

# Local Regulation for Historic Preservation

*Local municipal regulations can provide substantial protection to historic resources, preserving their contributions to cultural vitality and helping communities maintain quality of life.*

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## **Summary**

Demolition, alteration and incompatible development present a continual threat to Pennsylvania’s historic legacy. While federal and state regulations offer only limited protection, local municipal ordinances can substantially protect historical resources. Municipalities across the Commonwealth offer diverse stories of success, maintaining and enhancing historical and architectural character.

Pennsylvania law provides municipalities a range of options to tailor regulatory approaches for historic preservation to specific local objectives. The Historic District Act authorizes municipal protection of historical and architectural character through the regulation of new construction, alteration, restoration, or demolition of buildings within districts that have been certified by the Pennsylvania Historical and Museum Commission. The Municipalities Planning Code authorizes the use of zoning ordinances to protect historic resources – in fact, mandates it. Zoning regulations can be used to

protect historic resources whether located with other historic resources in a district-like setting or dispersed at isolated sites. Zoning also provides opportunity to create regulatory incentives for historic preservation.

## **Typical End Users**

Historic resource regulation, whether under the Historic District Act or under zoning, is implemented by local government. Members of local historical commissions, Historical and Architectural Review Boards, municipal staff, planners, engineers and solicitors, interested groups, property owners and residents all may be affected in the administration of such regulation and all may advocate for regulation to suit specific community development and preservation objectives.

## **Track Record**

Some ninety local governments have adopted ordinances pursuant to the Historic District Act, regulating 124 historic districts and protecting thousands of historic properties. An increasing number of municipalities are regulating and protecting historic resources through zoning provisions, although no concise statewide inventory is available.

Many examples exist in Pennsylvania where enforcement of historic resource regulation has thwarted demolition and promoted adaptive reuse of historic resources. There have been relatively few legal challenges to historic resource regulation in Pennsylvania, and, in almost every instance, local ordinances have been upheld by the courts.

## **Conservation Impact**

- While state and federal historic preservation regulations cannot govern the impacts of most private actions on historic resources, local regulation can effectively mandate and create incentives for resource protection.
- Local regulation of historic resources may be flexibly tailored to specific community resource protection objectives and social, economic, and political realities.
- Preservation of the historic built environment builds and secures the character of a community, making the community a more attractive place to live and work and discouraging migration to green field development.

## **What You'll Need**

- Community consensus regarding the value and importance of historic resources and the political will to subject historic resources to regulation for the benefit of the community. Consensus may require educational efforts.
- A clear inventory of historic resources, ideally identifying for each property those specific structures and other resources that contribute to historical integrity and thus should be subject to regulation.
- While numerous model regulations are available, professional expertise to assist in drafting or reviewing proposed regulations is recommended.

## **Obstacles and Challenges**

- Resistance to historic resource regulation by property owners who perceive it as intruding upon and diminishing their property rights or costing them undue time and money in order to comply. Such resistance can thwart political will to enact effective regulation even while, in the abstract, the community at large views historic preservation as a valid community objective.
- Lack of an adequate inventory of historic resources can lead to uneven regulation relative to actual historical values, leave locally important resources unregulated, and potentially lead to legal challenge due to a lack of a clear and comprehensive basis for historical designation.
- Weak or inconsistent observation and enforcement of administrative, procedural, or discretionary standards can undermine effective regulation, whether due to the nature of the implementing ordinance itself, lack of political will, or inadequate resource inventory.

## **Introduction**

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### **Benefits of Local Regulations**

Pennsylvania's historic resources richly endow residents with a sense of place and quality of life rooted in the lives and work of our forebears. Local regulation to protect historic resources and promote their continued viability can:

- Fulfill the mandate of the Pennsylvania Municipalities Planning Code (MPC) that "zoning ordinances *shall* provide for the protection of natural and historic features and resources," a mandate consistent with a variety of court rulings that have clearly established historic preservation as a legitimate public purpose for local government;
- Augment limited state and federal protection for historic resources with regulatory approaches tailored to specific local objectives;
- Stem the loss by demolition or irrevocable alteration of historic resources and their landscape settings;
- Establish incentive provisions for rehabilitation or adaptive reuse of historical structures;
- Promote new construction compatible with historic precedent and complementary to the historical landscape;
- Contribute to community cultural and economic vitality, stabilize property values, foster pride and appreciation of the historic built environment, and consequently contribute to community quality of life;
- Foster new "life" in older neighborhoods while minimizing the dislocation of current residents, through preservation, rehabilitation and reuse of existing buildings and structures;

- Promote opportunities for historical interpretation and live, hands-on educational experience, linking the present to the past.

## **Two Local Approaches to Historic Preservation**

Demolition, alteration and incompatible development present a continual threat to Pennsylvania's historic legacy. While federal and state regulations offer only limited protection, local municipal ordinances may regulate demolition, alterations, and additions to historic structures as well as regulate nearby new construction to provide protection of historical and architectural character.

In Pennsylvania, two state laws provide the legal foundation for municipalities to regulate historic resources:

- Act 167 of 1961, the Historic District Act, allows municipalities to identify, define and regulate local historic districts through adoption of a local ordinance. At present, ninety local governments have historic district ordinances in place, regulating 124 historic districts and protecting thousands of historic properties. (Home Rule Charter governments, such as the Cities of Philadelphia and Pittsburgh, regulate and protect some two-dozen additional historic districts.)
- An increasing number of municipalities are also regulating and protecting historic resources through zoning ordinances. Act 247 of 1968, the Municipalities Planning Code (MPC), as amended in 2000, specifically mandates that zoning ordinances provide for the preservation of historic resources, permitting municipalities to use zoning powers to protect historic resources either in one or more districts or on an individual site basis.

Together, these two enabling Acts provide a broad foundation for addressing historic preservation goals and give municipalities a wide range of options in tailoring approaches to specific objectives. They have been used successfully across Pennsylvania to meet historic preservation objectives.

Act 167 of 1961 authorizes municipalities to create local historic districts and seek to protect the historical and architectural character of such districts through the regulation of new building, reconstruction, alteration, restoration, demolition, or razing of buildings within districts that have been certified by PHMC. Pursuant to Act 167, a Historical and Architectural Review Board (HARB) is established to counsel the governing body in regard to applications affecting historic resources within certified districts. Typically the HARB reviews any proposed change to any resource within a certified district that has been designated as "contributing" to the historical integrity of the district and recommends to the municipal governing body whether or not a "certificate of appropriateness" should be approved for such change. Such review may further be extended to demolition or alterations of any structures within the certified district and even to any new construction. Approval rests with the governing body and is prerequisite to any other approval required from the municipality, most notably any building or demolition permit. While any National Register historic district is likely to be certified by PHMC, certification only follows upon the request of the affected municipality.

In many municipalities, historic resources are dispersed within rural or suburban settings, and thus unable to be included within defined historic districts, certified by PHMC and governed under Act 167. In some municipalities, even where it is feasible to establish discrete historic districts, there is insufficient political will to impose HARB review on all structures. In response, a number of municipalities have adopted provisions within the zoning ordinance to promote conservation of historic resources throughout the municipality, not just within the boundaries of discrete historic districts, and not subject to a perceived all-encompassing HARB review. Adopted zoning provisions may pertain to demolition, alteration or addition to any resources included in a municipal historic resources inventory, usually included on a map adopted by the governing body as an addendum to the zoning ordinance. A number of municipalities require submission of a Historic Resource Impact Study (HRIS) for any subdivision or land development including any inventoried historic resource or located within a set distance from such resources. Zoning ordinances also may provide regulatory incentives to owners of historic properties that propose adaptive re-use of their properties (for example, permitting increased density or more than one principal use of a property).

## **Identification of Historic Resources**

### **The National Register of Historic Places**

Historic resources can be buildings, structures, objects, sites, landscapes, or archaeological artifacts that have been identified as historically significant in their community context. Many such resources are deemed of national historical significance. The official federal list of such resources, reflecting the nation's cultural heritage, is the [National Register of Historic Places](#), maintained by the [National Park Service \(NPS\)](#). In addition to individual historic sites and the resources they contain, the National Register lists historic districts, areas that possess a significant concentration, linkage, or continuity of historic buildings, structures, objects, or sites designated by the NPS as worthy of preservation. Such historic districts may include individual historic resources that may not have been deemed of national significance on their own but that are considered "contributing" resources in the context of a district. Most historic districts also include "non-contributing" resources within their boundaries. As of January 2011, the National Register lists 2,637 individual locations across Pennsylvania containing 5,356 contributing resources. In addition, the National Register lists 635 historic districts containing 209,649 contributing resources.

Listing of a property on the National Register individually or within a district *does not*, absent other applicable federal, state or local regulation, guarantee protection of the property's historic resources. (However, income-producing properties listed in the National Register, either individually or as "contributing" properties within an historic district, may qualify for certain federal rehabilitation investment tax incentives. In certain cases, buildings or structures eligible for, or listed in, the National Register and owned or leased by nonprofit organizations or agencies, may be eligible for grant opportunities.)

## **Pennsylvania Historical and Museum Commission; Determinations of Eligibility**

While the NPS maintains the National Register, listing is based on recommendations forwarded from the PHMC, acting in the capacity of the State Historic Preservation Officer. PHMC will make a “determination of eligibility” (DOE) for the National Register prior to forwarding recommendations to the NPS. The distinction between listing on the National Register and receiving a DOE is important, since formal listing requires approval by the landowner or, in the case of an historic district, by at least 50 percent of the affected landowners (measured in number of landowners, not in acreage of land involved). Yet, while landowners may object to formal listing, a DOE will nevertheless invoke the same degree of federal or state purview, as discussed later.

## **Other Inventories of Historical Resources**

For every resource or district listed in the National Register or having received a DOE, there are several more that may be of local or regional significance. To the extent that such resources have been documented and nominated for National Register consideration, pertinent documentation will be maintained by PHMC. Otherwise, no consistent or comprehensive inventories of Pennsylvania historic resources exist. However, since the early 1980s, County Historic Sites Surveys have been completed in counties across the Commonwealth, and, more recently, PHMC has undertaken a substantial web survey of historic resources throughout the state.

## **Federal Regulatory Context**

While the focus of this guide is local regulatory options, it is important to understand an overview of applicable federal regulation that can bolster local preservation efforts.

Regulation for the protection of historic resources is largely rooted in the National Historic Preservation Act of 1966 (NHPA), which formally heralded the beginning of federal historic preservation policy and formalized the establishment of the National Register of Historic Places. The NHPA, which was further amended in 1976, 1980 and 1992, was intended to create a comprehensive framework for preservation of historic resources through a system of reviews, regulations and incentives. Within this Act, “Section 106” initiated a review process for impacts on historic resources either listed in, or determined to be eligible for the National Register (i.e., having received a DOE from PHMC), for any project using federal funds or otherwise requiring federal approval, permitting, or license, including approvals delegated by the federal government to the states. This includes most PENNDOT projects (which, while undertaken by the state, are dependent on federal funds), as well as telecommunications facilities, and wetlands permits, for example.

Section 106 does not absolutely prohibit alteration or destruction of historic resources, but it does require a thorough investigation of other alternatives and the consideration of mitigation measures. If the Section 106 review results in a “determination of adverse effect,” the subject project will essentially be derailed unless design revisions or mitigation are devised which are viewed as reversing the prior determination of adverse effect.

The National Environmental Policy Act of 1969 (NEPA) also may apply to historic resources as well as any other natural or cultural resources that may be impacted by federal action, also broadly construed to include federal funding and federal review process. When invoked, NEPA requires preparation of potentially extensive environmental impact assessment and provides for formal public involvement in the review process.

Other projects will come under the authority of Section 4(f) of the Department of Transportation Act of 1966. While each application is case-specific, Section 4(f) can be invoked to prohibit the use of federal funds for transportation projects that encroach on or require the “use” of any historic site, public park, recreation area, or wildlife refuge. Exceptions to this prohibition may occur when it is effectively argued that there is no practicable alternative to the use of such land, and that the proposed use includes all possible planning to minimize harm to historic and other resources. Section 4(f) applies to all transportation agencies which fund highway and bridge projects; the Federal Aviation Administration, which approves and funds airport expansions; and the Coast Guard, which owns or operates many historic lighthouses and often has regulatory authority affecting bridges.

The NHPA also encourages cooperation at various levels of government to address historic resources protection and authorized the appointment of a State Historic Preservation Office (SHPO) to administer provisions of the Act at the State level. In Pennsylvania, the PHMC is the state agency responsible for overseeing this coordination. Among the key duties of the PHMC is the responsibility for making initial determinations of eligibility for the National Register as well as initial determinations of adverse effect under Section 106. 1980 amendments to the NHPA also authorized the establishment of the Certified Local Government Program, which enables municipalities to participate directly in federal preservation programs and to access via PHMC certain funds earmarked for historic preservation activities, for which only “Certified Local Governments” (CLGs) are eligible. As of 2010, 43 municipalities have been formally recognized as CLGs in Pennsylvania.

## **Historic Preservation Using the Historic District Act (Act 167 of 1961)**

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Pennsylvania’s Historic District Act (Act 167 of 1961) authorizes municipal protection of historical and architectural character through the regulation of new construction, alteration, restoration, or demolition of buildings within districts that have been certified by the Pennsylvania Historical and Museum Commission (PHMC). Under this act, the municipality establishes a Historical and Architectural Review Board (HARB) to review any proposed change to historic resources within certified districts and recommend to the governing body whether or not a “certificate of appropriateness” should be approved for such change, the certificate being a prerequisite to development or building approval.



## **Establishment of the Historic District(s) to be Regulated**

Ideally, delineation of proposed historic district boundaries should reflect a comprehensive survey or inventory of historic resources throughout the municipality and an assessment of the extent to which the historical and architectural legacy of the community survives. District boundaries should define areas where historic integrity is largely intact and with few intrusive or “non-contributing” structures or landscapes. Act 167 requires that, prior to regulation, historic districts must be certified as historically significant by PHMC. Local ordinances enacted to regulate historic district(s) cannot be enforced until the PHMC Commissioners, appointed by the governor, approve a resolution certifying the historical significance of the subject district(s). This requirement is necessary even if a district already has been listed in the National Register of Historic Places or received a DOE from the PHMC.

As a prerequisite to certification, a survey of historic buildings, structures, sites, or areas within any proposed historic district should be completed, following the “Guidelines for Historic Resource Surveys in Pennsylvania” published by PHMC’s Bureau for Historic Preservation (BHP). PHMC recognizes that in some cases, impending demolition or development pressures affecting historic resources may preclude sufficient time for the preparation of a comprehensive survey. In such cases, as long as the municipality understands the scope and value of its historic resources and can substantiate it with adequate documentation, a thorough survey and building inventory may be postponed to a later date. If funds are available, it is recommended that municipalities hire a qualified consultant to assist in undertaking the survey. (Limited funding for surveys and preservation planning may be available from the BHP.) Documentation of the historic survey shall be submitted to PHMC using the “Pennsylvania Historic Resource Survey Form,” available from the BHP and which can be downloaded, together with instructions, from the PHMC website. A copy of the historic district ordinance signed in to law by the local governing body must accompany the completed survey form at the time formal certification is sought. In addition, the boundaries of the proposed historic district(s) must be clearly delineated on a map and accurately described in a written form. The boundaries of the proposed district(s) will be thoroughly reviewed by the BHP in relation to the area’s historical character.

## **Historical Architectural Review Board (HARB)**

Act 167 authorizes the appointment of a Historic Architectural Review Board, or HARB, to advise the local governing body on the appropriateness of building activity in the district. Requirements for membership on the HARB are outlined in the Act, which specifies that it must be comprised of at least five members that include a registered architect, a building inspector, and a licensed real estate broker, with the remaining members having a knowledge or interest in the preservation of historic districts.

## **Certificate of Appropriateness**

The major purpose of HARB is to *advise* the local governing body on the appropriateness of the construction, reconstruction, alteration, restoration, demolition or razing of any building relative to the historic character of the district, including entirely new construction and changes to non-contributing structures. Demolition may include

demolition by neglect as discussed under Historic Preservation through Zoning below. Act 167 specifically restricts HARB review to building activity, demolitions or alterations that can be seen from a public street or way. While some municipalities choose to limit the review process to situations in which a building permit is required, any building activity or alteration may be made subject to the historic district regulations. Work subject to review typically comes first to the attention of the zoning officer who requests a formal application to be forwarded to the HARB for review and comment. Within a time limit specified in the adopted ordinance, the HARB forwards its *recommendations* to the municipal governing body in regard to approval, denial or conditional approval of a “Certificate of Appropriateness” (COA) for the proposed work.

The governing body should consider HARB’s recommendations prior to granting a COA, which is prerequisite to the issuance of a building or demolition permit by the zoning officer. If, after review by the HARB, the governing body rejects the request for a COA, it must indicate what changes in the submitted plans and specifications would meet its conditions for maintaining the historic character of the district. The potential for denial of a demolition permit, in particular, can lead to exploration of alternatives for rehabilitation and/or adaptive reuse of historic properties otherwise facing imminent demise. Where demolition is clearly antithetical to maintenance of the historical character of the district, many municipalities require the property owner to adequately demonstrate that all reasonable beneficial use of the property will be denied if the permit is not granted.

## **Review Standards**

Act 167 Section 4(b) provides that:

“The governing body shall pass upon the appropriateness of exterior architectural features which can be seen from a public street or way, only, and shall consider the general design, arrangement, texture, material and color of the building or structure and the relation of such factors to the similar features of buildings and structures within the district.”

A number of municipalities have prepared more detailed standards of review pertinent to their specific historical context. Some have prepared specific design guidelines as discussed further below. Below are examples of such sample ordinances:

- [East Goshen Township Historic Preservation Ordinance](#)
- [City of Lancaster Heritage Conservation Districts Ordinance](#)
- [PHMC Model Historic District Ordinance](#)
- [East Bradford Township Historic Resource Protection Ordinance](#)
- [West Pikeland Historic Districts and Resource Overlay Ordinances](#)

## **Preparation of Historic District Ordinance**

The first step in preparation for adoption of an historic district ordinance under Act 167 is the delineation of the district (or districts) to be regulated and the boundaries specifically identified. The next step is the preparation of the ordinance text. PHMC has developed a

model ordinance for communities to utilize in drafting the text and can be obtained by contacting PHMC at (717) 787-3362. PHMC has identified several components to be included in an Act 167 ordinance; these include the following:

- Reference to the enabling legislation

- Statement of purpose
- Definition of terms
- Boundary description(s) for historic district(s) subject to regulation
- Establishment of the HARB
- Duties and responsibilities of the HARB
- Applicability and procedures for HARB review
- Provisions dealing with demolition by neglect
- Design guidelines and standards for alterations and additions
- Provisions dealing with economic hardship
- Procedures for granting approval, conditional approval or denial of COA
- Enforcement provisions, fines and penalties.

When the ordinance is prepared and the required documentation for the historic district is completed (including the survey material), a public hearing must be held to provide an opportunity for public comment. The proposed ordinance should be reviewed by PHMC, specifically the Bureau for Historic Preservation, prior to the public hearing. The Bureau may be able to identify problems or conflicts before the issues are raised at the public hearing. The ordinance may be adopted following the public hearing, but it may not go into effect until the PHMC has approved the ordinance and passed a resolution certifying the historical significance of the district as defined. When the municipality receives the resolution, the Historical and Architectural Review Board may be officially appointed and the ordinance may go into effect.

## Historic Preservation through Zoning

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### **Authorization under the Municipalities Planning Code**

The Pennsylvania Municipalities Planning Code (MPC) provides the authority to boroughs, townships and cities to exercise municipal land use controls, plan for development and regulate that development through zoning, subdivision and land development ordinances, and official maps. The MPC specifically cites the preservation of historic resources as a valid planning concern and, in Article VI, section 603(g)(2) mandates that "zoning ordinances *shall* provide for the protection of natural and historic features and resources." Article VI also provides for the regulation of "places having unique historical, architectural or patriotic interest or value" through the creation of specific zoning classifications.

## **Comparison of Zoning to Historic District Approach to Historic Preservation**

Regulation of historic resources through zoning is particularly useful for municipalities that may not have the density or concentration of resources needed for designation of an Act 167 historic district – where historic resources are not concentrated in easily delineated districts, but dispersed across the landscape. The use of zoning can also be useful where there is insufficient political will to impose HARB review on all structures.

Regulation through zoning is potentially more flexible than historic district regulation established in accordance with Act 167. While Act 167 sets forth a specific framework for regulation, aside from the “mandate” in section 603(g)(2), the MPC is silent as to *how* historic resources are to be protected through zoning regulation. The potential power of zoning is quite broad; MPC section 603(b)(2) states that, “zoning ordinances . . . may permit, prohibit, regulate, restrict and determine: size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal, and use of structures.”

## **Typical Approach to Zoning for Historic Preservation**

Typically, municipal MPC-based regulation of historic resources seeks to prevent unnecessary demolition of resources, to maintain historical integrity, to ensure that new development respects and complements historical resources and settings, and to integrate preservation of historic resources within economic development and redevelopment activities. The degree to which demolition is prohibited or alterations are governed is, frankly, a question of local political will. Broad zoning purview has clearly been enabled and the MPC mandates resource protection. From a practical perspective, most local governing bodies do not want to be perceived as placing undo restrictions, procedural hoops, or economic hardship on property owners. For this reason, many municipalities attempt to balance the additional regulatory burden with incentive provisions, as discussed below, or to limit the circumstances under which historic resource protection regulations apply. While under zoning, historic resource protection regulation can be applied to any change on any property, most local ordinances link applicability to building permit or land development applications affecting inventoried historic properties. Most local ordinances exclude routine maintenance from their purview. The most important prerequisite to historic resource protection regulations is a clear inventory of the resources to which they apply, discussed further below.

Typically, protective measures enacted within the municipal zoning ordinance are accomplished through the establishment of an historic overlay district covering all or portions of the municipality with applicability linked to a specific inventory of historic resources.

## **Reviewing Body**

Municipalities are empowered to create any number of advisory boards, commissions or other bodies by the City, Borough, or Township Code under which the municipality operates. Hence, municipal officials may establish an advisory body to provide the zoning officer, governing body or zoning hearing board with information and guidance pertaining to historic preservation much like the planning commission advises the

governing body on land development plans. The advisory body can be called whatever the municipality chooses: Historic Commission, Historic Committee, Heritage Commission, Heritage Committee, Heritage Task Force, etc. The name is not as important as the function -- to provide the zoning officer, governing body or zoning hearing board with the information needed to make decisions about historic resources in the municipality.

The advisory body only provides information and recommendations; it has no decision-making powers. While the membership requirements applicable to a HARB are not required, it is nevertheless helpful that members of the reviewing body be similarly knowledgeable about the history of the municipality, local architecture, or related areas such as construction, real estate and building inspection.

The advisory body may be established by ordinance or resolution and its members appointed by the governing body.

## Procedures

The MPC, while mandating historic resource protection, does not establish any particular procedures for regulation. Most municipalities establish procedures akin to or linked to other specifically enabled zoning review procedures such as special exception approval or conditional use approval. Procedures typically include the following elements:

- Permit applications are submitted to the zoning officer, who forwards the application, upon his/her determination that review for historic preservation purposes is required, to the designated advisory/reviewing body.
- The reviewing body reviews the application at the next regularly scheduled meeting following submission of a complete application.
- The applicant is given the opportunity to present the proposed project to the reviewing body.
- The implementing ordinance specifies issues for review; many municipalities link review to "[The Secretary of the Interior's Standards for the Treatment of Historic Properties,](#)" listed below.
- Following review, the reviewing body forwards a recommendation for permit approval, conditional approval, or denial to the governing body.
- Many ordinances require specific written recommendation(s); some simply rely on the recorded meeting minutes.
- If upon initial review, there are unresolved issues or deficiencies in the application, the reviewing body may request that the applicant return with revisions to the application at the next regular meeting. Refusal by the applicant to do so would normally result in a recommendation of denial of applicable permit(s).
- Upon receipt of recommendations from the reviewing body, the governing body considers the application at their next scheduled meeting and resolves to approve, conditionally approve or deny the application and so advise the zoning officer.
- Challenges to decisions go to the Zoning Hearing Board for review.

## **Demolition Permitting**

Whether they have historic preservation regulations or not, most municipalities permit demolition as a form of building permit, to be issued by the zoning officer. Most historic resource regulation adds a required review period by the historic resource advisory/reviewing body and the governing body prior to issuance of permits for demolition.

Typically, the historic preservation regulations provide that at the end of the review period, the reviewing body makes a recommendation to the governing body to grant or deny the demolition permit. The governing body then directs the zoning officer to approve, conditionally approve, or deny the permit application. Where no reasonably viable alternatives are available and a demolition permit ultimately is to be granted, the grant of approval may be conditioned on a reasonable delay of demolition to allow time for documentation and photography of the property.

In some municipalities, the demolition review period only creates a delay in permitting, with no regulatory provision allowing denial of the permit. While this approach allows time for dialogue with the applicant and time to identify potential alternatives to demolition, a mere delay of demolition (except where an applicant can demonstrate undue economic hardship or that all reasonable beneficial use of the subject property will be denied if the demolition permit is not granted) is an arguably weak response to the MPC mandate for historic resource protection.

The demolition review period may best be used by municipal representatives and, ideally, the applicant to carefully evaluate the historical values of the property relative to the realistic costs of maintaining it, as well as the physical viability of structures and their potential for rehabilitation or adaptive reuse. Many municipalities provide incentives, described below, to help ensure that viable adaptation or reuse may be feasible.

When a demolition request is associated with a subdivision or land-development plan, it is suggested that the permit not be issued until the land development plan has been considered, approved and recorded. This alleviates speculative demolition, especially when the project may not get municipal approval, or the applicant decided not to proceed with the project.

## **Demolition by Neglect**

A number of municipalities regulating historic resources extend demolition permitting requirements to “demolition by neglect.” Demolition by neglect, whether willful or not, can be defined as the absence of routine maintenance and repair over time, leading to structural weakness, decay or deterioration to the point where a building or structure meets standard criteria for condemnation. Not only do such structures become hazardous, they may reach a state where rehabilitation or adaptive reuse is no longer practicable. While building maintenance codes provide for such situations, all too often, the remedial action will be simply to remove the neglected structure. Defining demolition subject to historical regulation to include demolition by neglect is intended to catch such situations before it is too late. If demolition by neglect is identified, then it is

viewed as demolition occurring without a permit and the landowner is required to go through the application and review process just as any other.

## **Use Regulation**

Historic resource regulation is typically set forth in the form of “overlay” zoning which supercedes the “underlying” base zoning district provisions as they would apply to regulated historic resources. The underlying zoning in each district within a municipality defines the types of uses permitted, and delineates the regulatory provisions associated with those uses, notably density and area and bulk provisions. The adoption of historic resource regulation typically does not necessarily alter base zoning provisions although it may. In the interest of promoting preservation of historic resources and their settings, historic resource protection provisions may establish additional regulations affecting regulated historic resources. For example, certain uses that may be by-right in the underlying zoning district may instead be permitted subject to conditional use approval, giving greater control over site development to the municipality. Further, design standards may be applied to new uses or new construction on historic properties, on neighboring properties within a prescribed distance of the designated resources or even within the entirety of an historic overlay district, to promote overall historical integrity and avoid conflict.

## **Regulatory Incentives**

Recognizing that rehabilitation of historical structures can be far more costly than building a new structure, many municipalities create regulatory incentives to promote rehabilitation or adaptive reuse of historical structures.

A common incentive is to allow additional uses on historic properties not otherwise permitted under the base zoning. In some cases, where otherwise only one principal use is permitted per lot, historic properties are permitted to have an additional principal use. Some ordinances provide for limited commercial uses on historic properties or in historic structures in districts otherwise limited to residential, agricultural or conservation uses. Examples include offices, banks, small-scale retail uses, personal services, bed & breakfasts, day care facilities, and even restaurants. All such incentives aim to provide economic viability to overcome the need or desire to remove historic resources or compromise their historical integrity. Under a number of ordinances, such incentive provisions are subjected to conditional use approval in order to assure appropriate design as well as to protect or buffer neighboring properties.

Some municipalities give “free” density where historical buildings are rehabilitated or adaptively reused. In the context of residential development, this may involve excluding dwelling units within historical structures from the maximum unit count otherwise permitted. This can even extend to reuse of previously non-residential structures such as carriage houses or barns; some municipalities permit development of multiple-family dwellings within historic structures in districts otherwise limited to single-family dwellings. In the context of non-residential development, reuse of existing historic structures may be permitted in excess of otherwise applicable building or impervious cover limitations. Pocopson Township, Chester County, for example, permits three

additional square feet of development for each one square foot of habitable floor space (including on multiple floors) that is restored or rehabilitated in a preserved historic structure; this additional square footage can even be sold and transferred to another property within the Township. Pocopson also grants density bonus where the landscape forming the setting for historic structures is preserved by conservation easement, and exceeds the otherwise applicable minimum lot size.

## **Area and Bulk Regulation**

Many municipalities have setback and height regulations in their zoning ordinances that are optimized for creating the look of typical mid- to late twentieth century suburban residential subdivisions. Existing historical structures, which pre-date these regulations, often do not comply with these setback and height regulations. This renders such structures non-conforming, which becomes a problem when it is time to rehabilitate or expand the structures. Zoning variances might remedy some such situations but, under the law, should not do so without demonstration of “hardship” by the property owner; that the regulations will result in damage to historic resources may not meet the legal standard of hardship and justification for a variance.

For this reason, a number of historic resource protection regulations include provisions that modify otherwise applicable area and bulk regulations in order to promote reuse of historic buildings and compatible new construction.

## **Scope of Regulation**

While the MPC does not specify any limitations to historic resource protection regulation, many municipalities choose to limit their zoning purview to features visible from a public way, following the model of Act 167. Others choose not to govern maintenance, minor alterations or partial demolition. East Goshen Township, for example, goes so far as to define partial demolition as not less than fifty percent of the extant historical façade, so as not to regulate partial demolitions necessary to permit additions to a structure. Clearly, at some point, limiting purview also will limit opportunities to protect valuable resources.

## **Historic Resources Impact Statement (HRIS)**

An important tool for inclusion in the subdivision or land development review process is a requirement for the submission of a historic resources impact statement (HRIS), in cases of potential impacts to inventoried historic resources. Most municipalities requiring submission of a HRIS do so where inventoried historic resources are located on a lot or tract subject to subdivision or land development application or where historic resources are located within a specified distance of such lot or tract (usually 100-300 feet).

Typically, HRIS requirements provide for opportunity for review by the historic resources reviewing body in addition to the planning commission or the governing body, which otherwise reviews such applications. The key purpose of an impact assessment is, not only to assess potential impacts but, prior to plan approval, to also raise opportunities for design that may mitigate negative impacts and help preserve the integrity of the



historic resources and the landscape in which they are set. The contents of the impact statement are usually defined in the ordinance and may include such information as a description of the historic resource including a photographic record, description of the development proposal, a summary of how the proposal will impact the historic resource, and a discussion of potential mitigation measures.

## **Outline of Content for Historic Preservation Regulations**

The regulatory text for historic resource protection is incorporated into the zoning ordinance, usually in a discrete section or article. There are no specific requirements set forth in the MPC, however, depending on the degree of regulation desired, the following components should be considered:

- Statement of purpose
- Definition of terms (not otherwise included in the zoning ordinance)
- Boundary description for any overlay district(s) where applicable
- Definition of historic resources to which the regulation applies/reference to inventory
- Establishment of the reviewing body
- Duties and responsibilities of the reviewing body
- Applicability and procedures for review, approval or denial (building permits, alterations, demolitions, etc.)
- Incentive use and area and bulk provisions
- HRIS requirements
- Design guidelines
- Enforcement provisions, fines and penalties.

## **Setting the Stage for Regulating Historic Resources**

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### **Importance of Community Support**

Recognition of the importance of historic resources from diverse cultural, historical, economic and aesthetic perspectives helps to build broad support for the regulatory component of district designation.

Successful implementation of historic preservation regulations requires community support. Community support buttresses the political will necessary for adoption of historic resource regulation and, ultimately, to ensure long-term success of the preservation program. All too often, best intentions and hard work developing potential historic resource regulations can be dashed before a proposal is even formally considered by the local governing body. Word spreads, based largely on misunderstanding, that property owners will be faced by an onerous ordinance that regulates what they should or should not do to their properties or that will force them to “restore” their property, causing major financial burdens for private property owners. Rumors fly and governing body members are put on the defensive. What could ultimately be an excellent approach to promoting resource protection ends up being rejected before ever truly debated in the public forum.

## *Local Regulation for Historic Preservation*

A variety of steps can be taken to minimize misconceptions and obtain community support for local historic resource regulation:

- The more support that can be obtained early in the process, the easier the implementation will likely be.
- The benefits of regulation can be described from diverse cultural, economic and aesthetic perspectives to broaden the potential range of supporters.
- The public can be prepared for the effects of the proposed regulation through publication in the local media regarding what is being proposed, the reasons for the regulations, and clear delineation of the properties and situations to which the new regulation will apply.
- Property owners, contractors, and real estate professionals can be notified about the positive effects of the proposed regulation.
- Municipal staff can be briefed so that they can appropriately respond to questions.
- If the budget allows, historic design guidelines can be developed, and distributed to explain and illustrate appropriate and inappropriate maintenance, repairs, and design approaches, and to provide an overview of the history of the municipality and its architectural styles.

Municipal leaders can both learn from and make the community aware of the successful experience of existing municipal historic preservation programs around the state, many of which have been in existence for more than several decades. In PHMC's publication "[Historic District Designation in Pennsylvania](#)," author Michel Lefèvre cites Pennsylvania municipalities with excellent experience including: Bellefonte, Carlisle, Chalfont, Cheltenham, Doylestown, Gettysburg, Harmony, Hollidaysburg, Lower Merion, New Hope, Newtown (Bucks Co.), Phoenixville, Pottstown, Warwick, and West Whiteland. According to Lefèvre, now an independent preservation consultant no longer associated with PHMC, all of these municipalities have stayed the course over many years and the result can't help but convince the most skeptical individual that a well-administered historic preservation program can create an economically viable and vibrant place to work and live.

### **Planning Context**

Municipalities often embrace regulation of historic resources in response to a crisis – for historic resource regulation, a likely example being the imminent demolition of a cherished historic resource. In the inevitable haste that ensues, regulations seem to be drafted before the goals of those regulations are clear. This can lead to a lack of consensus or clarity as to how such regulations are to be interpreted or applied and exacerbate any weakness in public support. Michel Lefèvre suggests that a more reasoned approach would follow a planning exercise in which questions like the following have been asked and answered:

- What is a historic resource?

- What kinds of resources do we have?
- Where are those resources located?
- Why do we want to preserve them?
- How should they be preserved?
- Who is responsible to preserve them?
- How much regulation do we want to impose?
- What are the trends that have the potential to threaten these historic resources?
- What incentives can we provide to help preserve these resources?
- Do we have the administrative ability to impose regulations?
- Do we have qualified personnel to administer a preservation program?
- What are our ultimate aims?
- Does the municipality, the businesses and other sectors have contrary goals vis-à-vis historic preservation?
- Is there public support for these preservation initiatives?
- What needs to be done to gain public support?
- Are there regulations in the municipal code that are contrary to the preservation goals of the municipality?

Optimally, historic preservation objectives will be rooted in and supported by the municipal comprehensive plan. This will serve to demonstrate that historic resource regulation follows a deliberate planning program and is consistent with overall community resource protection and community development objectives.

## **Historic Resources Inventory**

An inventory or survey of historic resources enables municipal leaders and the public to understand what historic resources exist in a community, whether the resources are worth protecting and how they might be protected. Documenting historical resources in advance of enacting historic preservation regulations is also relevant from a legal perspective. Challenges to historic resource protective measures are likely to be unsuccessful if the municipality has completed a comprehensive inventory and can present a clear rationale for the sites identified or the district boundaries delineated. While a comprehensive survey is essentially a prerequisite to certification of an Act 167 historic district, a similar inventory will offer key support to local zoning regulation of historic resources as well.

Historic resource inventory databases are best designed as “living” documents which are updated as permits are issued as well as through a regular (ideally annual) review

process. Any additions or alterations that have occurred may be noted in the database while structures that have been demolished, burnt down, or removed may be removed from the inventory.

PHMC can provide technical assistance with surveys; a good resource is the PHMC publication, “[Standards for the PA Historic Resource Survey](#).” The [Pennsylvania Historical Resource Survey Form](#), available from PHMC, is the standard format for comprehensive historic resources surveys necessary to support certification of historic district regulation under Act 167.

In surveying local resources to determine what merits the designation “historic,” it is useful to follow the same general “criteria for determination” used in review of National Register nominations. In this vein, a building, structure, object, site, or district should be considered historic if:

- it is associated with events that have made a significant contribution to the broad patterns of our local, state, or national history; or
- it is associated with the lives of people, local, state, or national, who were significant in our past; or
- it embodies 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 (a neighborhood or village for example); or
- it has yielded or may be likely to yield, information important in history or prehistory (archaeology).

## **Historic Resource Classification**

### **Classification within Act 167 Historic Districts**

Within Act 167 Historic Districts, the documentation necessary to submit a district for certification usually inventories all structures within the district and designates them as either “contributing” or “non-contributing” to the historic character of the district. No further classification is usually deemed necessary. Further classification, as sometimes is done in zoning approaches to historic preservation, can be problematic, as described in the next section.

### **Classification in Zoning Ordinances**

While many do not go beyond the “contributing/non-contributing” approach to classification, some municipalities implementing historic preservation through zoning have differentiated inventoried historic resources into several classes. This detailed classification – some argue – can help with education of the community or serve as a basis for differential regulation of different classes of resources. Others argue that differential regulation is problematic or damaging to historic preservation efforts and that

all significant resources should be regulated in the same manner with resources classified as “historic” or “non-historic,” or “contributing” or “non-contributing.”

While there are many variations on the theme, proponents of more detailed classification typically divide historic resources into three classes:

- Class I or A includes resources that are either listed in the National Register of Historic Places have received a Determination of Eligibility from PHMC;
- Class II or B are other resources that are deemed historically or architecturally significant at the local level; and ‘
- Class III or C are resources that are fifty years and older but are not deemed historically significant or have not retained their architectural integrity. In some cases, the ubiquity of 50+ year old resources, e.g., early suburban tract homes, renders them seemingly insignificant. They nevertheless are included in the overall historic resource inventory because it is accepted practice to consider all resources over 50 years in age for potential National Register eligibility.

Several concerns arise from such classification. One is that people will perceive resources with a designation other than Class I as being substantially inferior, consequently judging them as expendable and less worthy of preservation. Another is that, where Class I is linked to National Register listed or deemed eligible properties, such classification may exclude properties of local historical or architectural significance from adequate protection, which, for various reasons, may not have been determined eligible to the National Register but might be if an application for DOE were to be made. A corollary concern is the fact that some properties may have been determined eligible several years ago but under present review may be determined no longer eligible, yet still are subject to the same regulation as those resources that are. Concern also is raised that application of classification systems within historic districts (districts defined under zoning rather than Act 167) could, over time, compromise the “toute ensemble” or overall historical integrity of the district, if different classes received different levels of protection.

The degree to which classification actually may hamper resource protection efforts is dependent on the degree to which differential regulation is applied to different classes. Some ordinances reserve the right to deny a demolition permit only for Class I. For example, under such regulation, La Ronda, a Spanish Revival Style mansion designated Class II in Lower Merion Township, Montgomery Co. – a rare example of that style in the region – was demolished. However, a large number of municipalities that employ classification do not differentiate between the regulation of Class I and Class II, affording the same protection for all resources inventoried as having historical or architectural significance. Other municipal ordinances give preference to Class I for incentive provisions such as additional use opportunities or area and bulk relief.

There are a variety of reasons given for differential regulation by resource class, most boiling down to local political concerns. While in the abstract, most people view historic preservation as a valid community objective, some owners of historic properties will perceive the introduction of regulations as diminishing their property rights and leading

to undue cost of time and money. Leaning on the National Register as the basis for Class I designation and then subjecting Class I to a higher degree of regulation than other classes is often viewed as politically and legally less likely to be challenged (although the MPC mandate to protect historic resources is not limited to National Register properties.)

Some municipalities invite voluntary submission of historic resources to be included in Class I or even on the municipal historic resource list at all. However, this likely will leave important resources unprotected and seems inconsistent with the fundamental nature of zoning, which is intended to place uniform regulation across defined classes of land use without regard to ownership.

Some municipalities are partial to a classification system because they believe that limiting full review to only the highest resource class(es) will not only marginalize property owner discontent and diminish the potential for legal challenges or other controversies, but will reduce their own administrative and procedural burden as well. Sometimes, given local fiscal concerns and limited time for action, differential regulation may be the only way to gain passage of historic preservation zoning regulations.

Ironically, differential regulation by class, intended to reduce political opposition, may raise further arguments in opposition. Classification systems typically place primary importance on national standards rather than on local standards of historical significance. And while the MPC mandate for historic resources paints a broad brush in favor of resource protection, specific criteria for classification for purposes of differential regulation may be open to challenge as subjective or arbitrary. Finally, differential regulation by class may create a difficult quandary for the municipality in drafting specific criteria for each class rather than one set of criteria for all historic resources.

## **Historic Review Guidelines**

Historic review and design guidelines are not only useful to educate the public, but can help articulate a clear vision as to what the municipal historic resource regulation was enacted to achieve. It is to be expected that individual members of governing bodies, municipal staff, designated reviewing bodies and HARBs may have unique interpretations of the purposes and effects of local historic resource regulation. One member may think of historic preservation in curatorial terms, while another looks at overall neighborhood or community character, and yet another may be more concerned about the importance of adaptive use and long-term economic viability. Such disparate views, while all potentially important, also can confuse the public and make the review process appear as arbitrary, potentially thwarting preservation objectives.

Historic review and design guidelines can focus the review process, producing greater consistency and limiting subjectivity, while at the same time informing owners of historic properties as to what is expected, reducing potential for conflict.

Historic review and design guidelines can be used both to review and evaluate proposed modifications to existing structures and also to recommend design approaches for new construction. Such guidelines are found in many forms but all serve to encourage building modifications and/or new development that complement historical character.

## Secretary of the Interior's Standards

Many local ordinances incorporate the Secretary of Interior's standards initially developed to guide the review of historic rehabilitations funded by federal funds. "[The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings](#)" is published by the U.S. Department of the Interior, National Park Service. The ten standards for rehabilitation are reprinted in their entirety below. Because full conformance with these guidelines could result in considerable cost to the owner of an historical property, municipal regulations often refer to the Secretary of the Interior's standards as recommended guidelines. Full conformance with these standards is often reserved for situations where incentive use provisions, density bonuses or flexible area and bulk provisions are offered to applicants.

1. A property will be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces and spatial relationships.
2. The historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided.
3. Each property will be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, will not be undertaken.
4. Changes to a property that have acquired historic significance in their own right will be retained and preserved.
5. Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property will be preserved.
6. Deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and, where possible, materials. Replacement of missing features will be substantiated by documentary and physical evidence.
7. Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.
8. Archeological resources will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.
9. New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.

10. New additions and adjacent or related new construction will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

### **Lancaster County Planning Commission Guidelines**

New construction in a neighborhood of historic buildings or in an area near historic buildings or in a historic landscape has the potential to add to or detract from the character of its historical surroundings. To retain community character compatible with historical precedent, new construction should be designed to incorporate appropriate elements of massing, shape, size, materials, orientation, set-back and the like. The following suggestions are drawn from "[Historic Preservation Guidelines](#)" published by the Lancaster County Planning Commission:

- **Size, Scale, and Proportion**. New construction should relate to the dominant proportions, size and scale of the historic buildings in the surrounding area.
- **Shape and Massing**. New construction should incorporate massing, building shapes, and roof shapes that are present among historic buildings in the surrounding area.
- **Materials**. Building materials should be compatible with those of historic buildings in the surrounding area. Traditional materials that are common to the area, such as brick, wood, and stone are preferred.
- **Patterns and Rhythm**. The rhythm of existing facades along the street and the components thereof should be maintained. Large buildings can be divided into bays to reflect rhythms exhibited by existing smaller structures.
- **Cornice and Floor-to-Floor Heights**. New construction should continue the floor-to-floor and cornice heights that are dominate in the surrounding area, or incorporate detailing to suggest those heights.
- **Windows and Doors**. New construction should use window and door openings of design and size typical of those among historic buildings in the surrounding area.
- **Orientation**. Principal facades of new construction should face the same direction as other existing buildings on the street or as indicated by predominant patterns in the surrounding area.
- **Location**. New construction should not be placed in a way that adversely affects a historic resource or the viewshed of which it is part, neither in terms of proximity nor visual impact.



## Issues Often Raised in Regard to Historic Preservation Regulations

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### **Lack of Detailed Guidance and Standards under the MPC**

The application of review and approval or denial of permits subject to regulation under an Act 167 historic district is clear. Within the certified historic district, any change to any structure within view from a public way may be made subject to issuance of a COA (Certificate of Appropriateness). The mandate for historic resource protection through zoning under the authority of the MPC also is clear. And the potential power of zoning is quite broad; as noted, “zoning ordinances . . . may permit, prohibit, regulate, restrict and determine: size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal, and use of structures.” However, the specific application of these powers related to historic resources under zoning is unstated. Regulation of alterations or demolition of historic buildings and structures by using the authority of the MPC often seems to cross over into the area of review and authority usually relegated to building codes. Despite the MPC mandate for protection, it is otherwise unusual for zoning regulation to go beyond the traditional objective focus of addressing use, siting, bulk, massing, setbacks and height restriction, and move into seemingly subjective issues of appropriate design or historic authenticity of alterations to the exterior of buildings.

Under building permit regulation, permits are issued “by right” and within a relatively brief time frame if an applicant meets the objective requirements of the zoning ordinance. This straightforward process is made complex when an applicant now has to go before the historic reviewing body and potentially wait up to two months or more for both the reviewing body and the governing body to meet and resolve whether or not to advise the zoning officer to issue the permit or not, at times, with seemingly subjective rationale. This added complexity resembles the complications that result if the zoning officer were to determine that an application – whether involving historical resources or not – requires approval of a variance, a conditional use or special exception.

Despite the clear MPC mandate for historic resource protection, municipal officials are often reticent to wade much deeper into historical regulation than the standard building permitting process provides. While a 30-60 day review period is reasonable in the context of getting the reviewing body together and presenting recommendations to the governing body, lengthy delay can make local officials nervous. Similarly, the potential for denial of a permit, based on seemingly subjective review of historical integrity, is uncomfortable territory for some officials.

It appears that municipal officials have great latitude in protecting historical resources under zoning, but just how far can they go? Until the courts or the General Assembly bring greater clarity, which is far from assured, no one can know.

Absent specific statutory or case law guidance on either purview or time for review, it is suggested that review procedures for historic resource regulation be linked to those specifically established by the MPC for other matters, e.g., special exception approval or conditional use approval. Some municipalities subject demolition permitting to special

exception approval, for example, where historic resources are involved. Similarly, some municipalities subject incentive use or area and bulk provisions for historic resources to conditional use approval. While these procedures may add both cost and time to the approval process, they link regulation of historic resources to clearly enabled zoning procedures. Where such procedures are invoked purely due to the presence of historic resources, the municipality may wish to reduce application and review costs assessed to applicants. In cases of otherwise applicable requests for approval of variance, conditional use or special exception, the presence of historic resources may seem to complicate, lengthen or add cost to the process. In such cases, it is suggested that the role of the historic reviewing body be conducted simultaneously with otherwise ongoing review and recommendations be presented to the zoning hearing board or governing body, as applicable.

### **Lack of Specific MPC Authority for Reviewing Body**

The Municipalities Planning Code does not grant specific authority for a municipality to create a historical commission or other reviewing body for historic resource regulation under zoning; nor does it set forth requirements for membership, roles or procedures for such a body. This omission stands in contrast to the very specific standards set forth under Act 167 for the establishment, roles and membership criteria for a HARB. However, municipalities are given the power to create such bodies, so long as their role is advisory, in the general powers bestowed by the city, borough and township codes. The reviewing body is *not* a decision making body; rather, it is charged to review applications, make comments and recommendations to the zoning officer, planning commission, governing body, or zoning hearing board, as applicable.

### **Confusing the Historic District Act with Zoning Regulations**

The public, potential applicants, builders, contractors and municipal officials can easily confuse a process associated with zoning approaches to historical resource regulation with the distinct Act 167 regulatory process. Too often, assumptions are made that essentially equate the administration of quite variable zoning regulation with the specific review process set up under Act 167. Applicants wonder why and how the regulations they experienced in an Act 167 historic district are not being applied the same way next door, to regulation of historic resources under zoning authority. Even members of local reviewing bodies may assume that their purview is exactly like that of a HARB. Misunderstanding and confusion can be particularly glaring in municipalities that use both regulatory approaches and have two separate reviewing bodies.

The key to avoiding problems is a clear regulatory process paired with educational efforts and ample communication to keep all role players on the same page.

## The Context for Historic Preservation Regulation

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### Pennsylvania Legislative History

Local historic resource regulation has been specifically enabled since adoption of the Historic District Act in 1961 (Act 167 of 1961).

In 1968, the Pennsylvania General Assembly established the Municipalities Planning Code (Act 247 of 1968). Under the Code, the state authorized local governments to regulate land use, including historic resources. Amendments enacted in 2000 expanded on this authority, mandating the use of zoning powers for historic resource protection.

### Courts Support Historic Resource Regulation

Since the early days of local historic preservation regulation, court rulings in a variety of cases around the country have clearly established historic preservation as a legitimate public purpose for local government. A number of challenges have been based on the argument that historic designation, in limiting what a property owner might do or in denying demolition, results in a “taking” without compensation and without due process of law. Some early challenges argued that historic preservation was merely an aesthetic consideration and not within constitutionally established police powers. In historic district contexts, there have been challenges that historic regulation should not apply to arguably non-historic buildings, but the “toute ensemble” doctrine has been upheld, holding that the integrity of a historic district can involve its entirety and that the power to regulate or restrict may apply to all buildings within a district or zone, regardless of individual historical or architectural importance.

The landmark case for regulation of historic resources was brought before the United States Supreme Court in the case of *Penn Central Transportation Company v. City of New York* (1978). In rejecting the proposal to lease the airspace above Grand Central Station for the erection of a 55-story office tower, the City was charged with taking property for a public use without compensation, in violation of constitutional due process and equal protection guarantees. In ruling on this case, the Supreme Court reaffirmed a prior ruling on the legitimacy of aesthetic considerations in government regulation of the public welfare and, by extension, the appropriateness of historic designation. The Supreme Court further rejected the idea that such regulation resulted in a taking because of potential loss of property value. This case and others have made it clear that as long as property owners can “earn a reasonable return” on their investment, there is no taking.

There have been relatively few challenges to historic resource regulation in Pennsylvania, despite misgivings regarding lack of clarity in enabling legislation, and, thus, particularly related to zoning cases, little case law to offer further clarification. Only one zoning case has come to the attention of the authors: According to the Lancaster County Planning Commission, Millersville University took Millersville Borough to court when the Borough, pursuant to zoning regulation, denied demolition of three small residential buildings. The court upheld the Borough's decision and the buildings remain.

Prominent cases in the cities of Philadelphia and Pittsburgh involved Historical Commissions ruled by home-rule charters not subject to the MPC or Act 167. Cases in the cities of York, Harrisburg and Williamsport all involved Act 167 historic district regulation. These cases are detailed in the PHMC publication "[Historic District Designation in Pennsylvania](#)." is worth summarizing some of the key points to come out of these cases here as they are instructive to municipalities considering regulation under either Act 167 or the MPC.

- All five of the aforementioned cases involved denial of demolition and, in essence, a charge of "taking" without just compensation. In all five cases, the local ordinances were upheld (although it took re-argument before the Pennsylvania Supreme Court to reach that conclusion in the Boyd Theater case in Philadelphia). The York case was the first case challenging the constitutionality of Act 167. While pre-dating the landmark Grand Central case, the court resolved that while "the taking of private property requires that just compensation be paid, it is also well-established that private property may be regulated to promote the public welfare." After re-argument in the Boyd Theater case, the Pennsylvania Supreme Court concluded "that the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth."
- The result of the Cleckner versus Harrisburg case added strength to the "toute ensemble" doctrine in Pennsylvania, as the denial of demolition permits was not based on unique historical or architectural character of the subject buildings, but on their contribution to the character of the historic district as a whole. The court concurred with the City's view that the demolition of the buildings would be "detrimental to the preservation of the fabric of the Historic District."

In Williamsport, the Park Home case before the Lycoming County Court of Common Pleas resolved several important issues. One, the court clarified that a municipality has the discretion to approve an alteration or demolition in one case and deny approval in another. The Park Home had asserted that Williamsport City Council's denial of their demolition request was arbitrary and capricious because demolition permits had been issued to other applicants on several occasions. The court responded that "each circumstance is different and cannot be used as a standard." A second point raised by the challenger in the Park Home case was that the Williamsport ordinance was "void for vagueness." The court clarified this issue by explaining that statutes considered vague are those *that deny due process* by not giving fair notice "that their contemplated activity may be unlawful, and [by not setting] reasonably clear guidelines." The court found the local ordinance adequate and reasonable, and rejected the challenger's argument. A third assertion raised by the Park Home was that the Williamsport ordinance should not apply to them retroactively, since the ordinance was enacted after they had been established in the area designated as historic. The court found that the ordinance did not retroactively "eradicate the Park Home's rights," since it did not interfere with their mission.

The Park Home case in Williamsport and the Weinberg case in Pittsburgh both raised procedural issues as well, regarding the keeping of full and complete records of proceedings, written findings of facts, and reasons upon which decisions were rendered. Fortunately for both cities, rather than finding fault with their ordinances on a procedural

basis, in both cases, the trial courts remanded the cases back for the making of records. As any local approval or denial may be appealed, these cases remind us that every HARB, designated reviewing body and governing body should arrange for a careful record of the proceedings of meetings where recommendations or decisions in regard to specific applications are to be deliberated or decided.

## **Pennsylvania Historical Context**

While no comprehensive record or inventory of pre-historical (pre-European settlement) resources exists, it is known that Pennsylvania hosted significant Native American populations, particularly seasonal encampments along the many rivers and streams. Wide, sunny floodplain areas were burned to allow for pre-European agricultural practices, taking advantage of the rich alluvial soils. Before being dammed to provide water power or enhance navigation, many rivers and streams were a rich food source, in the eastern part of the state particularly during the annual shad migrations. The Pennsylvania Historical and Museum Commission (PHMC) maintains an inventory of areas of relative likelihood for pre-historic settlement, essentially focused on streamside areas, particularly broader stream valleys.

Shortly after William Penn arrived in Pennsylvania in 1682, European settlers began to move inland, quickly extending permanent settlement from east to west. Since that time, a rich historical record has been preserved and many historical structures, landscapes, transportation routes and artifacts remain to tell their stories. While there also is no comprehensive inventory of archaeological resources stemming from the historical era, PHMC, the National Park Service, and local museums and historical societies host substantial collections of artifacts. Undoubtedly significant remnants of historical settlement rest in the soils around nearly every old farmstead, tavern, schoolhouse or crossroads hamlet, emphasizing the importance of conserving the lands that frame the settings of historical buildings, as well as the buildings themselves. Numerous troop movements through Pennsylvania in the French and Indian War, the War for Independence, and the Civil War likely resulted in much more than footprints being left along their routes.

Over time, the historical and architectural heritage of the Commonwealth has been threatened by private and public actions that have either destroyed or irrevocably altered the original appearance of numerous buildings, structures, neighborhoods, and landscapes. To stem the tide, regulation of historic resources was first introduced in the United States in the 1930s to assist in the revitalization of both residential neighborhoods and business districts. Historic designations have been reputed to increase or stabilize property values, foster pride and appreciation of the historic built environment, and consequently contribute to the quality of life of communities. Charleston, South Carolina, enacted the first historic district legislation in the United States in 1931. In 1959, Rhode Island was the first state to enact statewide historic district enabling legislation; Pennsylvania followed suit in 1961. More than 3,500 historical commissions in the United States now oversee historic preservation ordinances that help protect historic areas containing thousands of historic buildings.

In the PHMC publication “Historic District Designation in Pennsylvania,” author Michel Lefèvre points out that rehabilitation and re-use of buildings and structures became a viable alternative to redevelopment in the 1970s, a radical departure from the massive slum clearance programs of the urban renewal era of the 1950s and 1960s, concern over which contributed to the eventual passage by Congress of the National Historic Preservation Act in 1966. Since the 1970s, increased energy and raw material prices have made certain construction projects cost-prohibitive and the reuse of existing structures more attractive. In addition, federal and state policymakers, in an effort to combat unemployment, have targeted building rehabilitation, in part because it is more labor-intensive than new construction. Preservation and reuse of existing buildings and structures have over time increasingly been found to put new life into older neighborhoods while minimizing the dislocation of low-income residents associated with urban renewal.

## **Related Guides**

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NA

## **Library**

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### **Related Library Categories at ConservationTools.org**

Historic Preservation – General

<http://conservationtools.org/libraries/1/topics/126>

Historic Preservation Ordinances

<http://conservationtools.org/libraries/1/topics/127>

### **Featured Library Items at ConservationTools.org**

Visit the Related Library Categories to view these and other resources:

Title: Townships Must Consider Historic Resources When Planning for Future

Author: Samuel C. Slaymaker III, Esq.

Organization: Pennsylvania State Association of Township Supervisors (PSATS)

Source: Pennsylvania Township News

Year: 2008, March edition

URL:

Item Type: magazine article

Description: A summary of the evolution of historic preservation in Pennsylvania and the laws both authorizing and mandating consideration of the preservation of historic resources in the course of land use planning.

Fee: No.

Title: Historic District Designation in Pennsylvania

Author: Michel R. Lefevre

Organization/Source: Pennsylvania Historical and Museum Commission

Year: 2007

URL: [http://www.portal.state.pa.us/portal/server.pt/community/community\\_preservation/3770](http://www.portal.state.pa.us/portal/server.pt/community/community_preservation/3770)

Item Type: Manual

Description: A summary from the years of success and failure experienced by local governments in the process of initiating and administering historic district ordinances, lessons learned and pitfalls to be avoided. It is intended as a guide for local government officials, historic preservation organizations, and citizens who are considering the establishment of historic districts under municipal authority.

Fee: No.

Title: Preserving Our Places – Historic Preservation Planning Manual for Chester County Communities

Author/Organization/Source: Chester County Planning Commission

Year: 1998

URL: <http://www.chesco.org/planning/lib/planning/documents/preservingplaces/hispresmanual.pdf>

Item Type: Manual

Description: A general description of historic preservation planning and regulation at the federal, state and local levels, with suggestions for integrating historic preservation into the comprehensive community planning process. The manual also discusses private preservation efforts and their relevance to local governments and includes an appendix summarizing historical architectural styles.

Fee: No.

Title: Historic Preservation Guidelines – for the Preservation, Promotion and Regulation of Historic Resources

Author/Organization/Source: Lancaster County Planning Commission

Year: 2009

URL: <http://www.co.lancaster.pa.us/toolbox/lib/toolbox/tools/histpreservguidelines.pdf>

Item Type: Manual

Description: A menu of components to be used in preparation of local historic preservation ordinances. Each component is a model that can stand alone or be used in combination with one or all the other components. Each model component provides options for municipalities in terms of administration.

Fee: No.

## Experts/Contact

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*John has over 30 years of land use and environmental planning experience in southeast Pennsylvania, and is a frequent lecturer on topics of transferable development rights, historic preservation, and open space design. He is a former member of the West Chester Borough HARB and serves on the Board of Supervisors in East Bradford Township. John has written numerous historic preservation ordinances for local governments.*

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## **Acknowledgements**

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### **Suggestions are welcome.**

The Pennsylvania Land Trust Association would like to know your thoughts. Are any subjects in need of clarification or expansion? Are there gaps in the guidance? Other concerns? Please contact Andy Loza at 717-230-8560 and [aloza@conserveLand.org](mailto:aloza@conserveLand.org) with your thoughts. Thank you.

*Andy Loza, Executive Director  
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