



MEMORANDUM

TO: Philadelphia Historic Preservation Task Force
FROM: Will Cook, Associate General Counsel
CC: Regulatory Subcommittee
DATE: October 18, 2017
RE: Philadelphia Historic Preservation Ordinance | Baseline Review

As part of the National Trust's membership on the Historic Preservation Task Force and Regulatory Subcommittee, we have been asked to conduct a baseline review of Philadelphia's local preservation ordinance.¹ This ordinance helps make possible many benefits of Philadelphia's historic preservation program including, but not limited to, the preservation of community identity and neighborhood character, economic development for large and small businesses, increased property values, job creation, tourism, investment opportunities, environmental sustainability, and affordable housing. Out the outset, we would note that Philadelphia's ordinance is fundamentally strong. The ordinance is easy to locate, well organized, and contains relevant portions of the city's zoning code and definitions.

Moreover, the Philadelphia Historic Commission (PHC) has adopted detailed Rules & Regulations, an advisable practice due to the fact that rules of procedure are typically easier to amend than an ordinance, thereby affording the PHC necessary operating flexibility. In addition, Philadelphia has an online searchable database of local landmarks and districts. Accordingly, we would recommend many provisions in Philadelphia's ordinance as models for other cities.

To assist the Regulatory Subcommittee with its review, the first part of this memorandum identifies positive aspects of Philadelphia's historic preservation ordinance that help illustrate the ordinance's strong foundation. The second part raises issues for the Regulatory Subcommittee to consider for further investigation.

I. Existing Strengths

Broad Jurisdiction & Designation Criteria. First, it is important to note that the PHC, unlike preservation commissions in many other cities, has broad jurisdiction to designate sites and objects of historic, cultural, and aesthetic importance, as well as unique visual features within neighborhoods. §§ 14-1001, 14-1003(2). Consistent with this jurisdiction, the PHC has the power to consider a broad range of criteria for designation,

¹ For the most part, application issues by the PHC related to the ordinance are beyond the scope of this memorandum, insofar as its purpose is to evaluate the overall strength of the law itself.

including, but not limited to “familiar visual feature[s]” of neighborhoods as well as sites that exemplify the “cultural, political, economic, social, or historical heritage of the community” or that is “part of or related to a square or park, or other distinctive area[.]” §§ 14-1004(g), (h), & (j).

Moreover, any “interested party” may present testimony or evidenced regarding a proposed designation, further expanding the ordinance’s reach. § 14-1004(3). Additional strengths include the PHC’s ability to designate historic districts (based on association, plan, design, or history) and to prevent demolition of landmarked properties. § 14-203(78) (district definition), § 14-1003(2)(c) (power to designate districts) and § 14-1003(2)(e) (demolition review). The PHC also has the power to designate certain historic interiors. § 14-1003(2)(b).

Financial Hardship Requirement. Philadelphia’s local preservation ordinance includes a comparatively robust “financial hardship” exception, which allows review by a financial hardship committee, a technical advisory committee of the PHC. § 14-1005(5); Rules & Regulations 9. A financial hardship requirement is a “best practice” feature that the National Trust recommends for all local ordinances. Some cities require a specific burden of proof, such as “clear and convincing” evidence (Berkeley, CA, and San Antonio, TX), and disallow any claim for financial hardship where the hardship is self-created (Madison, WI).

Affirmative Maintenance. Another strong feature of Philadelphia’s local preservation ordinance is its affirmative maintenance requirement. § 14-1006. This type of provision, which many local ordinances lack, helps prevent a widespread preservation problem of demolition by neglect. This requirement also makes it more difficult for a property owner to create a hardship by allowing demolition by neglect as a way of exploiting a preservation ordinance’s financial hardship exception. New York City provides a good case study for affirmative maintenance requirements and demolition by neglect enforcement.

Flexible Approach Allowed to Avoid Unnecessary Hardship. Holding aside the frequency of its application or degree of public knowledge about its availability, we also highlight the preservation ordinance’s “unnecessary hardship” exception in instances where literal enforcement of the ordinance would cause unnecessary hardship to persons of low and moderate incomes. PHC Rules & Regulations 11.1 to 11.3. This provision recognizes that in such instances, that the preservation of “basic form and rhythm rather than restoration can meet the objectives of the ordinance and the Commission.” PHC Rules & Regulations 11.1. This mirrors a similar approach undertaken in Baltimore, MD, where the local historic preservation commission recently relaxed window and other standards for certain areas within the city. Aldair Park Historic District in Atlanta requires that the applicant seeking an unnecessary hardship exception must demonstrate that a proposed alteration is required to continue using the property for its intended use.

Objective Standards. Finally, PHC Rules & Regulations 6.9.a.6 requires adherence to the *Secretary of the Interior Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings*. This is another positive aspect of Philadelphia’s local preservation law, insofar as the PHC’s decisions are guided by objective standards. Should the PHC prefer a more tailored or flexible approach, however, the historic preservation ordinance allows for this by providing that the PHC may rely on the Secretary of the Interior’s Standards or “similar criteria.” § 14-1005(e)(6). Several other cities have taken a modified approach. Charleston, SC, is one example. Washington, D.C. has issued similar tailored guidance.

II. Issues for Further Study²

Although the PHC has broad jurisdiction to designate sites of historic, cultural, and aesthetic significance, as well as unique visual features or certain objects within neighborhoods, it is our understanding that this jurisdiction has not been exercised fully.³ However, we do not consider this as a local ordinance defect because the ordinance itself is fundamentally strong. Therefore, we suggest that the Historic Preservation Task Force consider ways to increase the number of nominations, staff, and funding available to review nominations, as well as ways to increase the number and quality of nominations based on cultural heritage, aesthetic grounds, and unique visual features, in addition to those that emphasize more traditional historic values, such as architectural significance only. The availability of incentives should also be a part of this effort,⁴ as well as the possibility of

² Although new legal tools are beyond the scope of this baseline review of the local historic preservation ordinance and do not address the current status of the ordinance, rules, and regulations, the Regulatory Subcommittee should also consider—as a way of strengthening existing levels of historic preservation regulation—whether and to what extent Philadelphia should consider the adoption of new forms of regulation for city neighborhoods whose residents want to preserve overall neighborhood character but oppose traditional one-size-fits-all historic preservation commission review. Another suggestion is for the City to consider establishing neighborhood conservation districts with design guidelines and neighborhood-level design review, a more flexible approach that other communities have adopted. In addition, an adaptive reuse ordinance and new incentives, among other new tools, would increase the ability of Philadelphia to preserve the character of its older buildings citywide, thus adding additional layers of protection to that which local law already provides.

³ See, for example, PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE, CERTIFIED LOCAL GOVERNMENT PROGRAM PERIODIC EVALUATION REPORT | CITY OF PHILADELPHIA (May 3, 2016) (CLG Report), *available at* http://www.phila.gov/historical/taskforce/Documents/Phila_CLGEval_FinalReport_2015.pdf.

⁴ Baltimore, a city with less than 1/2 of Philadelphia’s population and only 2/3 of Philadelphia’s land area, dedicates more money to preservation. Likewise, although Philadelphia’s operating budget is eight times larger than that of New Orleans, New Orleans dedicates twice as much funding to its preservation program, as does Phoenix, Arizona. Jared Brey, *Out with the old, in with the old: Will Mayor Kenney take a new approach to*

“tiered” designations tied to levels of historic significance as a way to increase PHC flexibility and community buy-in.⁵ We also recommend an overall review of the local preservation ordinance and PHC’s Rules & Regulations to ensure consistency between these governing documents. Other issues for further study by the Regulatory Subcommittee are set forth below.

Public Interest Exception. It is unclear from the local preservation ordinance’s text how “necessity” and the “public interest” exception are defined for the purpose of reviewing an application for demolition. § 14-1005(e)(7).⁶ Providing a definition, with clear criteria, would help promote clarity and predictability when permit applicants seek an exemption on this basis. For example, Washington, D.C.; Annapolis, MD; and San Antonio, TX, allow historic preservation exemptions for projects of “special merit,” which have been further defined by case law. Washington, D.C. requires that the project bring to the community “exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services.” The Regulatory Subcommittee should also evaluate whether properties of high architectural or historic significance (such as National Historic Landmarks) should be exempt from this exception.

Composition of PHC & Training. It is preferable for a preservation commission to have a separate identity within a municipal government.⁷ Otherwise, a commission’s responsibilities may on occasion conflict with its other duties. For this reason, the appointment of city government officials (even as ex officio members) such as the Director of Commerce, Commissioner of Public Property, Commissioner of Licenses and Inspections, Chairman of City Planning, Director of Housing, may have the unintended consequence of creating a public perception that PHC is politicized.⁸ The PHC should also consider a requirement for additional members with demonstrated expertise in historic

preservation?, PLANPHILLY (Nov. 12, 2015), available at <http://planphilly.com/articles/2015/11/12/out-with-the-old-in-with-the-old-will-mayor-kenney-take-a-new-approach-to-preservation>.

⁵ New Orleans employs a “Building Ratings Guide” that helps inform the level of scrutiny applied by the historic preservation commission in reviewing proposed changes. Categories include buildings of national importance, buildings of major architectural importance, buildings of architectural importance, important buildings that have been altered, buildings that contribute to the scene, and unrated buildings. Buildings are professionally ranked according to historic significance.

⁶ See also CLG REPORT, *supra* note 1, at 13 (“the concept of “public interest” as applied to hardship applications needs to be more clearly defined”).

⁷ NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL ORDINANCE PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS, PRESERVATION LAW REPORTER 14,001, 14,026 (Aug. 1983).

⁸ See CLG REPORT, *supra* note 1, at 1.

preservation. Although Rules & Regulations 15.1 requires annual training for PHC members, it is unclear from the text of the ordinance or Rules & Regulations how preservation training is implemented or enforced.⁹

Notice to Property Owners. Notifying property owners of proposed designations of their buildings is not only procedurally necessary, but also has the additional useful effect of alerting a preservation commission to possible opposition well in advance of the public hearing that must be held before designation. In addition, failure to notify a property owner may lead to invalidation of the designation. There is no single recommended practice, but providing notice as soon as practicable after a nomination is received (regardless of whether staff deems it “complete”), or within a set timeframe following nomination, will likely increase the ability of a preservation commission to evaluate the level of opposition early in the nomination process and help reduce future litigation risk to the City from property owners who might challenge inadequacy of notice based on timing issues.

Demolition Delay. If a preservation commission cannot deny a demolition permit, it may (under certain circumstances) be advantageous to impose a demolition delay for certain classes of properties, in order to give the commission and other local preservation or neighborhood groups a period of time in which they can negotiate with the property owner. This should be especially true for properties listed in or determined eligible for listing in the National Register of Historic Places, but that have not been locally designated by the PHC. Under some preservation ordinances, the length of the demolition delay will depend upon the market value or architectural significance of the building, with longer delays for more valuable buildings. Such a sliding scale of delay periods recognizes the fact that larger and more valuable buildings will generally require more sophisticated preservation schemes, and that preparation of such schemes can require greater time commitments for all parties involved. In any event, a preservation ordinance should not contain an unreasonably brief demolition delay period. Baltimore, MD; Boston, MA; Chicago, IL; New York, NY; and San Francisco, CA, provide examples of ordinances with demolition delay provisions, among others.

Timing Issues. The Regulatory Subcommittee should explore the reasonableness and effect of the existing deadlines imposed on the PHC for approvals of building permit applications (*i.e.*, the absolute 60-day limit in § 14-1005(6) for building permit applications, regardless of whether the PHC has an objection to the proposed alteration or demolition, as well as its ability to defer action for a designated period not to exceed six months).

⁹ *Id.*

New Construction. It is uncommon for a local preservation commission not to have the ability to review all new construction in terms of height, scale, and mass for compatibility with either adjacent historic landmarks or within historic districts, as opposed to the PHC’s current practice of “review and comment” only for buildings on undeveloped parcels. Allowing the PHC to evaluate all new development within historic districts regardless of whether a lot qualifies as “developed” or “undeveloped” would be considered a best practice for ensuring compatibility between historic and new construction, thereby strengthening PHC’s ability to protect the overall integrity of historic districts citywide. However, we recognize that because not all neighborhoods have uniform heights—thus making it difficult for a preservation commission to evaluate the appropriateness of height in all areas or for property owners to predict outcomes—the Regulatory Subcommittee may want to address this issue through zoning, design guidelines for new construction, or form-based codes.

Archeological Resource Protection. Although the existing historic preservation ordinance allows for the designation of historic sites that have yielded or are likely to yield information important in pre-history or history, § 14-004(i), should the Regulatory Subcommittee wish to examine the possibility of a separate archeological protection ordinance or provision within the existing local preservation law, Alexandria, VA, and St. Augustine, FL, have two of the most comprehensive in the nation.

Sustainability. To the extent the PHC has questions concerning how to review sustainable improvements to properties subject to its jurisdiction, we would recommend as a starting point the Secretary of the Interior’s Standards for Rehabilitation & Illustrated Guidelines on Sustainability for Rehabilitating Historic Buildings. A link is available here: <https://www.nps.gov/tps/standards/rehabilitation/guidelines/index.htm>. Similar guidance could be incorporated by reference into the PHC’s Rules & Regulations.

Appeals. Finally, although § 14-1008 of Philadelphia’s local preservation ordinance specifies an appellate procedure (an essential component for any local law), the Task Force should consider whether to allow direct appeal to a specialized appellate entity with dedicated preservation expertise as opposed to the Board of License and Inspection Review. This would arguably help create more certainty concerning preservation decision outcomes and reduce the perception of a politicized appellate process (a problem in other cities with a similar appellate process). The Mayor’s Agent in Washington, D.C. provides one example of an appellate entity with preservation expertise. Other jurisdictions allow for direct judicial appeal. In any event, we suggest that any appellate entity apply the same standards employed by the PHC, such as those required for designation.