within the Maryland-Washington Regional District, there
 80 shall be prepared, adopted and approved a master plan for historic
 81 preservation which shall constitute an amendment to the general plan

82 for the Maryland-Washington Regional District. Such plan shall
83 designate historic sites and historic districts and describe their
84 boundaries; it shall propose means for the integration of historic
85 preservation into the planning process; and it shall suggest other
86 measures to advance the goals of historic preservation.

87 (b) In considering historic resources for designation as historic sites or
88 historic districts, the planning board shall apply the following criteria:

89 (1) Historical and cultural significance. The historic resource:

90 a. Has character, interest or value as part of the development,
91 heritage or cultural characteristics of the county, state or
92 nation;

93 b. Is the site of a significant historic event;

94 c. Is identified with a person or a group of persons who
95 influenced society; or

96 d. Exemplifies the cultural economic, social, political or historic
97 heritage of the county and its communities.

98 (2) Architectural and design significance. The historic resource:

99 a. Embodies the distinctive characteristics of a type, period or
100 method of construction;

101 b. Represents the work of a master;

102 c. Possesses high artistic values;

103 d. Represents a significant and distinguishable entity whose
104 components may lack individual distinction; or

105 e. Represents an established and familiar visual feature of the
106 neighborhood, community or county due to its singular
107 physical characteristic or landscape.]

108 **[24A-4] 24A-3. Historic [preservation commission] Preservation Commission.**

- 109 (a) *Created.* [There is hereby created a commission to be known as the "historic
110 preservation commission of Montgomery County, Maryland."] The County
111 Executive must appoint, subject to confirmation by the County Council, a
112 Historic Preservation Commission.
- 113 (b) *Membership.* The [commission shall] Commission must consist of 9 members
114 [appointed by the county executive with the confirmation of the county
115 council]. Each member must be a resident of the [county] County. The [4]
116 fields of history, architecture, preservation, and urban design [shall] must each
117 be represented by [a minimum of] at least 1 member qualified by special
118 interest, knowledge, or training. The remaining members [of the commission
119 shall] must, to the extent possible, [be selected to] represent the geographical,
120 social, economic, and cultural concerns of the residents of the [county]
121 County.
- 122 (c) *Officers.* The [county executive shall] County Executive must appoint the
123 chairman and vice-chairman of the [commission] Commission, who [shall]
124 must serve at his pleasure[, but such appointments occurring after the
125 commission's first year of operation shall be made] after [due consideration
126 has been given to] considering the recommendation of the [commission]
127 Commission.
- 128 (d) *Term.* [The terms of the members of the commission shall be for] Each
129 member serves a three-year [period and members shall continue to serve] term.
130 A member serves until [their successors are] a successor is appointed and
131 [qualified] confirmed.
- 132 [(e) *Vacancy.* Any vacancy in the membership of the commission caused by the
133 expiration of a term, by resignation or death, by a superseding incapacity to
134 discharge duties, by a removal for cause, or by any other cause creating such
135 vacancy, shall be filled for a new term, or for the remainder of the term for

136 which there is a vacancy as the case may be, in the same manner as provided
 137 herein for the nomination and appointment of the initial members of the
 138 commission.]

139 [(f)] (e) *Removal for cause.* [A] The Executive may remove a member [may be
 140 removed] for cause [from the commission by the county executive].

141 [(g)] (f) *Compensation.* The members [of the commission] serve without
 142 compensation.

143 [(h)] (g) *Regulations.* The [commission] Commission must adopt, under method
 144 (2) of Section 2A-15 [of this Code, rules], guidelines and regulations that are
 145 necessary for:

146 (1) [the] proper transaction of [the] Commission business [of the
 147 commission. This includes provisions governing contested cases before
 148 the commission], including hearing and deciding contested cases; and

149 (2) carrying out its responsibilities under this Chapter.

150 [(1)](h) *Meetings.* The [commission shall] Commission must hold [such] regular
 151 meetings [which, in its discretion, are] as necessary to discharge its duties.

152 [Such meetings shall] Each meeting must be open to the public except when
 153 the state Open Meetings Law allows the meeting to be closed.

154 [(2)](i) *Staff.* [There may be appointed and assigned to the commission such
 155 employees, and the chief administrative officer shall make available to the
 156 commission such services and facilities of the county, as are necessary or
 157 appropriate for the proper performance of its duties, and the county attorney
 158 shall serve as counsel to the commission.] The County Executive must submit
 159 a budget request to the Council to provide the Commission with staff,
 160 facilities, materials, and contract services that the Executive finds are needed
 161 to administer this Chapter.

162 (j) *Counsel.* The County Attorney must serve as counsel to the Commission.

163 **[24A-5] 24A-4. [Same-] Powers and duties of the Commission.**

164 The [commission has the following powers and duties] Commission must:

- 165 (a) [To] research historic resources, and [to] recommend to the [planning board
166 that certain of them] Planning Board which resources should be designated as
167 historic sites or historic districts on the [master plan for historic preservation
168 and, hence, be subject to the provisions of this chapter.] Master Plan for
169 Historic Preservation;
- 170 (b) [To] recommend to the [planning board] Planning Board, as needed, any
171 update to the inventory of historic resources [which is] contained in the
172 ["Locational Atlas and Index of Historic Sites in Montgomery County."]
173 Locational Atlas;
- 174 (c) [To act upon] consider applications for historic area work permits and other
175 matters referred to it [for action pursuant to the provisions of] under this
176 Chapter[.];
- 177 (d) [To] appoint members to local advisory panels where necessary to assist and
178 advise the [commission on the performance of its functions.] Commission;
- 179 (e) [To] recommend programs and legislation to the [council] Council and [the
180 planning board] Planning Board where necessary to encourage historic
181 preservation [in the Maryland-Washington Regional District.];
- 182 (f) [To] review any legislation and proposals affecting historic preservation,
183 including preparation of master plans, and [to make] offer recommendations
184 [on such legislation and proposals] to appropriate authorities[.];
- 185 (g) [To] serve as a clearinghouse for information on historic preservation for
186 [county] County government, individuals, [citizens' associations] civic
187 organizations, historic societies, and local advisory committees; [to] provide
188 information and educational materials for the public; and [to] undertake
189 activities to advance the goals of historic preservation in the [county.] County;

- 190 (h) [To] employ or hire consultants or other temporary personnel, subject to
 191 appropriation and consistent with [county] County contract provisions, as
 192 [deemed] necessary to assist the [commission in the accomplishment of its
 193 functions] Commission; [such consultants or other personnel shall be
 194 compensated as may be provided for in the county budget.]
- 195 (i) [To] administer [an] a historic preservation easement program and any
 196 revolving funds or grant programs to assist in historic preservation[.];
- 197 (j) [To] advise the [planning board] Planning Board, [in the event of] if
 198 subdivision of land [containing an] would affect a historic resource, on the
 199 appurtenances and environmental setting necessary to preserve [it.] the
 200 resource; and
- 201 (k) [To delineate] recommend the extent of appurtenances and environmental
 202 setting associated with [an] a historic site or resource proposed for the Master
 203 Plan for Historic Preservation.

204 **24A-5. Historic preservation easement program.**

- 205 (a) The Commission must administer an easement program to preserve historic
 206 resources.
- 207 (b) (1) An owner of a historic resource may offer the County a preservation
 208 easement to protect or conserve interior or exterior features of the
 209 historic resource and its environmental setting or appurtenances by
 210 filing an application with the Commission.
- 211 (2) After receiving an application, the Commission must immediately
 212 forward it for review and comment to:
- 213 (A) the Planning Board, if the historic resource is located in the
 214 Regional District; and
- 215 (B) the appropriate municipal agency, if the historic resource is
 216 located in a municipality.

217 The Board and the municipal agency should submit their
 218 comments within 45 days after it receives the application. The
 219 Board and agency should evaluate the proposal, using the criteria
 220 specified in this Section, identify competing or supporting land
 221 use priorities and other relevant factors, and recommend any
 222 necessary easement terms and conditions.

223 (3) The Commission must review each application and decide if accepting
 224 the preservation easement would further the County's historic
 225 preservation goals. The Commission must consider, among other
 226 relevant factors:

227 (A) the relative significance of the historic resource;

228 (B) its structural condition;

229 (C) the owner's planned or completed preservation efforts;

230 (D) the existing zoning and nature of the surrounding neighborhood;
 231 and

232 (E) whether an easement will promote long-term survival of the
 233 historic resource.

234 (c) If the historic resource is designated as a historic site in the County Master
 235 Plan for Historic Preservation as an individual site or is located in a historic
 236 district, the Executive may acquire an easement if the Commission
 237 recommends it. If the historic resource is not designated as a historic site in
 238 the master plan, the Council must also approve the easement. The
 239 Commission must forward any comments received under subsection (b)(2) to
 240 the Executive and Council as appropriate.

241 (d) A preservation easement under this Section should be granted in perpetuity,
 242 and should include appropriate terms and conditions that:

243 (1) restrict changes and alterations in the property;

- 244 (2) require sufficient maintenance, repairs, and administration;
245 (3) authorize public access;
246 (4) give the appropriate government agencies the right to inspect the
247 property;
248 (5) allow the easement to be assigned to the Maryland Historical Trust or
249 other entity; and
250 (6) establish enforcement remedies.
- 251 (e) The County may hold a preservation easement jointly with the Maryland
252 Historical Trust.
- 253 (f) The grantor must record each preservation easement in the County land
254 records at the grantor's cost. The grantor must notify the state assessments
255 office that the easement was recorded.
- 256 (g) A preservation easement may be extinguished by court action if an unexpected
257 change in conditions applicable to the property makes it impossible or
258 impractical to continue to preserve it. The terms of an easement regarding
259 extinguishment should identify which changes in condition would suffice,
260 require that the County share in any proceeds from a sale or exchange of the
261 property after the easement is extinguished, and satisfy any applicable
262 regulations. Sharing the proceeds may include recapture of some or all
263 property taxes not paid by the grantor or its successor in interest as a result of
264 the easement.
- 265 (h) The Commission may enter into a cooperative agreement with the Maryland
266 Historical Trust or another government agency or private entity for technical
267 assistance in administering the historic easement program. This agreement
268 may include property evaluation, negotiation, and inspection.
- 269 (i) (1) The easement program authorized by this Section is in addition to, and
270 does not supersede or otherwise affect, any other County or municipal

271 program or policy requiring the donation of a preservation easement as
 272 a condition of financial assistance. This program must be coordinated
 273 with other County and municipal easement programs.

274 (2) A grant of an easement under this Section does not waive or otherwise
 275 alter any County or municipal regulatory requirement applicable to the
 276 historic resource, including any requirement to obtain a historic area
 277 work permit.

278 (i) The Commission may adopt regulations under method (2) to administer this
 279 program.

280 **24A-6. Historic area work permits [- Generally].**

281 (a) *Required.* [An] A historic area work permit for work on public or private
 282 property containing [an] a historic resource must be [issued pursuant to the
 283 provisions of] issued under this [chapter] Chapter before any person:

284 (1) [Constructing, reconstructing, moving, relocating, demolishing] builds,
 285 rebuilt, moves, or demolishes, or in any manner [modifying, changing
 286 or altering] alters the exterior features of any historic site or any historic
 287 resource located [within any] in a historic district[.];

288 (2) [Performing any grading, excavating, construction] grades, excavates,
 289 builds, or substantially [modifying, changing or altering] alters the
 290 environmental setting of [an] a historic site or [an] a historic resource
 291 located [within an] in a historic district; or

292 (3) [Erecting or causing to be erected] erects any sign or advertisement
 293 ([with the exception of those signs which] except a sign that temporarily
 294 [advertise] advertises the property for sale [an historic site or an historic
 295 resource located within an historic district, or which for] or advertises a
 296 political viewpoint) on the exterior or on the environmental setting of

297 any historic site or any historic resource located [within any] in a
 298 historic district.

299 (b) *Exceptions.* [Nothing in this section shall be construed to require the issuance
 300 of an] A historic area work permit is not required for any ordinary
 301 maintenance, repair of exterior features, [any] customary farming operations,
 302 or [any] landscaping [, which will have no material effect on historic resource
 303 located within an historic district, of which such features are a part]. [For the
 304 purposes of clarification of] To interpret this section, the [commission shall
 305 develop and publish guidelines regarding what activities constitute]
 306 Commission must define ordinary maintenance in published guidelines and
 307 [shall send] must retain evidence that a copy of these guidelines [by registered
 308 mail] was sent to [all owners] each owner of a historic [resources] resource
 309 designated on the master plan.

310 (c) *Disclosure [requirements].*

311 (1) [Applicants for permits] Each applicant for a permit to demolish or
 312 substantially alter the exterior features of any historic site or historic
 313 resource located [within an] in a historic district [are required to disclose
 314 its identification as such in writing on any application therefor] must
 315 identify the site as historic in the application.

316 (2) Any person who [shall undertake] undertakes any work [as stated]
 317 defined in subsection (a) [of this section] without first obtaining [an] a
 318 historic area work permit [shall be] is subject to the penalties
 319 [established] specified in Section 24A-11.

320 (d) *Advice of [commission prior to application] Commission before applying.* The
 321 [commission shall] Commission must adopt procedures to encourage owners
 322 of historic [resources to] resources to seek the Commission's advice [of the
 323 commission prior to] before filing an application for [an] a historic area work

324 permit, on the appurtenances and environmental setting appropriate to the
 325 resource, construction methods and materials, financial information
 326 concerning historic preservation, or any other [matter under this chapter
 327 affecting] factor that would affect the issuance of a permit.

328 **24A-7. Historic area work permits -Application procedures; appeals.**

- 329 (a) *Applications.* An applicant for [an] a historic area work permit must file an
 330 application with the Director. The application must contain all information the
 331 Commission requires to evaluate the application under this Chapter.
- 332 (b) *Referral of application.* Within 3 days after the application is complete, the
 333 Director must forward the application to the Commission for review.
- 334 (c) *Public meeting.* When the Commission receives the application, the
 335 Commission must schedule a public meeting to consider the application.
- 336 (d) *Notice.* The Commission must notify the Director and any citizen or
 337 organization that the Commission reasonably determines has an interest in the
 338 application of the time and place of the public meeting.
- 339 (e) *Conduct of Commission meeting.* The public meeting on the application must
 340 be informal, and formal rules of evidence do not apply. The Commission must
 341 encourage interested parties to comment and must keep minutes of the
 342 proceedings on the application.
- 343 (f) *Action by the Commission.*
- 344 (1) The Commission must make a public decision on the application [under
 345 paragraph (2)] not later than 45 days after the applicant files the
 346 application or 15 days after the Commission closes the record on the
 347 application, whichever is earlier.
- 348 (2) The Commission must [instruct] order the Director to issue or deny the
 349 permit. The Commission may require the Director to issue the permit
 350 with reasonable conditions necessary to assure that work under the

- 351 permit does not harm the historical, architectural, archeological, or
 352 cultural value of the historic resource.
- 353 (3) If the Commission [instructs] orders the Director to deny the permit, the
 354 Commission must notify the applicant in writing why the Commission
 355 denied the application.
- 356 (4) The [commission] Commission must [instruct] order the Director to
 357 issue the permit if the Commission finds that[:]
 358 [(A)] denial of the permit would prevent the reasonable use of the
 359 property or impose undue hardship on the owner[; and]
 360 [(B) within 120 days after the finding in subparagraph (A), no person
 361 seeking preservation has submitted an economically feasible plan
 362 for preserving the structure].
- 363 (5) [If the Commission does not act on an application within the time
 364 periods provided in this subsection, the application is approved,] The
 365 Director must approve any application which the Commission does not
 366 act on within the time limits of this Section unless the applicant agrees
 367 to extend the deadline for Commission action.
- 368 (g) [*Miscellaneous provisions*] Procedures.
- 369 (1) The applicant for a permit has the burden of production and persuasion
 370 on all issues the Commission determines. If another historic
 371 preservation organization holds a deed of easement for the property in
 372 the application, the applicant must submit proof to the Commission that
 373 the organization conducted an exterior architectural review and
 374 approved the action for which the applicant is seeking a permit.
- 375 (2) (A) The Commission may, by regulations [issued under method (2)],
 376 delegate authority to a County employee qualified in historic
 377 preservation and assigned to staff the Commission to review and

378 approve an application for work that commonly has no more than
 379 an insignificant effect on [an] a historic resource.

380 (B) The regulations:

381 (i) must describe the types of work that Commission staff can
 382 review and approve, and require the Commission to review
 383 any application that is not clearly subject to staff approval;
 384 and

385 (ii) may waive the public meeting and notice requirements of
 386 subsections (c) and (d) for any [applications] application
 387 that is clearly subject to staff approval.

388 (C) If the staff denies or does not act on an application within 5 days
 389 after the Commission received the application from the Director,
 390 the Commission must review the application *de novo*.

391 (D) Staff must report monthly to the Commission and each
 392 appropriate Local Advisory Panel about any application reviewed
 393 by the staff in the previous month, including the disposition of the
 394 application.

395 (3) A permit may impose conditions that require waiver of a provision of
 396 the building code if the waiver is allowed under the "historic structures"
 397 provision of the building code adopted under Section 8-14 and the code
 398 inspector determines that waiver is appropriate for the specific work
 399 covered by the permit.

400 (4) The Director must enforce this Chapter.

401 (h) *Appeal.*

402 (1) Within 30 days after the Commission makes a public decision on an
 403 application, an aggrieved party may appeal the Commission's decision
 404 to the Board of Appeals, which must review the decision *de novo*. The

405 Board of Appeals may affirm, modify, or reverse any order or decision
 406 of the Commission.

407 (2) A party may appeal a decision of the Board of Appeals under Section 2-
 408 114.

409 **24A-8. [~~Same-~~] Historic area work permit - Criteria for issuance.**

410 (a) The [~~commission shall instruct~~] Commission must order the [~~director~~] Director
 411 to deny a permit if it finds, based on the [~~evidence and information presented~~
 412 to or] record before the [~~commission~~] Commission, that the alteration [~~for~~
 413 which the permit is] sought by the applicant would be [~~inappropriate,~~
 414 inconsistent with or] detrimental to the preservation[, enhancement] or
 415 ultimate protection of the historic site or historic resource [~~within an~~] in a
 416 historic district, and to the purposes of this Chapter.

417 (b) The [~~commission shall instruct~~] Commission must order the [~~director~~] Director
 418 to issue a permit, or issue a permit subject to [~~such~~] conditions [~~as are found to~~
 419 be] necessary to [~~insure~~] ensure conformity with the purposes and
 420 requirements of this [~~chapter~~] Chapter, if it finds [~~that~~] one or more of the
 421 following:

422 (1) [~~The~~] the proposal will not substantially alter the exterior features of
 423 [~~an~~] a historic site or historic resource [~~within an~~] in a historic district;
 424 [~~or~~]

425 (2) [~~The~~] the proposal is compatible in character and nature with
 426 [~~thehistorical~~] the historical, archeological, architectural, or cultural
 427 features of the historic site or the historic district [~~in which an~~] where a
 428 historic resource is located, and would not be detrimental thereto or to
 429 the achievement of the purposes of this [~~chapter~~] Chapter; [~~or~~]

430 (3) [~~The~~] the proposal would [~~enhance or~~] aid in the protection,
 431 preservation, and public or private utilization of the historic site or

432 historic resource located [within an] in a historic district in a manner
 433 compatible with the historical, archeological, architectural, or cultural
 434 value of the historic site or historic district [in which an] where a
 435 historic resource is located; [or]

436 (4) [The] the proposal is necessary [in order that] to remedy unsafe
 437 conditions or health hazards [be remedied]; [or]

438 (5) [The] the proposal is necessary [in order] so that the owner of the
 439 [subject] property is not [be] deprived of reasonable use of the property
 440 or does not suffer undue hardship; or

441 (6) [In] in balancing the interests of the public in preserving the historic site
 442 or historic resource located [within an] in a historic district[,] with the
 443 interests of the public from the use and benefit of the alternative
 444 proposal, the general public welfare is better served by granting the
 445 permit.

446 (c) [It is not the intent of this chapter to] This Chapter does not limit new
 447 construction, alteration, or repairs to any 1 period or architectural style.

448 (d) [In the case of an application for work on an historic resource located within
 449 an historic district, the commission shall] The Commission must be lenient in
 450 its judgment of [plans] historic area work permit applications for:

451 (1) structures of little historical or design significance, or for plans
 452 involving new construction in a historic district, unless [such] the plans
 453 would seriously impair the historic or architectural value of surrounding
 454 historic resources or would impair the character of the historic district;

455 or

456 (2) altering a non-historic addition, if the addition was built before the
 457 property was identified on the Locational Atlas or the Master Plan for
 458 Historic Preservation.

459 **24A-9. Demolition by neglect.**

460 [In the event of a case of demolition by neglect of an] If a historic resource on
461 public or private property has suffered demolition by neglect, the following
462 provisions [shall] apply:

463 (a) If the historic resource has been designated on the master plan as [an] a
464 historic site or [an] a historic resource [within an] in a historic district, the
465 [director shall] Director must issue a written notice to [all persons] each person
466 of record with any [right, title or] interest in the subject property, or the person
467 occupying [such] the premises, of the conditions of deterioration, and [shall]
468 must specify the minimum items of repair or maintenance necessary to correct
469 or prevent further deterioration. The notice [shall provide] must require that
470 corrective action [shall commence] begin within 30 days [of the receipt of
471 such] after the recipient receives the notice and be completed within a
472 reasonable time [thereafter]. The notice [shall] must state that the owner of
473 record of the subject property, or any person of record with any [right, title or]
474 interest therein, may, within 10 days after [the receipt of] receiving the notice,
475 request a hearing on the necessity of the [items and conditions contained in
476 such] actions required by the notice. [In the event] If a public hearing is
477 requested, [it shall be held by] the [commission upon] Commission must hold
478 it after 30 days' written notice mailed to [all persons] each person of record
479 with any [right, title or] interest in the subject property and to [all citizens and
480 organizations] any other person or organization [which the director feels] that
481 the Director believes may have an interest in the proceedings.

482 (1) After a public hearing [on the issue of necessity of improvements to
483 prevent demolition by neglect], if the [commission] Commission finds
484 that [such] the improvements are necessary, it [shall instruct] must order
485 the [director] Director to issue a final notice to be mailed to the record

486 owners and [all parties] each party of record with any [right, title or]
 487 interest in the subject property, advising of the items of repair and
 488 maintenance necessary to correct or prevent further deterioration. The
 489 owners [shall institute] must take all necessary corrective action to
 490 comply with the final notice within 30 days [of receipt of] after
 491 receiving the [revised] notice.

492 (2) [In the event] If the corrective action specified in the final notice is not
 493 [instituted] taken within the time allotted, the [director] Director may
 494 [institute, perform and] complete the necessary remedial work, [to
 495 prevent deterioration by neglect and the] All expenses incurred by the
 496 [director] Director for [such] the work, labor, and materials [shall] must
 497 be a lien against the property, [and] draw interest at the highest legal
 498 rate, [the amount to] and be amortized over [a period of] 10 years,
 499 subject to a public sale [if there is a] after any default in payment.

500 [(3) Failure to comply with the original or final notice shall constitute a
 501 violation of this chapter for each day that such violation continues and
 502 shall be punishable as set forth in section 24A-11.]

503 [(4)] (3) [In the event that] If the [commission] Commission finds that,
 504 notwithstanding the necessity for [such] the required improvements,
 505 taking the action [provided in] required under paragraphs (1) and (2) [of
 506 this subsection] would impose a substantial hardship on any [or all
 507 persons] person with any [right, title or] interest in the subject property,
 508 [then] the [commission shall] Commission must seek alternative
 509 methods to preserve the historic site or historic resource located [within
 510 an] in a historic district. If, [none are confirmed] after finding a
 511 substantial hardship, the Commission does not modify its order within a
 512 reasonable time, the [director shall] Director must not [proceed in

513 accordance with paragraphs (1) and (2)] enforce the original
 514 Commission order.

515 (b) If the historic resource is listed in the ["Locational Atlas and Index of Historic
 516 Sites in Montgomery County, Maryland," or the microfilmed addenda to such
 517 atlas, published by the Maryland-National Capital Park and Planning
 518 Commission] Locational Atlas, the [director shall] Director must advise the
 519 [planning board] Planning Board which, after [receiving the] giving the
 520 Commission a reasonable opportunity to submit a recommendation, [of the
 521 commission, shall] must conduct a public hearing to determine whether the
 522 historic resource will be [designated] recommended as [an] a historic site or
 523 historic district in the [master plan for historic preservation] Master Plan for
 524 Historic Preservation.

525 (1) [Where] If the [planning board determines] Planning Board finds that it
 526 will not recommend that the historic resource [will not be included] for
 527 inclusion in the [master plan for historic preservation] Master Plan for
 528 Historic Preservation, the Planning Board must remove the resource
 529 from the Locational Atlas and take no further action [will be taken].

530 (2) [Where] If the [planning board determines that the historic resource in
 531 all likelihood will be included] Planning Board recommends the
 532 resource for inclusion in the [master plan for historic preservation]
 533 Master Plan for Historic Preservation, the [planning board shall]
 534 Planning Board must initiate an amendment to the [master plan for
 535 historic preservation pursuant to the provisions of article 28 of the
 536 Annotated Code of Maryland] Master Plan for Historic Preservation
 537 under Chapter 33A.

538 [a.] (A) [In the event that such] If the amendment is adopted and
 539 the historic resource is [placed on the master plan for historic

540 preservation] included in the Master Plan for Historic
 541 Preservation as [an] a historic site or [an] a historic resource
 542 [within an] in a historic district, the [director shall] Director must
 543 give written notice to [all persons] each person with any [right,
 544 title, or] interest in the subject property of the conditions of
 545 deterioration, and [shall] must specify the items of repair or
 546 maintenance necessary to stabilize the condition of the historic
 547 resource and prevent further deterioration.

548 [b.] (B) [Such] The notice [shall] must provide that [such] any
 549 required stabilization work [shall commence] must start within 30
 550 days [of receipt of] after the recipient receives the notice and
 551 [shall] must be completed within a reasonable time [thereafter].

552 [c.] (C) [In the event that] If stabilization action is not [instituted
 553 within the time allotted, or not] started or completed within a
 554 reasonable time [thereafter], the [director] Director may [institute,
 555 perform and] complete the necessary stabilization work, [and the]
 556 Any expenses incurred by the [director] Director for [such] the
 557 work, labor, or materials [shall] must be a lien against the
 558 property, [and] draw interest at the highest legal rate, [the amount
 559 to] and be amortized over [a period of] 10 years, subject to a
 560 public sale [if there is a] after any default in payment.

561 **24A-10. [Moratorium on alteration or demolition] Locational Atlas and Index of**
 562 **Historic Sites.**

563 (a) [*Application for permits for historic resources on locational atlas.*]
 564 Administration.

565 The Planning Board must maintain the Locational Atlas.

566 (b) Amendments.

- 567 (1) The Planning Board may place or remove any site on the Locational
568 Atlas after:
- 569 (A) giving the Commission an opportunity to submit a
570 recommendation; and
- 571 (B) conducting a public hearing.
- 572 (2) If the Planning Board recommends a site for inclusion on the Master
573 Plan for Historic Preservation, the Planning Board must place that site
574 on the Locational Atlas.
- 575 (3) The Council may place or retain any site on the Locational Atlas that
576 the Planning Board has recommended for the Master Plan for Historic
577 Preservation.
- 578 (4) If the Council includes any site on the Master Plan for Historic
579 Preservation, then the Planning Board must remove the site from the
580 Locational Atlas.
- 581 (5) If the Planning Board recommends including a site on the Master Plan
582 for Historic Preservation but the Council does not place the site on the
583 Master Plan for Historic Preservation, the Planning Board must remove
584 the site from the Locational Atlas, unless the Council directs that the site
585 be retained on the Locational Atlas.
- 586 (6) During September 2009 and every 5 years thereafter, the Commission
587 or its designee must notify every property owner on the Locational
588 Atlas that:
- 589 (A) the property is on the Locational Atlas; and
- 590 (B) any demolition and alternative permit application will be
591 processed under subsection (c).
- 592 (c) Demolition and alteration permits.

593 (1) Any applicant for a permit to demolish or substantially alter the exterior
 594 features of any historic resource [which is] listed in the ["Locational
 595 Atlas and Index of Historic Sites in Montgomery County, Maryland," or
 596 the microfilmed addenda to that atlas, published by the Maryland-
 597 National Capital Park and Planning Commission] Locational Atlas, but
 598 which is not designated as [an] a historic site or historic district on the
 599 [master plan for historic preservation] Master Plan for Historic
 600 Preservation, must disclose that fact on the application.

601 (2) If the [historic resource] site or district is included in the Locational
 602 Atlas or is located in an area under review for designation as [an] a
 603 historic district and is not under review for designation as [an] a historic
 604 site, the application must, at the option of the applicant, be:

605 (A) reviewed by the Commission under the historic area work permit
 606 procedure [in Section 24A-7 if the applicant seeks review under
 607 that Section] ; or

608 (B) referred to the Planning Board under subsection (d).

609 [(b)] (d) Referral to the [planning board] Planning Board. If the applicant does
 610 not seek [review under Section 24A-7] a historic area work permit, the
 611 Director must promptly forward the permit application to the Planning Board.
 612 The Planning Board must decide whether to recommend the resource for
 613 inclusion in the Master Plan for Historic Preservation after holding a public
 614 hearing and considering any recommendation of the Commission [to make a
 615 finding, after a public hearing, as to the significance of the historic resource
 616 and to determine whether, after considering the recommendations of the
 617 Commission, the property will be designated as an historic site or an historic
 618 resource within an historic district, listed in the master plan for historic
 619 preservation]. The Planning Board's public hearing on an application to

620 demolish or substantially alter any historic resource listed in the [locational
 621 atlas] Locational Atlas satisfies the requirements of [section] Section 33A-6
 622 for a public hearing on a preliminary draft amendment to the Master Plan for
 623 Historic Preservation [historic preservation master plan] if all notice
 624 requirements of [that section] Section 33A-6 are [met] satisfied.

625 [(c))(e) *[Determination] Decision by the [planning board] Planning Board.*

626 (1) [Where] If the [planning board determines] Planning Board decides that
 627 the historic resource will not be [included] recommended for inclusion
 628 in the [master plan for historic preservation] Master Plan for Historic
 629 Preservation, the [director shall forthwith issue] Director must approve
 630 the permit, and the Planning Board must remove the site from the
 631 Locational Atlas.

632 (2) [Where] If the [planning board determines] Planning Board
 633 recommends that the historic resource [in all likelihood will] should be
 634 included in the [master plan for historic preservation] Master Plan for
 635 Historic Preservation, the [director shall withhold issuance of the permit
 636 once] Director must not approve the permit for [a maximum period of]
 637 at least 195 days [from the date] after the application for demolition [is]
 638 was filed. If [, as a result of the master plan process,] the property is
 639 designated [an] a historic site or [an] a historic resource [within an] in a
 640 historic district and the application was not previously approved, the
 641 application [shall be governed by the procedures established in section
 642 24A-7] must be processed as a historic area work permit.

643 [If, after a public appearance as provided for in section 24A-7, the
 644 commission determines that failure to grant the permit applied for will
 645 have the effect of denying the property owner of all reasonable use of
 646 his property or causing him to suffer undue hardship, then the

647 commission must instruct the director to issue the permit subject to such
 648 conditions, if any, as are found to be necessary to insure conformity
 649 with the purposes and requirements of this chapter.]

650 ~~[(d)]~~(f) *Time limits for [planning board] Planning Board action.*

651 (1) Within 60 days after [the filing of] an application is filed, or within 15
 652 days after the [closing of the record following a public hearing] hearing
 653 record closes, whichever occurs later, the [planning board shall render
 654 its findings and determinations with respect to an] Planning Board must
 655 decide on the application.

656 (2) [Failure to adhere to the limits] If the Planning Board does not issue its
 657 decision in the time specified in [section 24A-10 shall cause] paragraph
 658 (1), the Director must issue the permit [to issue] by operation of law[,
 659 except in the event of a finding and further proceedings as provided in]
 660 unless issuance of the permit is stayed under subsection [(c)] (e)(2) [of
 661 this section].

662 **24A-11. [Violations and Penalties] Master Plan for Historic Preservation.**

663 (a) (1) As an amendment to the General Plan for the County, the Planning
 664 Board prepared and the Council adopted a Master Plan for Historic
 665 Preservation. This plan designates historic sites and historic districts,
 666 describes their boundaries, and integrates historic preservation into the
 667 planning process.

668 (2) Amendments to the Master Plan for Historic Preservation must be
 669 approved and adopted under Chapter 33A.

670 (A) If the Council approved work program for the Planning Board
 671 includes the consideration of particular sites or districts for
 672 inclusion in the Master Plan for Historic Preservation, such
 673 amendments must be submitted for the Council's consideration.

674 (B) The Planning Board may also submit other amendments that it
 675 recommends for Council approval.

676 (b) For all sites and districts considered for designation after {effective date}:

677 (1) If the property owner consents to the site's inclusion in the Master Plan
 678 for Historic Preservation, then the Planning Board must find at least 1 of
 679 the following criteria when it recommends a historic resource for
 680 inclusion in the Master Plan for Historic Preservation:

681 (A) Historical and cultural significance. The historic resource:

682 (i) has character, interest, or value as part of the development,
 683 heritage, or cultural characteristics of the County, state, or
 684 nation;

685 (ii) is the site of a significant historic event;

686 (iii) is identified with a person or a group of persons who
 687 influenced society; or

688 (iv) exemplifies the cultural, economic, social, political, or
 689 historic heritage of the County and its communities.

690 (B) Architectural and design significance. The historic resource:

691 (i) embodies the distinctive characteristics of a type, period,
 692 or method of construction;

693 (ii) represents the work of a master;

694 (iii) represents a significant and distinguishable entity whose
 695 components may lack individual distinction; or

696 (iv) represents an established and familiar visual feature of the
 697 neighborhood, community, or County because of its
 698 singular physical characteristic or landscape.

699 (2) If the property owner does not consent to the site's inclusion in the
 700 Master Plan for Historic Preservation, then 4 members of the Planning

701 Board must find the following when it recommends a historic resource
 702 for inclusion in the Master Plan for Historic Preservation:

703 (A) at least 3 criteria in subsection (b)(1); and

704 (B) the public interest in preserving the historic resource outweighs
 705 the interests of the objecting property owner to recommend a site
 706 for inclusion in the Master Plan for Historic Preservation.

707 (c) If the Planning Board does not recommend an amendment to the Master Plan
 708 for Historic Preservation to include a site or district after receiving any
 709 recommendation of the Commission, the Planning Board must not submit a
 710 master plan amendment to the Council that includes that site or district;
 711 however, the Planning Board must submit its recommendation to the Council
 712 if the Council amended the Planning Board's work program to include
 713 consideration of the subject site or district.

714 **[24A-11] 24A-12. Violations and penalties.**

715 Any person who violates [a provision of] this [chapter] Chapter, [or fails to
 716 comply with any of the requirements thereof, or disobeys or] disregards a decision of
 717 the [commission] Commission, or [fails to abide by] does not satisfy the conditions
 718 of a permit, [shall be subject to punishment for] has committed a class A violation [as
 719 set forth in section 1-19 of chapter 1 of the County Code]. Each day a violation
 720 continues [to exist shall constitute] is a separate offense.

721 **[24A-12 Severability.**

722 The provisions of this chapter are severable and if any provisions, clause,
 723 sentence, section, word or part thereof is held illegal, invalid or unconstitutional, or
 724 inapplicable to any person or circumstances, such illegality, invalidity or
 725 unconstitutionality, or inapplicability shall not affect or impair any of the remaining
 726 provisions, clauses, sentences, sections, words or parts of the chapter or their
 727 applications to other persons or circumstances. It is hereby declared to be the

728 legislative intent that this chapter would have been adopted if such illegal, invalid or
729 unconstitutional provision, clause, sentence, section, word or part had not been
730 included therein, and if the person or circumstance to which the chapter or part
731 thereof is inapplicable had been specifically exempted therefrom.]

732 **[24A-13. Historic preservation easement program.**

733 (a) There is a county easement program to preserve historic resources in
734 Montgomery County. The commission must administer the program in
735 accordance with this section.

736 (b) (1) An owner of an historic resource may offer the county a
737 preservation easement to protect or conserve interior or exterior features
738 of the historic resource and its environmental setting or appurtenances
739 by making application to the commission.

740 (2) Upon receipt of an application, the commission must
741 immediately forward the application for review and comment to:

742 (A) the planning board if the historic resource is located in the
743 Maryland-Washington Regional District; and

744 (B) the appropriate agency of a municipality if the historic
745 resource is located within a municipality.

746 Review and comment under this paragraph must be made within
747 45 days and should include an evaluation of the proposal using
748 the criteria specified in this section as well as identification of
749 competing or supporting land use priorities or other relevant
750 factors or issues. Recommendations may include proposed
751 easement terms and conditions.

752 (3) The commission must review the application to determine if
753 acceptance of the preservation easement would further the

754 county's historic preservation goals. In making its determination,
755 the commission should consider, among other relevant factors:

- 756 (A) the relative significance of the historic resource;
- 757 (B) the structural condition;
- 758 (C) the owner's planned or completed preservation efforts;
- 759 (D) the existing zoning and nature of the surrounding
760 neighborhood; and
- 761 (E) whether an easement will promote long-term survival of
762 the historic resource.

763 (c) If the historic resource is designated as an historic site in the county
764 master plan for historic preservation, either as an individual site or
765 located within an historic district, the county may acquire an easement
766 upon positive recommendation of the commission and approval of the
767 county executive. If the historic resource is not designated as an historic
768 site in the master plan, the additional approval of the county council is
769 required prior to any acceptance by the county. The commission must
770 forward any comments received under subsection (b)(2) to the county
771 executive and the county council, as appropriate.

- 772 (d) A preservation easement under this section should be granted in
773 perpetuity and include appropriate terms and conditions that:
- 774 (1) restrict changes and alterations;
 - 775 (2) require maintenance, repairs, and administration;
 - 776 (3) authorize public access;
 - 777 (4) provide a right of governmental inspection;
 - 778 (5) provide for a right of assignment to the Maryland Historical Trust
779 or other appropriate agency or entity; and
 - 780 (6) establish enforcement remedies.

- 781 (e) The county may hold a preservation easement jointly with the Maryland
782 Historical Trust.
- 783 (f) A preservation easement must be recorded by the grantor among the
784 land records of the county at the grantor's cost. The grantor must notify
785 the supervisor of assessments and the Office of the Public Tax Advocate
786 of the recordation of the preservation easement.
- 787 (g) Reserved.
- 788 (h) A preservation easement may be extinguished by judicial proceeding if
789 an unexpected change in the conditions applicable to the property, such
790 as casualty, make it impossible or impractical to continue to use it for
791 preservation purposes. The terms of an easement related to
792 extinguishment should identify appropriate changes in condition,
793 provide that the county share in any proceeds from a subsequent sale or
794 exchange of the property after the easement is extinguished, and be in
795 accordance with any applicable executive regulations. The sharing in
796 proceeds may include the recapture of property taxes saved by the
797 grantor or its successor in interest, either in part or in full, as a result of
798 the easement.
- 799 (i) The commission may enter into a cooperative agreement with the
800 Maryland Historical Trust or other appropriate agencies or entities for
801 technical assistance in administering the historic easement program.
802 This may include assistance in property evaluation, negotiation, and
803 inspection.
- 804 (j) (1) The easement program authorized under this section is in addition
805 to, and does not supersede or otherwise affect, any other county or
806 municipal program or policy requiring the donation of a preservation

807 easement as a condition of financial assistance. It must operate in
808 conjunction with other county or municipal easement programs.

809 (2) The grant of an easement under this section does not eliminate or
810 otherwise alter any county or municipal regulatory requirement
811 applicable to the historic resource, including any requirement to
812 obtain an historic area work permit.

813 (k) The county executive, with the advice of the commission, may adopt
814 regulations under method (2) to administer the historic preservation
815 easement.]

816 **Sec. 2. Effective Date.** This ordinance takes effect 20 days after the date of
817 Council adoption.

818

819 This is a correct copy of Council action.

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822 Linda M. Lauer, Clerk of the Council

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majority of the Planning Board approved, at least three (3) of the criteria are met, and the Board finds that the “public interest in preserving the historic resource outweighs the interests of the objecting property owner.”

It is MHT’s opinion that the County’s intention to require that a higher threshold be met if a property owner does not affirmatively consent to historic designation is inconsistent with state statute because it introduces a review criterion that has no apparent basis in law, and that may be viewed as arbitrary and capricious. Article 66B, §8.02 gives jurisdictions the authority to “designate boundaries for sites, structures, or districts which are deemed to be of historic, archeological, or architectural significance.” The consent of a property owner is not directly related to the historic, archeological, or architectural significance of a property and is therefore not a criterion authorized under Article 66B, §8.01 et seq. or State Finance and Procurement Article, §5-323(b)(1). To the same end, the statute authorizing Montgomery County to designate historic properties requires that the criteria for designation be consistent with the criteria for listing on the National Register of Historic Places (Art. 28, §7-108(e), State Finance and Procurement Article, §5-323(b)(1), 36 CFR §60.4). The four National Register criteria do not include owner consent.¹

Notwithstanding the inconsistency with existing state law and policy, the decision to require that a property meet three, instead of one criterion raises significant questions that are unaddressed in the proposed amendments. Why not two criteria? Or five? What, if any bearing would the additional criteria have on the owner’s objection to designation? Would the specific criteria impact the decision of the Board in determining if “the public interest outweighs the interests of the objecting property owner”? Additionally, because requiring an owner’s consent prior to designation, or requiring an elevated threshold for designation if such consent is not granted, does not appear to have a basis in law and may be interpreted as arbitrary, such a requirement may raise procedural due process issues.

Decisions by the Planning Board

The proposed ordinance amendments would require an affirmative recommendation of the Planning Board for a proposed Master Plan amendment to be considered by the County Council. If the owner consents to the amendment, a simple majority vote would suffice, but if the owner does not affirmatively consent, a super majority vote would be required. It is MHT’s opinion that the proposed changes are inconsistent with Article 66B, §8.02, Annotated Code of Maryland, as well as Article 28, §7-108(a), Annotated Code of Maryland, and Chapter 59-H, Montgomery County Code, and Section I.A. of the CLG Procedures Manual.

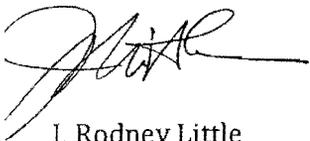
¹While the National Register listing process does require that property owners be afforded the opportunity to object to listing, there is a fundamental and significant difference between the role and regulatory impact of National Register listing and designation by local governments. Listing in the National Register has no direct bearing on a property owner’s ability to alter their property unless the alterations are being assisted by a Federal agency or involve Federal funding or permitting. This is a policy decision intended to prevent taxpayer dollars from supporting activities that adversely impact historic properties and was born out of a time when the construction of interstate highways and urban renewal projects were demolishing or significantly altering historic properties without consideration of the value of those resources. Owner objection provisions were introduced into the process in 1980 to address a flaw in the Federal tax code that created a disincentive that denied accelerated depreciation for buildings constructed on the site of a property listed in the National Register of Historic Places. Local historic designation, by contrast, is a zoning power implemented by local governments as a means to protect and preserve historic properties as a public benefit. Because such designations are regulatory in nature and are fundamentally land use controls enabled by applicable state zoning enabling legislation, the validity of owner objection and consent provisions in such matters is limited to the authority granted in such legislation. Existing case law on the validity of local historic preservation ordinances reinforces the relationship between historic preservation and zoning. See J. Miller, “Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?”, PRESERVATION LAW REPORTER (Nat’l Trust for Historic Preservation, THP Feb. 1991).

Section 8.02 of Article 66B authorizes jurisdictions to “designate boundaries for sites, structures, or districts which are deemed to be of historic, archeological, or architectural significance, by following the procedures of the local jurisdiction for establishing or changing areas and classifications of zoning.” While Montgomery County considers historic designation in the context of Master Plan amendments, designation is fundamentally a zoning action and thus the process should be substantially similar to that used for amendments to zoning classifications. Because amendments to local, sectional, and district zoning maps in Montgomery County under Chapter 59-H, Montgomery County Code, require review, and either an affirmative or negative recommendation by the Planning Board before consideration by the County Council, it is appropriate to require historic designation amendments to require such review. However, there are no provisions in Chapter 59-H that permit the Planning Board to withhold negative recommendations on proposed zoning map amendments from County Council consideration.

Summary

The proposed amendments represent significant changes to the County’s historic preservation program that may significantly impact the County’s ability to adequately fulfill the public purposes for which the ordinance was adopted. The County’s long-standing practice of systematically surveying and evaluating properties for historic designation by applying accepted historic preservation criteria and considering designations in a broad and multifaceted planning context demonstrates a commitment to historic preservation unparalleled in Maryland. MHT encourages all Maryland jurisdictions to adopt and administer historic preservation programs in a manner that is legally defensible, predictable, consistent, and based on sound expert judgment and public policy. For the reasons outlined in this letter, MHT does not support these amendments, but would instead extend to the County the offer of technical assistance and guidance should you wish to explore other possible changes to the historic preservation program and legislation. Should you have additional questions about matters raised in this letter please contact Cory Kegerise, Administrator of Local Preservation Programs at (410) 514-7635 or ckegerise@mdp.state.md.us.

Sincerely,



J. Rodney Little
State Historic Preservation Officer
Director, Maryland Historical Trust

cc: The Honorable Isaiah M. Leggett, County Executive
The Honorable Phil Andrews, President, Montgomery County Council
Mr. Royce Hanson, Chair, Montgomery County Planning Board

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NATIONAL
TRUST
FOR
HISTORIC
PRESERVATION®

March 25, 2009

Hon. Phil Andrews, President
Hon. Roger Berliner, Vice President
Hon. Marc Erlich; Hon. Valerie Ervin; Hon. Nancy Floreen; Hon. Mike Knapp;
Hon. George Leventhal; Hon. Duchy Trachenberg
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: *Historic Preservation Amendment 09-1*

Dear President Andrews and Members of the Montgomery County Council:

On behalf of the National Trust for Historic Preservation, I am writing to provide comments to you on proposed Historic Preservation Amendment 09-1. For the reasons described below, we believe that the proposed amendment raises serious legal and policy questions. Consequently, we urge that the amendment not be adopted in its current form.

The National Trust is a private nonprofit organization chartered by the U.S. Congress in 1949 to promote the historic preservation policy of the United States and to further public participation in the preservation of the nation's historic resources. Today, the National Trust has more than 270,000 members around the country, including more than 8,700 members in Maryland. Among other things, the National Trust works to support governmental laws and policies that help to preserve historic resources — particularly *local* historic preservation laws, which are in fact the strongest form of legal protection for historic sites and landmarks. The National Trust has provided advice and assistance to hundreds of communities that have enacted historic preservation ordinances, and we have worked closely with many of the more than 1,700 municipalities across the country that have enacted such ordinances.

As set out in more detail in the attached analysis by Julia H. Miller, our concerns about proposed Historic Preservation Amendment 09-1 primarily relate to two issues:

First, the amendment would change key elements of the current designation structure of the County's preservation law in a manner that would, to a large degree, leave final historic designation authority in the hands of the Planning Board, rather than the Council itself. In our view, such a delegation of Council authority would be questionable from a policy standpoint, and also raises serious legal concerns. For example, the amendment would preclude Council review of Planning Board decisions to deny designations through amendment of the Master Plan on Historic Preservation — a change that would appear to conflict with the requirement of the Regional District Act that master plan amendments be made at the direction of the Council. See Maryland Code, Art. 28 § 7-108. In addition, placing final decision-making authority for certain designation decisions with the Planning Board would effectively delegate the Council's

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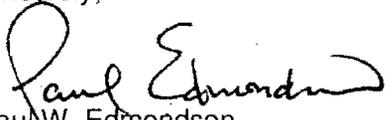
authority to an administrative body that does not have detailed subject-matter expertise. In our opinion, this delegation of Council authority would leave the County's preservation law susceptible to legal challenge.

Our second concern relates to the proposed introduction of special standards and procedures whenever a property owner declines to consent to designation. First, Section 7-108(e) of the Regional District Act requires that the criteria for designation of historic properties be "not inconsistent" with those used by the Maryland Historic Trust to identify properties for inclusion in the Maryland Register of Historic Places, which in turn, are based on the standards for listing in the National Register of Historic Places. The introduction of heightened designation standards in the absence of "owner consent" would appear to be contrary to this directive. Second, the requirement for a supermajority Planning Board vote for designation in the absence of owner consent would appear to conflict with section 7-108(d)(4) of the Act, which states that a local and/or functional master plans—which includes the Historic Preservation Master Plan—are to be amended by three affirmative votes of members of the Board. Finally, adoption of the proposed consent provision could jeopardize the County's eligibility for state preservation funds—which requires consistency with the standards and procedures set forth under Article 66B, § 8.-01, *et seq.*

Our concerns about the proposed terms of Preservation Amendment 09-01 should not be interpreted as opposing any change to Montgomery County's preservation program, since we recognize that the law could be improved (particularly with respect to the process for the identification and designation of historic properties). However, such an effort should not be undertaken in haste. Historic preservation has served the County well over the past thirty years, protecting not only its historic resources, but also its unique identity as developed over the past 300 years. The County's designation process provides property owners with multiple opportunities to be heard. Moreover, applications for historic area work permits are issued based on a strong collaborative process, which involves extensive consultation with staff and the HPC before an actual permit application is filed. Under this approach, only those applications that are directly contrary to the objectives of the County's preservation program, such as demolition, are denied. Even then, the process permits demolition in situations of undue hardship and when required to accomplish special public interest projects.

Rather than adopt the amendment as proposed, the National Trust respectfully suggests that the proposal be tabled to allow for a comprehensive examination of the County's preservation program. With the assistance of the Office of Legislative Oversight and/or the establishment of a special task force, the Council should be able to develop solutions that reinforce the existing ordinance's strengths, address its weaknesses, and ensure that the law remains legally sound.

Sincerely,


Paul W. Edmondson
Vice President & General Counsel

Encl.

cc: Royce Hanson, Chair, Montgomery County Planning Board
Jef Fuller, Chair, Montgomery County Historic Preservation Commission

March 25, 2009

Summary and Analysis of Montgomery County's Proposed Amendments to its Historic Preservation Law

Prepared by: Julia H. Miller, National Trust Special Counsel

As with many programs developed within Montgomery County in the 1970s, the County's preservation ordinance has been noted by experts throughout the state and around the country because of its forward-thinking approach to preservation. In contrast to the typical preservation law, Montgomery County integrates historic preservation into the planning process to ensure that planning efforts reinforce preservation goals, as well as the reverse. At the same time, it would certainly be useful to re-examine the structure of Montgomery County's preservation program, particularly with an eye to improving its process for the identification and designation of historic properties in Montgomery County. This effort should not be undertaken in haste. Rather, it should result from a careful and thoughtful review of the County's existing preservation program, taking into consideration both its strength and weaknesses.

If enacted, Historic Preservation Amendment 09-1, introduced on February 24, 2009, would alter existing law by changing the process for identifying and designating historic resources in Montgomery County in fundamental ways. The amendments would delegate final decision-making authority to the Planning Board, enabling it to disregard recommendations by the Historic Preservation Commission to designate properties as historic sites or districts, for reasons unrelated to the merits of the property. Moreover, the amendments would establish an elevated threshold for designation whenever a property owner objects to a nomination, effectively preventing the designation of new resources within the County and potentially leading to future efforts to de-designate already protected properties.

Significantly, the amendments, if adopted, would appear to violate key provisions of the Regional District Act, Md. Code art. 28.¹ Section 7-108 of the Act requires that amendments to the general plan—including master plan amendments—be made at the direction of the Council rather than the Planning Board. Even if the Council could delegate its authority, delegation to the Planning Board would be susceptible to legal challenge because none of the board's members have expertise in historic preservation. Second, section 7-108(e) of the Act requires that the criteria for designation of historic properties be "not inconsistent" with those used by the Maryland Historic Trust to identify properties for inclusion in the Maryland Register of Historic Places, which in turn, are based on the standards for listing in the National Register of Historic Places. Designation based on consideration of owner consent rather than these standards would be contrary to this directive. Third, section 7-108(d)(4) of the Act states that a local

¹ Consider *Mossburg v. Montgomery County*, 620 A.2d 886, 890 (Md. 1993) (striking down a provision in the County's zoning ordinance which required that four out of the five members of the Montgomery County Board of Appeals approve an application for a special exception, where such authority had not been expressly conferred by the Regional District Act) and *Chevy Chase View v. Rothman*, 594 A.2d 1131, 1136 (1991) (holding that zoning enactments at variance with the Regional District Act are "inoperative.")

and/or functional master plans—which includes the HP Master Plan—must be amended by three affirmative votes. Thus, the County appears to lack the legal authority to require a supermajority vote to designate a property over a property owner's objection. Finally, it should be noted that adoption of the proposed consent provision could jeopardize the County's eligibility for state preservation funds—which requires consistency with the standards and procedures set forth under Article 66B, § 8.-01, *et seq.*

Set forth below is a brief summary of the County's existing law and the proposed amendments followed by comprehensive discussion of issues and concerns relating to those changes.

BACKGROUND

Under Montgomery County's historic preservation law, codified at Montgomery County Code Ch. 24A, historic properties are identified in two ways—by inclusion in the Locational Atlas and Index of Historic Sites (Locational Atlas) or by official listing in the Master Plan for Historic Preservation (HP Master Plan).² Inclusion in the Locational Atlas provides notice to existing and potential property owners and County officials that certain properties may be considered historically or architecturally significant and also provides temporary protection for such properties against substantial and potentially detrimental alterations and demolitions. Listing in the HP Master Plan provides full protection for the County's historic resources, including potentially incompatible actions, such as alterations and additions, removals, demolition and demolition by neglect.³

1. Locational Atlas

The Locational Atlas is an interim listing of potential historic resources. Sites included in the Atlas are temporarily protected against demolition or incompatible "substantial alterations." Under the process set forth under section 10 of Chapter 24A, a property owner may either consent to review by the Historic Preservation Commission (HPC) under its "Historic Area Work Permit" (HAWP) procedures, see M.C. Code Ch. 24A § 7, or seek a final decision from the County on whether to designate the property through the master plan amendment process. Under the latter approach, a permit may not be issued during the period in which the merits of the property are considered, provided that a decision is made within 195 days from the date the application for the permit was filed. If the property is designated, then the owner will need a HAWP to proceed.

The Atlas was established upon the completion of a comprehensive survey of the County's potential historic resources in 1976. Over the years, properties listed in the Atlas have been systematically evaluated for inclusion in the HP Master Plan, often in conjunction with the County's Master Plan review process. To date, about 140 properties of the original 1,000 properties remain on the Atlas at this time. The Planning Board has served as the "Keeper of the Atlas," even though its members lack expertise in historic preservation.

² Pursuant to Article 28 of the Maryland Code, historic properties in Montgomery County are identified through the planning process, but regulated vis-à-vis zoning-type, permitting procedures.

³ That being said, it should be noted that applications for historic area work permits are issued based on a strong collaborative process, which involves extensive consultation with staff and the HPC before an actual permit application is filed. Under this approach, only those applications that are directly contrary to the objectives of the County's preservation program are denied. Even then, the process permits demolition in situations of undue hardship and when required to accomplish special public interest projects.

New properties are rarely added to the list. Third parties, in a few instances, have nominated new properties to the Atlas. The County uses the Maryland Inventory of Historic Places application for such nominations. See discussion below.

2. Master Plan for Historic Preservation

The HP Master Plan is the County's official listing of protected resources, including both individual sites and historic districts. To qualify for designation, the historic and/or architectural significance of the property must be thoroughly researched and documented. Applications for HP Master Plan Amendments may be initiated by the County or by the submission of an application by a property owner or third party by the filing of the "State Historic Sites Inventory Form" (available from the Maryland Historical Trust and posted at: <http://www.marylandhistoricaltrust.net/invform.doc>). See, also, "Standards and Guidelines for Architectural and Historical Investigations in Maryland," at: <http://www.marylandhistoricaltrust.net/s&q-architect.pdf>.

In Montgomery County, nominated properties are first evaluated by the historic preservation staff, who advise the HPC on whether the property meets the criteria for designation as a historic site or district, and if so, the "environmental setting," needed to protect the site. The HPC, upon holding a public hearing and consideration of the merits of the property under the County's criteria for designation,⁴ may recommend designation to the Master Plan so long as the property satisfies one or more of the criteria for designation.

If the HPC recommends designation, then a draft amendment is prepared. The Planning Board, upon holding a public hearing at which it considers a "Public Hearing (Preliminary) Draft Amendment" to the HP Master Plan, and upon receipt of comments from the County Executive, decides whether to recommend designation of the property as proposed or modified, and prepares a "Planning Board (Final) Draft Amendment." The Draft Amendment is then transmitted to the County Council for review, along with the Planning Board's recommendation.

PROPOSED CHANGES

While some of the proposed amendments to the County's preservation code are intended to clarify existing practices, many would radically change the County's process for identifying and designating historic resources.

⁴ Sec. 24A-3(b). In considering historic resources for designation as historic sites or historic districts, the planning board shall apply the following criteria:

- (1) Historical and cultural significance. The historic resource:
 - a. Has character, interest or value as part of the development, heritage or cultural characteristics of the county, state or nation;
 - b. Is the site of a significant historic event;
 - c. Is identified with a person or a group of persons who influenced society; or
 - d. Exemplifies the cultural economic, social, political or historic heritage of the county and its communities.
- (2) Architectural and design significance. The historic resource:
 - a. Embodies the distinctive characteristics of a type, period or method of construction;
 - b. Represents the work of a master;
 - c. Possesses high artistic values;
 - d. Represents a significant and distinguishable entity whose components may lack individual distinction; or
 - e. Represents an established and familiar visual feature of the neighborhood, community or county due to its singular physical characteristic or landscape.

1. Locational Atlas

Under existing practice, the Planning Board has served as the “Keeper of the Locational Atlas” in Montgomery County. The amendments would increase the Board’s authority over the Atlas by making the Planning Board’s decisions to remove properties from the Atlas unreviewable by the County Council. Since, as explained above, a property is protected from demolition only if it is included in the Atlas, once a property is removed from the Atlas, the property will no longer be protected against demolition or incompatible substantial alterations. Judicial review, an expensive and unsatisfactory substitute for Council review, would become the only recourse against a Planning Board decision to remove a property from the Atlas, notwithstanding its historical or architectural significance.

Although the HPC is the expert body on preservation issues, its role could easily be overridden by the Planning Board, and its recommendations would carry no specific weight. The proposed amendments would also require the HPC to notify owners of property on the Atlas every five years that their properties are included in the Atlas and the legal implications that follow.

2. HP Master Plan

The proposed amendments would change the standards and process for designating historic resources in the County. First, the amendments would remove the “high artistic value” criterion from the County’s criteria for historic designation, even though the criterion is derived from the National Register of Historic Places and is routinely used by historic preservation boards to identify and designate historic resources throughout the United States. Second, the amendments would preclude Council review whenever the Planning Board decides not to recommend an HP Master Plan Amendment, except where the property under consideration was previously identified by the Council in its “approved work program for the Planning Board.” Finally, and most importantly, the Amendments would require heightened review whenever a property owner objects to designation. If a property owner does not consent, then three conditions must be met:

- Four of the five members of the Planning Board must recommend inclusion of the site in the Master Plan;
- At least three criteria for designation must be met; and
- The Planning Board must find that “the public interest in preserving the historic resource outweighs the interests of the objecting property owner to recommend a site for inclusion” in the Master Plan.

If any one of these conditions cannot be satisfied, Council review would occur only if the site is part of the Planning Board’s work program. In other words, in addition to exercising final decision-making authority on the qualifications of the property for historic designation, the Board would also be making unreviewable “legislative/policy” determinations as to the relative public benefits of historic preservation versus individual impacts.

3. Other Changes

Many of the other changes in the proposed bill are non-substantive. Minor, yet noteworthy changes include:

- The removal of “which will have no material effect” language under Section 24A-6(b), governing exceptions from HAWP requirements. Under the proposed amendments, ordinary maintenance, repair of exterior features, customary farming operations and landscaping would not require a HAWP, regardless of whether the proposed change would have a “material effect.” (Since “environmental setting” is undefined, this could be problematic as to landscaping.)
- Revision of language pertaining to the denial of applications for HAWPs from requiring denials for changes that are “inappropriate, inconsistent, or detrimental” to the preservation or ultimate protection of the historic site to just “detrimental.”
- The addition of a new standard that requires leniency in review of HAWPs to alter a non-historic addition (defined as addition built before the property was identified on the Locational Atlas or the Master Plan).

DISCUSSION

The proposed amendments raise two principal concerns, calling into question both the legality and practicality of the proposed amendments. The first concern relates to the delegation of the Council’s decision-making authority to the Planning Board. The second concern relates to the use of heightened standards and procedures to designate properties whenever a property owner withholds his or her consent. Each of these concerns, along with comments on a few minor changes, is discussed below.

1. Delegation of Council Decision-making Authority to the Planning Board

Pursuant to the proposed Historic Preservation Amendment 09-1, the Planning Board would be established as Montgomery County’s “Preservation Gate Keeper.” The County Council would only consider amendments to the Master Plan which pertain to sites or districts previously identified by the County Council in its “approved work program for the Planning Board,” or amendments that the Planning Board “recommends for Council approval.” Under this proposed process, the Planning Board will be able to disregard the recommendations of the HPC without recourse and could make decisions not to designate based upon factors that have little or anything to do with the criteria for historic designation.

Under Maryland law, master plan amendments are to be made at the direction of the County Council (sitting in its capacity as district council). See Md. Code, Art. 28 § 7-108(a), which provides that amendments to the General Plan, including changes to the Master Plan for Historic Preservation, are to be made “at the direction of the district council.” The proposed delegation of the Council’s final decision-making authority to the Planning Board—including decisions *not* to amend the Master Plan—would appear to violate this requirement.

Moreover, even if the County Council has the requisite legal capacity to delegate its final decision-making authority to an administrative body, delegation of Council authority to the Planning Board could be subject to legal challenge because none of the Board’s members have specific subject-matter expertise in historic preservation. As a general legal principle, courts have upheld delegations of legislative authority to historic preservation commissions precisely because such boards have expertise in the subject matter and procedures are in place to ensure against arbitrary and capricious behavior, such as appeal to a legislative body.⁵ In

⁵ See, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051, 1062-63 (5th Cir. 1075) (finding that Vieux Carre Ordinance provides adequate legislative direction to the Commission to enable it to perform its functions consonant with the due process clause where the ordinance delineates the district, defines what alterations in which locations

contrast to the Historic Preservation Commission, which by law must be comprised of experts in the field of preservation,⁶ comparable expertise is not required for members of the Planning Board. Indeed, review by a planning board is generally sought to obtain input on the consistency of the proposal with a jurisdiction's overall planning objectives rather than to avert potential designations.

Delegation of final decision-making authority in the Planning Board is also problematic from a policy perspective. Historic preservation is and has been an important public objective in Montgomery County. By refusing to exercise oversight over Planning Board decisions, the Council is sending a strong message to the owners of the County's approximately 4,000 already-designated resources, some of whom have spent thousands of dollars in reliance upon the County's commitment to historic preservation, that it no longer supports historic preservation.

In the past, the County Council has reviewed all Planning Board decisions pertaining to proposed designations, regardless of whether the Planning Board recommended adoption of the amendment as proposed by the HPC, as revised by the Planning Board, or not at all. This approach, which enables the Planning Board to add its own recommendations to that of the HPC, makes sense from a public policy standpoint. If the County were to amend Chapter 24A, it should establish a process that codifies this practice.

2. Designation of Historic Properties Based on Owner Consent

The proposed amendments would also require heightened review by the Planning Board whenever a single property owner withholds his or her consent. To designate a property as a historic site or district, four of the five members of the Planning Board must recommend inclusion of the site in the HP Master Plan and the Board must find that three criteria (rather than a single criterion for designation) have been satisfied and that "the public interest in preserving the historic resource outweighs the interests of the objecting property owner to recommend a site for inclusion" in the Master Plan. While a property owner would not have absolute veto authority over historic designations, the proposed requirements would place formidable obstacles to the designation of new historic sites and districts, and may make it extremely difficult to designate new sites to the HP Master Plan.

While the concerns of property owners obviously merit consideration—and in fact *are* taken into account under existing practices—the introduction of heightened designation criteria based on an owner's personal interests or wishes is highly questionable on a number of grounds, as explained below.

A. Authority of the County to Consider Owner Consent Interests in Deciding Whether to Designate Historic Properties

require approval, specifies the qualifications and manner of selection of board members, and provides an "elaborate decision-making and appeal process"; and *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 453-455 (N.C. 1979) (rejecting unlawful delegation charge where, among other things, the discretion of the commission is limited, a majority of the members of a historic district have demonstrated special interest, experience, or education in history or architecture, and procedural safeguards serve as an additional check).

⁶Sec. 24A-4 (b) Membership. The commission shall consist of 9 members appointed by the county executive with the confirmation of the county council. Each member must be a resident of the county. The 4 fields of history, architecture, preservation and urban design shall be represented by a minimum of 1 member qualified by special interest, knowledge or training. The remaining members of the commission shall, to the extent possible, be selected to represent the geographical, social, economic and cultural concerns of the residents of the county.

As a preliminary matter, the proposed amendments would appear to be inconsistent with the authority delegated to the County under the Regional District Act, Md. Code, Art. 28, § 7-108(e), which requires that designations be based solely on a property's significance. This provision authorizes the Planning Commission to amend the plan to designate historic sites and districts (the HP Master Plan), provided that the criteria for designation "is not inconsistent" with the "criteria applicable to the Maryland Historical Trust (MHT) under § 5A-323 of the State Finance and Procurement Article."⁷

Section 5A-323 of the State Finance and Procurement Article, Md. Fin. & Proc. Code § 5A-323, in turn, directs the MHT to identify historic properties for inclusion in the Maryland Inventory of Historic Places and the Maryland Register of Historic Places.⁸ The only criteria identified in 5A-323 is the criteria for listing in the National Register of Historic Places, noting properties included in the State Register must be listed in or qualify for listing in the National Register of Historic Places.⁹ See also COMAR § 05.08.05.02, which requires the listing in or eligibility for

⁷ § 7-108(e). Plans identifying historic sites, structures, etc.- The Commission may make and adopt and, from time to time, amend a plan which shall identify and designate sites, structures with their appurtenances and environmental settings, or districts having a historical, archeological, architectural or cultural value, provided that the criteria for the designation or identification is not inconsistent with the criteria applicable to the Maryland Historical Trust under § 5A-323 of the State Finance and Procurement Article. In making or amending of the plan, the Commission may establish advisory committees to assist it in the performance of its duties. The plan shall constitute an amendment to the general plan for the Maryland-Washington Regional District except that the plan may include sites, structures with their appurtenances and environmental settings, or districts located in municipalities within Montgomery and Prince George's counties, not subject to the jurisdiction of the Commission, with the consent of the governing body of that municipality. Consent of the governing body shall constitute the agreement of the municipality to be bound by all rules and regulations governing such sites, structures with their appurtenances and environmental settings, or districts as may be enacted by the district council.

⁸ § 5A-323. Identification of historic properties. (a) Maryland Inventory of Historic Properties.- The Trust shall compile a Maryland Inventory of Historic Properties that consists of districts, sites, buildings, structures, and other objects of known or potential value to the prehistory, history, upland and underwater archeology, architecture, engineering, and culture of the State. (b) Maryland Register of Historic Properties.-

(1) The Trust shall compile a Historic Register to include all properties in the State that are listed in or eligible for listing in the National Register of Historic Places of the United States Department of the Interior.

(2) The Trust shall adopt regulations specifying procedures and eligibility standards for including properties in the Historic Register.

(3) The Director shall determine whether a property is eligible to be listed in the National Register of Historic Places.

(4) (i) The Director's determination may be appealed to the Governor's Consulting Committee on the National Register of Historic Places, which reviews nominations to the National Register under the National Historic Preservation Act.

(ii) The determination of the Governor's Consulting Committee is final.

(c) Confidentiality.- The location and character of a historic property included in the Maryland Inventory of Historic Properties or the Historic Register shall be confidential if the Director determines that disclosure would create a substantial risk of theft of the property or damage to the property or to the area where the property is located.

⁹ The National Register Criteria, codified at 36 C.F.R. § 60.4, are as follows:

National Register Criteria for Evaluation

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

A. That are associated with events that have made a significant contribution to the broad patterns of our history; or

B. That are associated with the lives of persons significant in our past; or

C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

listing in the National Register as a condition to listing in the Maryland Register. The criteria for listing in the National Register focus specifically on the merits of the property and do not include factors that take into consideration the personal views of the property owner or findings as to the weight of competing interests.

B. Authority of the County to Require a Supermajority Vote of Approval to Amend HP Master Plan

Pursuant to Art. 28, § 7-108(d)(4) of the Maryland Code, the adoption of the HP Master Plan only three affirmative votes is required to amend the plan. Thus, the proposed requirement to have four affirmative votes by the Board appears to be contrary to the Act's express terms. The provision states, in pertinent part:

4. See § 7-108. Regional district plan and amendments. . . . However, for the adoption or amendment of a local master plan or a functional master plan which lies entirely within one county the affirmative votes of three members from that county shall prevail and be sufficient to adopt the plan.”

C. County Eligibility for Historic Preservation Funding

In Maryland, Certified Local Governments (CLGs), such as Montgomery County, are eligible for CLG Subgrant funds, and the CLG Educational Set Aside Program. These funds are used by the County to support a wide variety of projects such as historic site research and survey work, National Register nomination development, community planning, training, and public education. Introduction of an owner consent process and preclusion of City Council review when the Planning Board decides not to designate could jeopardize the County's CLG status, and thus its eligibility for funding.

While Montgomery County is not subject to Art. 66B §§ 8.01 – 8.17, the MHT uses Article 66B as the benchmark for determining eligibility for CLG status. In addition, a jurisdiction must provide for the designation of sites, structures and historic districts that meet established state

D. That have yielded or may be likely to yield, information important in prehistory or history.

Criteria Considerations

Ordinarily cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

- a. A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
- b. A building or structure removed from its original location but which is primarily significant for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
- c. A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his or her productive life; or
- d. A cemetery which derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
- e. A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
- f. A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
- g. A property achieving significance within the past 50 years if it is of exceptional importance.

or local criteria consistent with the Secretary of the Interior's Standards for Identification and Standards for Registration. See Maryland Certified Local Government Procedures Manual (Maryland Historical Trust, Sept. 2004), p.4. The proposed amendments would appear to be inconsistent with Article 66B § 8.02, which requires that designations be accomplished through the zoning process rather than by a Planning Board.¹⁰ Also, the Secretary's Standards, posted at http://www.nps.gov/history/local-law/arch_stnds_4.htm, require independent review by experts in historic preservation and preclude consideration of issues outside the scope of the individual criteria for designation, such as owner consent.

D. Other implications

In addition to the legal concerns addressed above, the proposed owner consent process raises a number of practical and policy concerns, which underscore the need for further review. The amendments would undermine the County's ability to protect its historic resources and embrace procedures that have been eschewed by communities elsewhere.

First, although the County could technically designate properties over an owner's objection, the amendments would most likely operate to prevent designation in fact in those cases in which an owner refuses to consent. As a practical matter, the preparation of a draft master plan amendment could take months, as the ability to muster full participation by the Board, much less four votes, is unrealistic—where obtaining a quorum of three is not easily accomplished.

Second, as written, it appears that a single owner in a historic district could invoke the proposed three-part inquiry. Experience has shown that jurisdictions with owner consent provisions protect very few resources. One-hundred percent agreement among property owners of a proposed historic district would effectively mean that no historic districts would ever be designated.

Third, the requirement that three criteria be met in lieu of one whenever an owner objects to designation suggests a lack of understanding of the designation criteria and the level of research and documentation behind each nomination. While it is not unusual for properties of architectural significance to meet more than one criterion, properties of historical interest, although no less important than architecturally significant properties, may only meet one or two criteria. Heightened review, if merited, should be based on a finding of exceptional importance rather than arbitrary distinctions between the number of criteria satisfied.

Fourth, the open-ended requirement that the Planning Board balance a property owner's concerns with that of public interest serves only to introduce the issue of economic hardship at the designation stage. The State of Maryland has declared that the preservation of historic resources is an important public interest. See Maryland Code, Article 66B, §§ 8.01 (b). Yet, the prevailing practice among jurisdictions with preservation programs is to designate properties based on the substantive merits of an individual property, deferring consideration of economic impact until a specific proposal to alter property has been considered and addressed. Notably, the Maryland Historic Zoning Enabling Act also requires consideration of economic hardship in the context of specific applications rather than at the designation stage. See Md. Code, Art. 66B §§ 8.09-8.10.

¹⁰ § 8.02. Power to designate boundaries for sites, structures, or districts. For the purposes of this subtitle, each local jurisdiction may designate boundaries for sites, structures, or districts which are deemed to be of historic, archeological, or architectural significance, by following the procedures of the local jurisdiction for establishing or changing areas and classifications of zoning.

Too often, objections to designation are based on an owner's desire to avoid the process of government review or for speculative—rather than actual—hardship concerns. Indeed, review of takings claims at the designation stage (rather than as part of the permit process) has been deemed “unripe” for review by the Maryland Court of Appeals. See *Casey v. City of Rockville*, 929 A.2d 74 (Md. 2008). Moreover, the use of owner consent provisions, which enable property owners to veto designation based on whim or a campaign of misinformation, may violate due process and be deemed an unlawful delegation of legislative authority to individual property owners.¹¹

COMMENTS ON OTHER CHANGES

While many of remaining amendments to Ch. 24A are intended, presumably, to make the ordinance more readable, a few changes—although minor—merit mentioning.

First, the rationale behind the removal of the “high artistic value” criterion is unapparent, given that the latter criterion is derived expressly from the criteria for listing on the National Register of Historic Places, which were developed in the 1960s and are widely used by federal, state, and local governments to identify and designate historic properties throughout the United States. Charges that local governments lack authority to regulate aesthetics was resolved long ago by the U.S. Supreme Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954) (“It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”)

Second, the removal of the “no material effect” language under § 24A-6(b), which establishes exceptions to the HAWP, would amount to more than a mere housekeeping change. Categorical exceptions to certain activities, such as landscaping changes, may be assumed to be justifiable because ordinarily they would not harm a historic resource. In some cases, however, where such changes would have a material effect on the resource—such as when historic landscaping is a significant feature of the resource—then review is warranted.

Finally, an across-the board application of lenient review of HAWPS to alter a non-historic addition (defined as an addition built before the property was identified on the Locational Atlas or the HP Master Plan) makes little sense. In some cases, the addition may be an important component of the resource itself. A better preservation approach may be to identify the level of scrutiny to be applied to an addition through the designation process.

¹¹ As the Supreme Court explained, in striking down an owner consent requirement in a zoning law, “[t]he statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority . . . may do so solely for their own interest, or even capriciously.” *Eubanks v. City of Richmond*, 226 U.S. 137, 144-5 (1912). See also, *Brodner v. City of Elgin*, 420 N.E.2d 1176 (Ill. App. 1981) (provision requiring the consent of property owners to rezone property was unenforceable under the Due Process Clause as an unlawful delegation of the city's rezoning power); *Cary v. City of Rapid City*, 559 N.W.2d 891 (S.D. 1997) (striking down as unconstitutional a state zoning statute allowing 40 percent of neighboring property owners to block a rezoning action). For further discussion on the use of owner consent in the designation of historic properties, see J. Miller, “Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?”, PRESERVATION LAW REPORTER (Nat'l Trust for Hist. Pres. THP Feb. 1991), and C. Bowers, “Is Owner Consent Objectionable?”, THE ALLIANCE REVIEW (Nat'l Alliance of Pres. Comm'ns May/June 1997).

CONCLUSION

Montgomery County's historic preservation program—although highly regarded—could be strengthened in a number of different ways. However, the significant changes proposed by Historic Preservation Amendment 09-1 raise a number of serious legal and public policy concerns, and are in fact likely to diminish the effectiveness of the County's current historic preservation program. Rather than taking up the current proposal, the County Council should give serious consideration to developing a comprehensive review process designed to enhance and strengthen the County's preservation program by more fully exploring existing problems and the range of solutions that exist to address those problems.

NATIONAL
TRUST
FOR
HISTORIC
PRESERVATION®

May 21, 2009

Hon. Phil Andrews, President
Hon. Roger Berliner, Vice President
Hon. Marc Erlich; Hon. Valerie Ervin; Hon. Nancy Floreen;
Hon. Mike Knapp; Hon. George Leventhal; Hon. Duchy Trachenberg
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: *Historic Preservation Amendment 09-1*

Dear President Andrews and Members of the Montgomery County Council:

On April 14, 2009, the National Trust for Historic Preservation received a letter from the Council's Legislative Attorney, Jeffrey Zyontz, dated April 10, 2009, which questioned some of the statements made by the National Trust in its letter and memorandum to the Council, dated March 25, 2009. Although the National Trust truly appreciates the time spent by Mr. Zyontz to share his thoughts with us, we cannot agree with his observations. Indeed, more than anything, his comments underscore the fact that the proposed Knapp Amendments rest on *shaky* legal ground.

The National Trust remains convinced that the Council would not be acting in the County's best interests if it were to adopt this amendment. By saying so, the National Trust does not seek to negate the importance of the views of property owners in the designation of historic sites. However, just as in zoning or other land use matters, these views should not impair the County's ability to serve the greater public interest.

We are also mindful of the fact that designation decisions do not always come easy and the Council can sit in a particularly difficult spot as it wrestles with competing concerns over the fate of Montgomery County's future. However, the Council should shoulder its responsibilities rather than hide behind legal fictions such as "empty envelopes" and processes (such as owner consent and supermajority review) to ensure that controversial preservation issues never reach its doors.

At this point, the National Trust would like to reiterate its principal concerns with the proposed amendments:

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(1) The proposed delegation of the Council's final decisionmaking authority to the Planning Board, a non-expert body; and

(2) The introduction of owner consent into the designation process, combined with heightened review standards and a supermajority vote.

As we explained in detail in our memorandum of March 25, these proposals raise important legal and policy questions. Our response to Mr. Zyontz's specific comments in his letter is attached to this letter.

We ask that this correspondence be placed in the Council's record on the Knapp Amendment. We also would be more than happy to talk to you about our specific concerns.

Sincerely,



Julia H. Miller
Special Counsel

cc: Jeffrey Zyontz

Attachments

- Reply to Mr. Zyontz's letter of April 14, 2009
- Letter from Planning Board Chairman Royce Hansen to Council President Michael Knapp regarding Perpetual Building designation
- Dade County Attorney's Opinion 82-83 (Sept. 16, 1982)
- Michigan Attorney General Opinion 6919 (Oct. 10, 1996)

March 25, 2009

Response to Mr. Zyontz's Letter of April 14, 2009 to the National Trust for
Historic Preservation

Prepared by: Julia H. Miller, National Trust Special Counsel

Decisions by Planning Board

Page 1, Par. 1: **"The provision cited in your letter is a codification
of existing practice".**

Response: Placing final decision-making authority in the hands of the Planning Board is not codification of the County's longstanding practice; this is a new practice. For the past 30 years, the Planning Board has issued recommendations to designate or not to designate, which the Council reviewed. Our position, which is that the County Council must exercise its final review of a Planning Board recommendation against designation, is shared by the Chairman of the Planning Board, as evidenced by his July 14, 2008 letter transmitting the Planning Board's master plan recommendation against designating the Perpetual Building in Silver Spring as a historic site. In that letter, which is attached, Chairman Hanson accurately stated the process as follows: "[W]e [the Planning Board] recognize that the County Council is the final decision maker in regard to amending master plans," and went on to ask that in its review of the *Planning Board's Draft Master Plan Amendment* the Council support the Planning Board's recommendation against designation. The National Trust, for reasons explained in its letter and attached memorandum of March 25, 2009, and as further discussed below, does not support the Council's "new" practice.

Page 1, Par. 1: **"Current law does not require the Council to hold a public hearing if it does not intend to change the recommendations of the Planning Board. . . . It is the Council's current practice to not take action unless the Planning Board makes a positive recommendation on a historic master plan amendment."**

Response: The Council need not hold a public hearing if it does not seek to change the Planning Board's recommendation on a master plan. However, there must be public

deliberation as to whether or not the Council—as a body—shares the views of the Planning Board. Absent a public deliberation, how does the Council make that determination? Private discussions behind closed doors? A “closed” session where it makes a deliberative decision on a planning issue? By e-mail vote? Any of these types of action clearly would violate Maryland’s Open Meetings Act. The Council must meet in public and make a determination as to whether the Council—as a deliberative body—agrees or disagrees with the Planning Board’s recommendation against designation.

The Council appears to seek to circumvent its obligation to make this public determination by taking the position that a Planning Board recommendation against designation is the equivalent of an “empty envelope;” that is, as a matter of law the Council has nothing before it to consider. This effort represents an improper delegation of authority to the Planning Board by making the Board a “final” decision maker in the event it recommends against designation. The impropriety of this “empty envelope” argument is further underscored if one considers what authority the Council would have should the Board recommend against designation of a resource that the Council believes merits designation. Under the “empty envelope” interpretation of the law, the Council would not have the *authority* to review that recommendation and approve an amendment to the HPMP—an absurd result given that under Article 28 the County Council “shall” adopt a General Plan and amendments thereto, including “sites, structures, areas or settings of archeological, historical, architectural, cultural or scenic value or significance.” Article 28 § 7-108(a)(2)(ix). The practical effect of the “empty envelope” argument (that in the absence of an affirmative recommendation from the Planning Board the Council has nothing to review) is merely a *de facto* — and illegal — delegation of final master plan decision-making authority to the Planning Board.¹

Moreover, for the reasons stated in the National Trust’s March 25th letter and attached memorandum, and as reiterated below, it is especially imperative that the Council review all PLANNING BOARD decisions because the PLANNING BOARD lacks expertise in historic preservation and, as such, may and has issued HPMP

¹ See *Montgomery Preservation, Inc. v. Montgomery County, et al.* Montgomery County Circuit Court Civil Action No. 312827 now pending in the Montgomery County Circuit Court (challenging the County Council’s failure to designate the north parcel of the Falkland Apartments based on, *inter alia*, the “empty envelope” argument).

recommendations based on grounds that have little or nothing to do with historic preservation.

Page 2, Par. 1: **"The Planning Board has that authority (to serve as preservation gate keeper) under current law," citing to Md. Code, Art. 28 § 7-108(c) and MC Chapter 24A-3(b).**

Response: Md. Code, Art. 28 § 7-108(c) does not delegate final decision-making authority to the Planning Board with respect to HPMP amendments. That provision delegates authority to the Council.

We do not dispute that MC Chapter 24A-3(b) directs the Planning Board to apply the criteria for designation or that the Planning Board has served as the Keeper of the Locational Atlas. These facts do not negate the legal requirement that final decision-making authority rests with the Council.

Page 2, Par, 1: **"There has not been a legal challenge in the past 30 years to the Planning Board's role in historic preservation, even though the members do not have expertise in historic preservation."**

Response: The National Trust's understanding is that Montgomery Preservation, Inc., the Silver Spring Historical Society and several individuals have sued the Planning Board over its decision not to recommend designation of the Perpetual Building in Silver Spring as a historic site. While the trial court dismissed this lawsuit, the plaintiffs will appeal that decision to the Court of Special Appeals. The facts under this case presented the first opportunity for aggrieved parties (organizations and individuals) to challenge the Council's new practice of refusing to hold a public hearing on a Planning Board recommendation against designation of a historic resource. See *Montgomery County Preservation Inc., et al. v. Montgomery County Planning Board*, Montgomery County Circuit Court Civil Action No. 305502 (challenging the Planning Board's recommendation against designation of the Perpetual Building under the criterion established under Chapter 24A).²

² This will be appealed along with *Montgomery Preservation Inc., et al v. Montgomery County*, Montgomery County Circuit Court Civil Action No. 305501 (challenging the County Council's failure to consider the Planning Board's recommendation against designating the Perpetual Building based on its "empty envelope" argument).

Moreover, the lack of judicial challenges to the County's historic preservation ordinance does not make the ordinance valid.

Page 2, FN 5: **Planning Board doesn't need expertise because Council doesn't need expertise.**

Response: 1. *County's authority is not absolute.* Under Md. law, decision-making authority rests with the County Council—yet that authority is not unconditional. Under § 7-108(a)(3)(ix) of Article 28, decisions to amend the general plan must be based on the evidence as applied to the designation criteria in the preservation ordinance.

Moreover, under § 7-108(e), the M-NCPPC cannot amend the general plan, including the HPMP, unless it is consistent with Maryland standards. Thus, the Council would not have the authority to recommend the adoption of a plan contrary to the M-NCPPC's own authority—which means that decisions to designate must be based on the state's preservation standards. This would preclude the use of owner consent, as proposed under the Knapp Amendment, and which would prohibit the exclusion of the criterion relating to "high artistic value."

2. *Delegation of Authority.* To the extent that the Council relies on the determination of a non-expert body, especially when that decision is not grounded in preservation criteria, its decision becomes suspect and vulnerable to legal challenge. Moreover, under the unlawful delegation of authority doctrine, also known as the non-delegation doctrine, a legislative body may delegate decision-making authority to an administrative body provided that the administrative body's discretion is controlled. In the context of preservation cases, such delegations have been upheld where, among other things, the decision makers have expertise in historic preservation. See, e.g. *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444, 452 (N.C. 1979) (the delegation of legislative power to municipal governing bodies is not an unlimited delegation where, among other things, state law requires that "a majority of the members of such a commission shall have demonstrated special interest, experience, or education in history or architecture . . ."). Indeed, delegations of authority are particularly troublesome where there is no process for appeal to the legislative body. Compare, *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975) ("The elaborate decision-making and appeal process set

forth in the ordinance creates another structural check on any potential for arbitrariness that might exist"); *A-S-P Assocs.*, 258 S.E.2d at 453-455 (ordinance governing changes to properties within historic district does not rise to the level of an unconstitutionally delegation of legislative power where members have expertise in historic preservation and procedural safeguards, including appeal to city council, serve as additional check); *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 425 (Cal. Ct. App. 1973) (upholding ordinance against unlawful delegation challenge, where, among other things, decisions by the board are subject to council review). Delegations of final decision-making authority on historic designations to a non-expert planning board, by contrast, are legally suspect.

Page 2, Par. 2: **"There is no provision in HPA 09-1 that delegated the Council's authority to affirmatively amend any master plan as suggested by your letter."**

Response: The National Trust's letter does not suggest that the proposed amendments confer authority on the Planning Board to affirmatively amend the master plan. Rather, it questions from a policy and legal perspective, the placement of final decision-making authority in the Planning Board whenever it decides not to recommend designation. A decision not to recommend would be a final decision under the Knapp Amendment because the designation process ends with that decision. There is no appeal.

Page 2, Par. 3: **"Under Article 28 § 7-108(d), master plan amendments may only be initiated with the consent of the Council. Under Chapter 24A § 9(b)(2), the Planning Board must initiate an amendment to the Master Plan for Historic Preservation if it finds a resource threatened by a building permit on the Locational Atlas and the Planning Board deems the site worthy of protection. This is a current delegation of authority to a master plan amendment."**

Response: The provision cited above from Chapter 24A merely delegates to the Planning Board authority to initiate an amendment. It does not suggest in any way that the Planning Board becomes the final decision maker with respect to the amendment.

The Council's improper delegation of its authority to the Planning Board is created with the Council's policy of not reviewing a Planning Board decision not to designate. While checks on abuses of discretion

existed when the Council reviewed all PB decisions—even decisions not to recommend designation—those checks are no longer in place.

Supermajority Voting

Page 2, Par. 4 **"Your letter implies that the requirement for the Planning Board supermajority vote to recommend an amendment to the Master Plan for Historic Preservation violates Article 28, as interpreted by *Mossburg v. Montgomery County*."**

Response: The National Trust's memorandum (page 1, n.1) cites to *Mossburg* and *Chevy Chase View v. Rothman* to underscore the point that authority under the Regional District Act must be express. The Act does not confer express authority on the Council, much less the Planning Board, for supermajority decision-making. Here, the County lacks express or implied authority to require a supermajority vote.

"The Planning Board's recommendation is not a final judgment; the Council retains authority to decide the issue. Amending the Planning Board's work program will bring the issue to Council."

Response: The Planning Board's decision not to recommend designation would be a final decision under the Knapp Amendment because if the Planning Board decides against recommending that a building be designated as a historic site, there would be no Council review and no appeal. See Memorandum from Zyontz to County Council, Feb. 20, 2009, p. 2 ("Sites or districts that the Planning Board does not recommend for inclusion in the Master Plan for Historic Preservation would not be submitted to the Council.")

The argument that the Council would retain decision-making authority under HPA 09-1 is unpersuasive. The ability of the Council to include a property in the Planning Board's work plan is not tantamount to Council oversight. The Knapp Amendment offers no process for seeking an amendment to the Planning Board's work program if the Planning Board does not issue a recommendation and regardless, the Director would be obligated under the terms of the County's current preservation ordinance to issue a pending demolition permit before the Council or Planning Board could act, if the applicant seeks demolition of the resource. (Also, the Council cannot have it both ways. First, the County claims that the Council has no authority to review so-called "empty envelopes," then

it claims that, for delegation purposes, the Council retains such authority.)

Page 3, Par. 1 **Article 28 § 7-108(d) (4) "applies to amendments already approved by the Council. It does not apply to recommendations made to the Council by the Planning Board."**

Response: Laws on the same subject matter should be read in *pari materia*, that is, in a logical, consistent manner. As proposed, the adoption of a supermajority vote requirement would create the bizarre result that four Planning Board votes in support of designation would be required at the Planning Board level but only three Planning Board votes when considered by the full Commission (the Montgomery County and Prince George's County Planning Boards sitting together for final adoption of the master plan and also referred to as "M-NCPPC"). Article 28 § 7-108(d) (4).

Additionally, it should be noted that the proposed supermajority rule and the requirement, that "heightened standards" be applied whenever a property owner withholds his or her consent to designation, would run afoul of uniformity requirements. See, e.g., Art. 28, § 8-102, which states that "all regulations shall be uniform for each class or kind of building throughout any district or zone." This "heightened standard," which would be applied solely in response to the personal views of the individual property owner with respect to designation, would expressly preclude the uniform application of the historic preservation standards to similar properties within the same zone in derogation of the uniformity requirement. The disparate treatment of similar properties in the proposed historic district for the Damascus/Goshen planning area provides a perfect example of how this standard will run afoul of the uniformity clause of Article 28.

Legislative Authority

Page 3, Par. 2 **"Your letter cited Article 28 § 7-108(e) of the Maryland Code, but did not cite Article 28 § 8-101 (c)."**

Response: Article 28 § 8-101(c) delegates authority to the Council to regulate properties after they are designated as historic sites, but does not address the designation process itself.

Authority to identify historic properties on the general plan comes from § 7-108(3)(ix) and that authority is given to the Council.

(3) The appropriate district council, pursuant to procedures set forth in this section, may direct the Commission to prepare the general plan, or amendments thereto, based on studies and the consideration of such elements, factors, and conditions as the following:

ix) Sites, structures, areas, or settings of archeological, historical, architectural, cultural, or scenic value of significance.

Moreover, the language under Article 28 § 7-108(e) cannot be disregarded. Article 28 § 7 imposes two limitations on the M-NCPPC, with regard to the designation of historic structures. First, under Article 28 § 7-108(a)(1), the Commission may only initiate and adopt a general plan and amendments to the plan "at the direction of the district council." Thus, the M-NCPPC may only adopt a HPMP amendment at the direction of the Council. Second, the Commission cannot amend the plan to identify and designate sites for historic preservation unless they meet the state's criteria for designation. See 28 § 7-108(e). The Council cannot recommend that the M-NCPPC do something the commission has no authority to do. In other words, the Council must make its decisions based on the same criteria by which the M-NCPPC is bound. Moreover, the language under 28 § 7-108(e) would be rendered meaningless.

Not Inconsistent

Page 4, par. 1-3 **Deletion of criteria would not make Montgomery County's law inconsistent with state standards, as set forth under Article 28 § 7-108(e).**

Response: It may be possible to embellish/elaborate on the criteria applicable to the Maryland Historical Trust in the designation of historic resources under County law. That effort would, most likely, be deemed "not inconsistent" with the state's criteria. But removal of a criterion is a different matter. Under the state's criteria, which, as noted in our March 25th memo are based on that for the National Register of Historic Places, a property is eligible for designation if it had "high artistic value." The proposed removal of the criterion would be "inconsistent" rather than "not inconsistent" with the

state criteria because a property that otherwise met that criterion could not qualify for designation.

Moreover, removal of the criterion, would not, as Mr. Zyontz suggests, make the law "less stringent." From the perspective of a property owner seeking designation, removal of a criterion could make designation "more difficult." Regardless, the proposed amendment would make Montgomery County's criteria for designation *different* and thus contrary to the requirements of Article 28 § 7-108(e).

Finally, even if removal of the "high artistic value" criterion could theoretically be justified, no justification has been proffered.

Historic Zoning

Page 4, par. 4 **"You claim that designating historic properties by a master plan is inconsistent with Article 66B, which requires [that] such action be zoning decisions."**

Response: The National Trust did not claim that Montgomery County is subject to Article 66B. Rather, we made the point that the proposed owner consent provision would be inconsistent with the state's declared policy of preserving historic properties, as embodied in Article 66B § 8.01, *et seq.*

"The Maryland Historic Trust has recognized the County's authority under Article 28 and has not required strict adherence to Article 66B in the past to attain the status of a Certified Local Government."

Response: The Maryland Historical Trust testified and submitted a letter into the record (dated Mar. 30, 2009), which states that "it is MHT's position that even Charter Counties and other jurisdictions not subject to Article 66B should enact legislation, policies, and procedures related to historic preservation that are at least as strong and legally defensible as those required of other jurisdictions." If adopted, the Knapp Amendments would make Montgomery County's historic preservation law (and program) weaker than laws and programs established under Article 66B §8.01, *et seq.*

Owner Consent

Page 5, par. 2 **HPA 09-1 would not require "owner consent" to designate historic resources.**

Response: The fact that the Council can theoretically designate property over an owner's objection is beside the point. Under HPA 09-1, the legal barriers required to actually get a property to the Council for consideration as a historic site are so high that it would become virtually impossible for a property to be designated in a situation where the owner has not consented. Owner consent would become more than a factor for consideration. Rather, it would serve as a legal restriction on the Council's ability to designate historic property.³

This provision would also violate the uniformity requirement of Article 28, as discussed above.

Page 5, par. 3 **The U.S. Supreme Court's decision in *Eubank v. Richmond* is distinguishable.**

Response: The essential point in *Eubank v. Richmond*, and other cases like it, is that legislatures cannot tie their hands, i.e. delegate their authority to individual property owners or their neighbors, because they base their decisions on personal interests or whim rather than the public interest. See, e.g. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (holding unconstitutional a zoning law that conferred authority on landowners to prevent a particular use on a neighbor's land); *People ex rel. Chicago Dryer Co. v. City of Chicago*, 109 N.E.2d 201, 206 (Ill. 1952) ("The legislature cannot abdicate its functions or subject citizens and their interests to any but lawful public agencies, and a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified."); 8 Eugene McQuillan, *Municipal Corporations* § 25.35, at 111 (3d ed. 2000) (" [Z]oning powers may not be delegated to private parties or property owners."); *Emmett McLoughlin Realty v. Pima County*, 58 P.3d 39 (Ariz. App. 2002) (state law that proscribes counties from rezoning land without the landowner's permission violates the Arizona Constitution); *Brodner v. City of Elgin*, 420 N.E.2d 1176 (Ill. App. Ct. 1981) (declaring owner consent

³ The "owner consent" issue also is the subject of litigation. See *Montgomery Preservation, Inc., et al. v. Montgomery County*, Circuit Court Civil Action No. 309446 (challenging the County Council's failure to designate certain Damascus/Goshen properties based on, inter alia, owner objections).

provision to be an unconstitutional delegation of the city's legislative zoning authority because it "confer[red] upon the owner of the property the absolute discretion to decide that no rezoning shall ever occur); *FM Properties Operating Co. v. City of Austin*, 22 S. W.3d 868, 877 (Tex. 2000) (state law allowing landowners to exempt their properties from municipal water requirements unconstitutionally delegated legislative power to landowners).

While there are no court cases addressing the use of owner consent in historic preservation ordinances, two attorney generals, one county, one state, have advised against such use. See Dade County Attorney Opinion 82-83 (Sept. 16, 1982) (ruling that owner consent provision is improper and renders preservation ordinance invalid because it unlawfully delegates authority to individuals); 1996 Michigan Attorney General Opinion 6919 (Oct. 10, 1996) (concluding that "a local unit of government may not enact an ordinance that restricts that unit from placing property in a local historic district without the consent of the property owner" where there "is no language in the [Enabling] Act that authorizes a local unit of government to pass an ordinance that restricts that unit from placing property in a local historic district without the property owner's consent). Both opinions are attached.



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

July 14, 2008

The Honorable Michael Knapp
President
Montgomery County Council
Stella B. Warner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Dear Mr. Knapp,

With this letter, I am transmitting to you the *Planning Board (Final) Draft Amendment to the Master Plan for Historic Preservation: Perpetual Building Association Building*.

This amendment considers the historic and architectural significance of a property at 8700 Georgia Avenue that was nominated for historic designation by a community group. The Planning Board held a public hearing on this amendment on January 10, 2008 and discussed the merits of the nomination at a worksession on March 20, 2008.

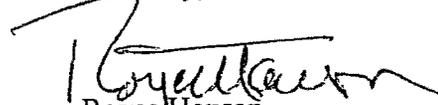
After extensive deliberation, the Board voted to not recommend this property for historic designation. We were not convinced that the history or architecture of this building met the standards of Chapter 24A or the *Master Plan for Historic Preservation*.

Although we are not recommending this property for historic designation, we recognize that the County Council is the final decision maker in regard to amending master plans. Thus, we are sending this document forward for the Council's review and consideration; however, we urge the Council to concur with the Board's recommendation and to not designate this particular property.

Under Chapter 33A of the Code, the Executive has 60 days in which to comment on this Planning Board (Final) Draft Amendment.

Should you have any questions concerning this specific amendment, please do not hesitate to contact Clare Kelly of our staff at (301) 563-3402 or clare.kelly@mncppc-mc.org.

Sincerely,


Royce Hanson
Chairman

COUNTY ATT.

JAN 09 2:31 PM
RH:gmw
Enclosure

cc: The Honorable Isiah Leggett

62

8787 Georgia Avenue, Silver Spring, Maryland 20910 Phone: 301.495.4605 Fax: 301.495.1320

www.MCParkandPlanning.org E-Mail: mcp-chairman@mncppc.org

Appendix II

MEMORANDUM

COUNTY ATTORNEY'S OPINION NO. 82-23

TO C. H. Pawley, Chairman
Historic Preservation Board

DATE September 16, 1982

FROM Robert A. Ginsburg
County Attorney

SUBJECT City of Miami Beach
Compliance with Dade
County Historic Preservation
Ordinance

You have asked this office to advise you whether the City of Miami Beach, by passing City Ordinance 82-2318 has complied with §16A-3 of the Code of Metropolitan Dade County.

I am of the opinion that City Ordinance 82-2318 is not in compliance with §16A-3.

Chapter 16A regulates historic preservation in Dade County, and §16A-3 provides a method whereby a municipality in the County may enact its own ordinance governing preservation:

(1)...All municipalities within Dade County shall have up to and including July 1, 1982, to adopt local ordinances with respect to districts, individual sites and archeological zones. Adherence with this chapter by municipalities shall be deemed accomplished by the filing of each municipality's respective ordinance with the clerk of the Dade County board of county commissioners.

(2) Before a municipal historic preservation ordinance shall be filed, it shall address the following sections: The establishment of an historic preservation board with powers and duties; the creation of a process to designate the individual sites, districts and archeological zones; a process for review for certificates of appropriateness and certificates to dig; and an appeal process. Municipalities shall also submit the proposed ordinance to the National Register of Historic Places for certification by the National Register to be eligible for the 1976 Tax Act. Although municipalities are not restricted from implementing the ordinance prior to National Register certification, the municipality must obtain certification as expeditiously as reasonably possible.

APPENDIX II

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(3) Should any municipality fail to adopt an ordinance regulating historic preservation prior to July 1, 1982, this chapter shall govern. (Ord. No. 81-13, §3, 2-17-81)

City Ordinance 82-2318, adopted by the Miami Beach City Commission on June 16, 1982, purports to be a municipal ordinance in compliance with the above-quoted section. It creates a Historic Preservation Board with authority to recommend to the Planning Board and City Commission the designation of historically, architecturally, or archeologically significant sites and districts. Id., §26-4(A)(1). Before a site or structure may be designated, however, §26-5(A)(1) requires that the following conditions be met:

a. No property may be designated an individual Historic Site unless it is listed on the National Register of Historic Places, unless the owner thereof agrees to waive this requirement;

b. No property shall be designated an Historic Preservation Site, nor any property included within an Historic Preservation District, without the written approval of the legal owner(s) thereof;

c. No property shall be designated an Historic Preservation Site or included within an Historic Preservation district unless such a designation serves the purposes and goals contained in Section 26-1 of this Section, and unless the designation of the property is consistent with the criteria for evaluation used by the National Register of Historic Places (Emphasis added).

The question of compliance with §16A-3, Dade County Code, is multi-faceted. Whether certain requirements of that section have been met is easily determined; there is no question, for example, that Miami Beach Ordinance 82-2318 was filed with the clerk of the Dade County Board of County Commissioners prior to July 1, 1982. Similarly, whether a municipality obtains federal certification by the National Register of Historic Places is a question with an easily discernible answer.

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September 16, 1982

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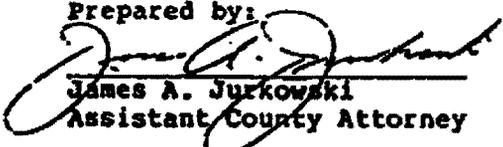
Compliance in other respects, however, is not so clear-cut. Whether a municipality's ordinance "regulates historic preservation" within the meaning of §16A-3, for example, is a question requiring an evaluation of the intent and effect of the municipality's ordinance in the context of the purposes of Chapter 16A.

Such issues need not be addressed in the present instance, however, since Miami Beach Ordinance 82-2318 fails the threshold requirement that it represent a valid exercise of the city's legislative power. Florida law does not permit the governing body of a city to delegate its legislative function. Although execution of a law may depend upon the exercise of some authority, discretion, or judgment within appropriate legislative standards, it cannot depend on the unbridled discretion of a single private individual. Connor v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968); Amara v. Town of Daytona Beach Shores, 181 So.2d 722 (Fla. 1st DCA 1965); Cassidy v. Consolidated Naval Stores Co., 119 So.2d 35 (Fla. 1960); State ex rel. Taylor v. City of Tallahassee 177 So. 719, 130 Fla. 418 (1937). Public decisions must be made by public agencies, not by private persons who act not on behalf of the public, but in their own best interest. See McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980) (Adkins, J., dissenting; majority held validity of legislative delegation not proper issue for consideration).

In the City of Miami Beach ordinance under review, it is clear that whether the Miami Beach Historic Preservation Board (and therefore the City) acts at all is decided by private individuals, totally unfettered by accountability to the electorate, or to any appropriate legislative standards. Since the City Board is powerless to regulate historic preservation absent the unanimous consent of all property owners affected, such a delegation of authority is improper and renders the ordinance invalid. I am therefore of the opinion that Miami Beach Ordinance 82-2318 is not in compliance with §16A-3 of the Code of Metropolitan Dade County.


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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6919

October 10, 1996

HISTORICAL PRESERVATION:

Placing property in a local historic district

Under the Local Historic Districts Act, 1970 PA 169, a local unit of government may not enact an ordinance that restricts that unit from placing property in a local historic district without the consent of the property owner.

Honorable Susan Grimes Munsell

State Representative

The Capitol

Lansing, MI 48913

You have asked if under the Local Historic Districts Act, 1970 PA 169, MCL 399.201 et seq; MSA 5.3407(1) et seq (the Act), a local unit of government may enact an ordinance that restricts that unit from rezoning property to a local historic district without the consent of the property owner.

The title of the Act establishes its scope:

AN ACT to provide for the establishment of historic districts; to provide for the acquisition of certain resources for historic preservation purposes; to provide for preservation of historic and nonhistoric resources within historic districts; to provide for the establishment of historic district commissions; to provide for the maintenance of publicly owned resources by local units; to provide for certain assessments under certain circumstances; to provide for procedures; and to provide for remedies and penalties.

See, Vernor v Secretary of State, 179 Mich 157, 163; 146 NW 338 (1914).

The opinion request is framed in terms of whether a local unit of government may enact an ordinance that restricts that unit from rezoning property to a local historic district without the consent of the property owner. However, neither the title to the Act nor any of its provisions relate to a local unit of government's authority to enact zoning ordinances. Rather, the declared purpose of the Act in section 2 is historic preservation.

The term "[h]istoric preservation," as defined in section 1a(j) of the Act, means "the identification, evaluation, establishment, and protection of resources significant in history, architecture, archaeology, engineering, or culture."

In section 1a(k) of the Act the Legislature has defined "[h]istoric resource" to mean "a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, archaeology,

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engineering, or culture of this state or a community within this state, or of the United States."

Section 3(1) of the Act authorizes legislative bodies of local units of government to establish, by ordinance, historic districts within their respective boundaries. Under section 4 of the Act, legislative bodies of local units of government may enact ordinances establishing historic district commissions to administer historic districts.

Under section 3(1) of the Act, property is placed in an historic district when, by ordinance, the legislative body of a local unit of government enacts an ordinance establishing the boundaries of that historic district. This is separate from the zoning process in that same local unit of government. Under the Act, property placed in an historic district is not subject to use restrictions because it is in an historic district. Rather, the property is subject to restrictions on changing its exterior appearance under section 5 of the Act. See also, Letter Opinion of the Attorney General (Mr. Max Altekruze, Secretary to Franklin Historic District Commission, March 6, 1975.)

In section 5 of the Act the Legislature has authorized a local historic district commission to review and act upon an application for a permit for any work affecting the exterior appearance of an historic resource within the established local historic district. Under section 9(1) of the Act, the commission acts by filing a certificate of appropriateness, notice to proceed, or denial of a work permit.

The Act contains procedural safeguards to protect the rights of an aggrieved owner of property located in an established historic district whose application for a work permit has been denied by the local historic district commission. These decisions of local historic district commissions are subject to administrative and judicial review under sections 5(2) and 11 of the Act.

A review of the Act does not reveal a legislative intent to address zoning. The Act authorizes the preservation of historic resources within established local historic districts and contains procedures under which local historic district commissions administer established historic districts. The judicial review provisions of the Act protect the rights of owners of historical resources located within established historic districts. There is no language in the Act that authorizes a local unit of government to pass an ordinance that restricts that unit from placing property in a local historic district without the property owner's consent.

It is my opinion, therefore, that under the Local Historic Districts Act, 1970 PA 169, a local unit of government may not enact an ordinance that restricts that unit from placing property in a local historic district without the consent of the property owner.

Frank J. Kelley

Attorney General

<http://H:/Owner consent/Opinion #6919.htm>
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