



THE CITY OF SAN DIEGO

REPORT TO THE PLANNING COMMISSION

DATE ISSUED: June 18, 2009 **REPORT NO. PC-09-048**

ATTENTION: Planning Commission, Agenda of June 25, 2009

SUBJECT: HISTORICAL RESOURCES APPEAL PROCESS – A PROPOSED AMENDMENT TO THE TO THE LAND DEVELOPMENT CODE (PROCESS 5)

SUMMARY

Issue(s): Should the Planning Commission recommend approval to the City Council of an amendment to the Land Development Code Chapter 12, Article 3, Division 2, Designation of Historical Resources Procedures, to expand the City Council’s authority in the historical designation appeal process?

Staff Recommendation: That the Planning Commission recommend to the City Council either to maintain the current historic appeal process or adopt the proposed amendment that would expand the Council’s discretion in overturning a historical designation.

Environmental Review: This activity is not a “project” and is therefore not subject to CEQA pursuant to State CEQA Guidelines Section 15060(c)(3).

Fiscal Impact Statement: Work on this proposal has been funded through the City Planning & Community Investment Department General Fund budget.

Code Enforcement Impact: As proposed, the amended regulations would not result in an impact on Neighborhood Code Enforcement.

Housing Impact Statement: The proposed amendment would not affect provision of housing units.

BACKGROUND

Land Use and Housing Committee (LU&H): On June 26, 2006 the Land Use and Housing Committee took public testimony on the issue and referred the item to the full Council without a recommendation. In addition, LU&H requested an opinion from the City Attorney’s Office on the legality of both the current appeals process and the proposed amendment. The legal opinion was issued on June 25, 2008.

Historical Resources Board (HRB): On January 22, 2009, the Historical Resources Board voted 7-0-0 to recommend to the City Council to retain the current historical resource appeal process for the following reasons: [It] (1) maintains the designation decision with the technical experts appointed to the HRB and according to the Land Development Code, guidelines and published HRB policies and procedures; (2) maintains the distinction between a designation decision that is used to identify significant historical resources and a permitting decision that is used to regulate land uses; and (3) aligns with CEQA and definition of a historical resource.

Community Planners Committee (CPC): On February 24, 2009, the Community Planners Committee voted 23-1-0 to maintain the current historical resources appeal process.

Code Monitoring Team (CMT): On March 11, 2009, the Code Monitoring Team voted 3-1-1 to maintain the current process, recognizing that the land entitlement process is different from the historical resource designation process.

California State Office of Historic Preservation (OHP): On April 7, 2009, the Office of Historic Preservation sent an email stating their support for the Historical Resources Board recommendation that the City Council should maintain the current process and not adopt the proposed amendment.

DISCUSSION

The City Council referred this issue to Land Use and Housing (LU&H) after discussion about the current limited circumstances under which the City Council may overturn the action of the Historical Resources Board (HRB) to designate a historical resource. LU&H reviewed the issue on June 26, 2006, took public testimony, and referred the issue to the full City Council without a recommendation. In addition, LU&H requested an opinion by the City Attorney's Office on the legality of both the staff recommendation and the alternative proposed by attorneys representing the development community and property owners.

The authority to designate a historical resource in the City of San Diego has been with the HRB since it was established in 1965. This is, in large part, due to the composition of the HRB, including required historic preservation professionals. The decision whether or not a building, site, structure, object, landscape, or other resource should be designated a historical resource is based solely on its historical significance, consistent with adopted designation criteria. The circumstances surrounding an appeal of a historical designation relate to factual errors in materials or information, violations of HRB bylaws or hearing procedures, or presentation of new information.

The Land Development Code (LDC) allows nomination of a property for historical designation by the Mayor, City Council, HRB, or any member of the public, including the property owner. A research report is required for the submittal of a nomination and is relied on by the HRB in deciding whether or not the property meets one or more of the

adopted criteria for historical designation. The designation occurs at a noticed public hearing and the affirmative vote of six members of the 11-member HRB is required to designate a historical resource. In relatively few instances, a property owner does not want designation because of perceived or real constraints to redevelopment or use of the property and an appeal to the City Council is filed with the City Clerk following the HRB hearing.

Prior to the update of the Land Development Code, the City Council had full discretion in reviewing historical resources designations. In 2000, when the LDC went into effect, the citizen-based Preservation Ordinance Review Committee, Historic Sites Board, City Manager, Planning Commission, Mayor, and City Council all supported the revised appeal process in which the City Council may reject designation based on limited written findings in support of its decision. This process and the LDC language distinguish the decision of designation of a resource (an issue of historicity) from the regulation of that resource (an issue of land use control).

There have been approximately 38 appeals filed since 2000. Of these, the City Council overturned 10 and upheld 4 designations; 13 appeals were withdrawn after a design solution was worked out between staff and the appellant, and 11 appeals are on hold pending a hearing date. Nine of the 11 appeals on hold are located in the Downtown community planning area and were designated in 2004 through 2006. The other two appeals include the Kensington Neon Sign and a modernist-style commercial building in Sorrento Valley designated in 2008 and 2009, respectively.

Although the Mayor's office is taking a neutral position on the appeals issue, staff is processing the proposed revision to the Code. The proposed alternative Code language in a strikeout/underline format is provided in Attachment 1. The HRB reviewed the proposal in January and voted unanimously to recommend the City Council maintain the current process and not adopt the proposed change. The CPC reviewed the proposal in February and voted 23-1 to maintain the current process and in March 2009 the CMT also supported maintaining the current process. Because the City is a Certified Local Government (CLG) all amendments to our historical resources regulations must be reviewed by the Office of Historic Preservation (OHP). M. Wayne Donaldson, State Historic Preservation Officer, and OHP staff reviewed the proposed amendment language in April 2009 and support the HRB recommendation to maintain the current process. We are seeking a recommendation from the Planning Commission prior to docketing the item at City Council for action.

Additional background and analysis of the appeal process is provided below. The City Attorney's Memorandum of Law (MOL) is Attachment 2 to this report. The MOL concludes that the appeals issue is a matter of policy and the City Council has the legal authority to decide how they want to handle historic designation appeals, both the current process and the proposed amendment are acceptable from a legal perspective.

ANALYSIS

Current Process

Currently, the LDC limits the City Council's discretion in overturning a historical resource designation to factual errors in materials or information presented to the HRB, a violation of bylaws or hearing procedures by the HRB or an individual member, or the presentation of new information. In order to overturn a designation, the Council is required to make written findings in support of one or more of these circumstances. The LDC does not provide a finding to be made by the City Council that the decision by the HRB to designate a historical resource was not supported by the evidence presented to it. This is a finding common to all discretionary permit appeals; however, designation is not a discretionary permit process. This limitation places the authority to designate a property as a historical resource, based on adopted historical criteria, with the HRB and provides oversight of procedural issues associated with the designation process with the City Council.

If an appeal is filed and the designation of a historical resource is overturned by the City Council, the property is not a designated historical resource. The development regulations contained in Chapter 14 of the LDC governing designated historical resources do not pertain to the property and a Site Development Permit for historical resources would not be required for development of that property. If no other discretionary action is required by the City, then review under the California Environmental Quality Act (CEQA) would also not be required. If another discretionary action, such as a Coastal Development Permit, Site Development Permit (other than for historical resources), variance, etc, is required for development of the property, then CEQA review would be required.

It is determined on a case-by-case basis whether a resource, once designated by the HRB and overturned by the City Council, would be considered a historical resource under CEQA. There is language in CEQA that allows the lead agency to determine whether or not the building or structure is a historical resource and whether the demolition of it is a significant environmental impact.

Retaining the current appeal process would maintain the designation decision with the technical experts appointed to the HRB, would maintain the distinction between a designation decision that is used to identify significant historical resources in the City of San Diego and a permitting decision that is used to regulate land uses, and would closely align with CEQA. There are consequences of the current process to owners of historical resources who are seeking to redevelop their property. Demolition or substantial alteration of a designated resource requires a Process 4 Site Development Permit and CEQA review. The permitting and environmental review process can be lengthy and costly and could delay a development project. There are examples, however, of successful incorporation of designated historical resources into new projects and several appeals have been withdrawn after the owner and design team worked to incorporate the resource into the project design.

Alternative to Current Process

The alternative to the current narrow appeal process is to broaden the City Council's discretion in overturning a historical designation. It has been proposed, that a finding could be added to allow the City Council to determine the decision by the HRB to designate a historical resource was not supported by the evidence presented to it (see Attachment 3, information from Attorney Marie Burke Lia). This alternative would allow a new hearing before the City Council on the issue of historical designation. Including this finding for overturning a historical designation in the LDC would substantially increase the City Council's discretion, resulting in review of not only procedural aspects of the designation but also a review of the historical significance of the resource being appealed. This alternative would alter the current distinction between the determination of historical significance and the permitting of a development project, and would allow the City Council to grant an appeal under much broader circumstances.

Providing greater discretion by the City Council in the historic resource designation process would rest greater responsibility for the preservation of historic properties with elected officials rather than appointed HRB members. It has been suggested that this would politicize the process and make the determination of historic significance less rigorous with consideration of property owner interests increased above those of historic preservation. It has also been suggested that the process is already politicized in favor of historic preservation.

Potential consequences of broadening the appeals process include a potential increase in the number of designations that are appealed to the City Council, particularly by property owners who cannot feasibly retain the resource or incorporate it into a new project. There may be a reduction in the predictability of the entitlement process when a designation is uncertain, an increase in the timeframe necessary to process a discretionary approval when a designation is appealed and overturned, and an increase in the potential for court action following a successful appeal.

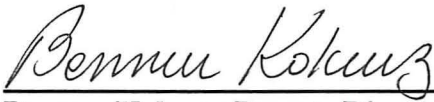
Other Jurisdictions

In order to address this issue, staff reviewed the appeal process of several other Certified Local Governments in California and found that in other jurisdictions, as is the case in San Diego, the appeal process is inextricably linked to the entire designation process and has to be viewed as part of the overall historic preservation program. It is, therefore, difficult to compare only appeal findings among jurisdictions. For example, some jurisdictions only allow a property owner to nominate a resource for designation, or require consent of the owner for nomination. These limitations on nomination would eliminate the need for an appeal process. Many other jurisdictions require historic designations to be approved by the elected body following a recommendation by the resources board or commission. In these cases, appeals are made to the court.


CONCLUSION

In conclusion, staff recommends that the Planning Commission recommend to the City Council either maintaining the current historical resource designation appeal process or adoption of the proposed alternative that would expand the Council's discretion in overturning a historical designation, or remain neutral on the issue and not present a recommendation to the City Council.

Respectfully submitted,



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KOKSUZ/CW

Attachments:

1. Proposed Code amendment language
2. Memorandum of Law dated June 25, 2008
3. Information from Attorney Marie Burke Lia

Article 3: Zoning**Division 2: Designation of Historical Resources Procedures****§123.0201 Purpose of Historical Resource Designation Procedures**

The purpose of these procedures is to establish a process to identify and designate for preservation those *historical resources* that embody the special elements of the city's architectural, artistic, cultural, engineering, aesthetic, historical, political, social, and other heritages.

§123.0202 Designation Process for Historical Resources

- (a) **Nominations.** Nominations of a *historical resource* to become a *designated historical resource* may originate from the Historical Resources Board, the City Manager, the City Council, or any member of the public including the property owner by submitting a research report or similar documentation, as identified in the Historical Resources Guidelines of the Land Development Manual, to the Board's administrative staff for consideration by the Board. Nominations from the City Manager may originate as a result of a site-specific survey required for the purpose of obtaining a construction or *development permit* consistent with Section 143.0212.
- (b) **Public Notice to Owner.** The owner of a property being considered for designation by the Historical Resources Board shall be notified at least 10 *business days* before the Board hearing. Notice to the owner shall contain information about the potential impacts of designation and a request to contact the Board's administrative staff regarding information for making a presentation to the Board on the proposed designation. No action shall be taken by the Board to designate a *historical resource* except at a public hearing that provides all interested parties an opportunity to be heard.
- (c) **Adequacy of Research Report.** The decision on whether or not to designate a *historical resource* shall be based on the information in a research report, as specified in the Historical Resources Guidelines of the Land Development Manual. If the Board determines, either by public testimony or other documentary evidence presented to it, that the research report is not adequate to assess the significance of the *historical resource*, the Board may continue its consideration of the property for up to two regular meetings and direct that a research report be prepared by the applicant with specific direction from staff as to the inadequacies of the original report. The revised research report may be prepared by City staff or volunteers, with a copy provided to the owner at least 10 *business days* before the next Board meeting at which the designation will be considered. If a final decision is not made within 90 calendar days of receipt of a nomination for designation, the consideration of the property by the Board shall terminate unless a continuance has been granted at the request of the property owner.

- (d) Continuance. At the request of the property owner, the Historical Resources Board shall grant a continuance of one scheduled Board meeting after the motion has been made to designate a *historical resource*.
- (e) Historical Resources Board Decision. The Historical Resources Board shall review the Research Report and shall make a decision on whether to designate a *historical resource* based on the criteria specified in, and consistent with the procedures of the Historical Resources Guidelines of the Land Development Manual. The action to designate shall require the affirmative vote by six members of the Board.
- (f) Findings. The decision to designate a *historical resource* shall be based on written *findings* describing the historical significance of the property.
- (g) Re-initiation of Designation Proceedings. Designation procedures may not be re-initiated within 5 years without owner consent, absent significant new information.

§123.0203 Appeal From Historical Resources Board Decision

(a) The action of the Historical Resources Board in the designation process is final 11 *business days* following the decision of the Board unless an appeal to the City Council is filed with the City Clerk no later than 10 *business days* after the action of the Board. The decision of the Historical Resources Board may be appealed by an *applicant* or an *interested person*. An appeal shall be in writing and shall specify wherein there was error in the decision of the Board. The City Council may reject designation on the basis of the following:

- (1) ~~F~~Actual errors in materials or information presented to the Board,
- (2) ~~V~~Violations of bylaws or hearing procedures by the Board or individual member, ~~or~~
- (3) ~~P~~resentation of new information, ~~or~~
- (4) The findings required by Section 123.0202(f) are not supported by the information provided to the Historical Resources Board.

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- (b) Upon the filing of the appeal, the City Clerk shall set the matter for public hearing as soon as is practicable and shall give written notice to the property owner and the appellant of the time and date set for the hearing. At the public hearing on the appeal, the City Council may by resolution affirm, reverse, or modify the determination of the Board and shall make written *findings* in support of its decision.

§123.0204 Recordation of Designated Historical Resources

No later than 90 calendar days following the final decision to designate a *historical resource*, the City Manager shall record the designation with the County Recorder.

§123.0205 Amendment or Recision of Historical Resource Designation

The Historical Resources Board may amend or rescind any designation of a *historical resource* in the same manner and procedure as was followed in the original designation. This action may be taken only if there is new information, the discovery of earlier misinformation, or a change in circumstances surrounding the original designation.

§123.0206 State and National Register

The City Council shall consider endorsing the nomination of a *historical resource* for inclusion in the California Register of Historic Resources and the National Register of Historic Places upon recommendation of the Historical Resources Board.

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Michael J. Aguirre
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MEMORANDUM OF LAW

DATE: June 25, 2008

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Reforming the Appeals of Historical Resources Board Designations (San Diego Municipal Code § 123.0203)

INTRODUCTION

On November 9, 2004, the City Council referred to the Land Use and Housing Committee [LU&H] for further consideration the topic of reforming the appeals of historical resource designations decided by the Historical Resources Board [HRB]. On June 21, 2006, the LU&H requested that this office evaluate contrasting reform proposals, analyze the legislative history of designation appeals, and examine designation appeals elsewhere in California.¹ The LU&H then returned this matter back to the City Council. (Attachment A) Currently, the City Council may affirm, reverse, or modify HRB designations, but is limited, absent new information, to finding the HRB made procedural or factual errors. San Diego Municipal Code section 123.0203 governs HRB appeals:

- (a) . . . The City Council may reject designation on the basis of *factual errors* in materials or information presented to the Board, violations of bylaws or hearing *procedures* by the Board or individual member, or presentation of *new information*.
- (b) . . . At the public hearing on the appeal, the City Council may by resolution *affirm, reverse, or modify* the determination of

¹ Although not among the LU&H requests, this memorandum analyzes an important, closely related matter, namely, should San Diego Municipal Code section 123.0205 be amended to clarify that the HRB may not amend or repeal its designations while an appeal is pending with the City Council?

the Board and shall make written findings in support of its decision.

Emphasis added. As stated, there are contrasting proposals to reform HRB designation appeals. (Attachment B) Each would broaden the City Council's discretion over these appeals. One would allow the Council to remand appeals back to the HRB; the other would allow it to review designations from scratch.² The Office of the Mayor proposes to give the Council the remand option. Historical resources consultant, Marie Burke Lia, proposes the alternative, to give the City Council blanket discretion to review HRB designations. This is commonly called *de novo* review. It would no longer limit the Council to finding procedural or factual errors, to reverse or modify designations, and unlike the remand proposal, does not defer to the collective expertise of the HRB in considering the merits of an appeal.

QUESTIONS PRESENTED

1. May the City Council reform the appeals process for HRB historical resource designations, to give the City Council discretion to either remand appeals back to the HRB for reconsideration or conduct de novo review?
2. What standards of review for the appeal of historical resource designations have been applied by other comparable California cities?
3. Should City Council clarify that the HRB may not amend or repeal a previous historical designation while an appeal of that designation is pending with the City Council?

SHORT ANSWERS

1. Yes, the San Diego Charter in no way restricts the City Council review on appeal. Thus the City Council may adopt either of the proposals to reform the appeals of HRB historical resource designations, or both.
2. Other California charter cities and major metropolitan areas have adopted the de novo standard of review, some with provisions that give deference to the collective expertise of their historical board.

² Another proposal, to exclude community stakeholders, and restrict the right to appeal to property owners, was subsequently withdrawn, and is therefore not analyzed in this memorandum.

3. Yes, this would protect the City Council's jurisdiction until it decides an appeal, thus harmonizing local law governing designation appeals with state law governing judicial appeals.

ANALYSIS

I. The City Council May Reform the Appeals of Historical Designations Because the San Diego Charter Does Not Restrict Its Review of Board Decisions.

The City Council has plenary authority to reform the appeals process and standard of review applied to HRB historical resource designations because the San Diego Charter in no way restricts City Council review of any HRB decisions.

Generally, where a city charter empowers a city council to enact zoning regulations, and it neither limits council in its consideration of an appeal, nor restricts it from hearing an appeal *de novo*, then *de novo* review of board or commission decisions may be applied. *De novo* review means a council may give full consideration to all the facts and issues.

In *Break Zone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1221 (2000), the court held, that where the local ordinance did not otherwise limit city council review, *de novo* review was correctly applied to an appeal of a planning commission decision to grant a conditional use permit. The San Diego Charter empowers the City Council to enact zoning regulations and nowhere limits City Council review, either procedurally or substantively. Indeed, San Diego Charter section 11 maximizes the legislative power of the City Council without express or implied limits on how it considers appeals of any boards or commission decisions.

All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State.

San Diego Charter § 11. Further, the state supreme court in *Lagrutta v. City Council*, 9 Cal. App. 3d 890, 894 (1970), held a city council had the power and the obligation to hear an appeal from planning commission *de novo*. This holding underscores the extent to which charter cities like the City of San Diego may regulate land use and zoning.

In 1914, section 6 of article XI of the state Constitution was amended to provide that cities could amend existing charters and adopt new ones 'to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.

Emphasis added. Lagrutta, p. 894. Historical resource designation an area of zoning that lies firmly within the constitutional police power of local governments. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 129 (1978); *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 422- 423 (1973).

The HRB is just one of several boards created by the Council to advise on land use matters. San Diego Municipal Code § 11.0201 et. seq. San Diego Charter section 43 gives the City Council full legislative power create advisory boards and to govern their powers and duties. San Diego Charter § 43. Neither this section, nor any other section of the San Diego Charter, limits the Council’s review of any actions of the HRB, or any other advisory board. Therefore *de novo* review of HRB historical designations is entirely within the legal purview of the Council. Nor should it be surprising then that Council may adopt a lesser or different standard of review (*Break Zone Billiards*, 81 Cal. App. 4th at 1221, fn 10; *Lagrutta*, 9 Cal. App. 3d at 895.) including the remand of appeals back to the HRB for reconsideration.

The City Council created a Historic Site Board on December 6, 1965. It gave the board authority to create a local register of historic sites but it was silent on the right to appeal board decisions. SDMC § 26.02(D)(2). As explained, this silence could not prevent board decisions from being appealed to the Council, and could not prevent the Council from applying the *de novo* standard of review. Twenty-four years later, on April 24, 1989, the City Council amended (and renumbered) the city’s historical resources regulations. For the first time, it expressed the right to appeal Board decisions, “. . . within ten (10) days of the action . . .,” and broadly authorized the Council to, “. . . affirm, reverse or modify the determination of the Board.” SDMC § 26.0204(G). It was however silent on the standard of review and thus the Council could continue to give fresh and full consideration to all the facts and issues – that is *de novo*. Not for another seven years, on December 9, 1997 (during the first major overhaul of the Land Development Code) did the City Council adopt the current and more limited standard of review for HRB appeals. In retrospect, until recently, the City Council exercised *de novo* review authority over HRB appeals uninterrupted for thirty-two years.³ Thus reverting to this standard, as proposed by consultant Maria Burke Lia, has strong historical precedent.

In sum, the City Council has considerable flexibility to consider the proposals before it, to reform the standard of review of HRB designation appeals, because the state constitution and state law give the City of San Diego wide latitude to create and govern advisory boards, and the San Diego City Charter in no way restricts City Council review of advisory board decisions.

II. The Standard of Review Applied to Appeals of Historical Designations in Other Comparable California Cities.

The LU&H requested a review of how other local governments approach the appeals process for historical designations. Most California cities with historic preservation ordinances

³ The foregoing legislative history is documented at Attachment E.

specify procedures and standards of review for designation appeals. The State Office of Historic Preservation recommends including provisions that defer to the collective expertise of historic boards. Such provisions, for example, may allow planning staff decisions to be appealed or forward appeals to boards with specialized expertise, or allow designations to become final and only denials to be appealed. Drafting Effective Historic Preservation Ordinances, Department of Parks and Recreation, California Office of Historic Preservation, Technical Assistance Bulletin #14, Rev. 2005, p. 76. Many cities review designation appeals *de novo*, including two of the largest California metropolitan areas, Los Angeles and San Francisco.

First, we review the City of Los Angeles. Their Cultural Heritage Commission is advisory only and can not designate historical resources. Los Angeles Administrative Code, 2nd Ed. § 22.171.10 (c)(1). Appeals go to city council, and are *de novo*, but the appeals proceeds depending on how the resource was initially nominated.

1. If city council initiates the designation, and the commission recommends designation, the council may designate on a majority vote, but if the commission recommends against designation, then a two-thirds majority is required to override the recommendation. (Los Angeles Administrative Code, 2nd Ed. § 22.171.10(c)(2))
2. If the commission, or the city planning department director, initiates the designation, and the commission recommends designation, the city council may, again, designate by a simple majority, but if the commission recommends against designation, it is final. (Los Angeles Administrative Code, 2nd Ed. § 22.171.10(c)(3))

This ordinance gives deference to the expertise of their commission by raising the bar to surmount recommendations against designation.⁴

Second, we review the City and County of San Francisco. Their Landmarks Preservation Advisory Board is also is advisory only. It may recommend for or against proposed designations to the planning commission. San Francisco Municipal Code § 1004.2. The planning commission decides designations, either by approving, disapproving, or modifying advisory board recommendations. San Francisco Municipal Code § 1004.3(b). The planning commission automatically transmits approvals and modifications, but not disapprovals, to the board of supervisors. San Francisco Municipal Code § 1004.3(c). Upon transmittal, the board of supervisors may affirm or modify, but not reverse, the designation. San Francisco Municipal Code § 1004.4. Planning commission denials are final but may be appealed. San Francisco Municipal Code § 1004.5. On appeal, the board of supervisors may overturn the planning commission designation by a simple majority, and the standard of review is *de novo*. San

⁴ On February 7, 2008, the Los Angeles Office of Historic Resources issued recommendations for a comprehensive revision of their Cultural Heritage Ordinance, which has been modified little since it was approved in 1962.

Francisco Municipal Code § 1004.5(b). By automatically transmitting designations, and restricting appeals to denials, this ordinance defers to the specialized land use and zoning expertise of their planning commission.

The Office of the Mayor has requested, in general, that our historical resources regulations be compared to those of following cities:

- Los Angeles
- San Francisco
- Sacramento
- San Jose
- Riverside
- Ontario

The historic boards of the last four cities, Sacramento, San Jose, Riverside, and Ontario, only recommend designations, they do not decide them, and so their historic regulations do not contribute to this analysis. To provide still a few more comparisons, our office drew from a list of sample cities, compiled by the State Office of Historic Preservation, other charter cities with designation appeals provisions. These included the cities of Fresno, Pasadena, and Glendale.

In the City of Fresno, the Historic Preservation Commission is advisory only (Municipal Code of Fresno § 12-1609(c)(2)), however the city council, by a majority vote, may reconsider its own previously disapproved designations. The standard of review is *de novo*.

No proposal for designation once considered *and disapproved* by the Council *shall be reconsidered* except upon the affirmative vote of four Council members. Any decision to reconsider shall be *treated as a new proposal* for designation.

Emphasis added. Municipal Code of Fresno § 12-1620(d). The San Diego Municipal Code generally allows City Council to reconsider its actions, but unlike the City of Fresno, it does not specifically address actions on board or commission appeals, or designation appeals. San Diego Municipal Code § 2.11 et. seq. The HRB itself has adopted procedures to reconsider its own designations, conditioned on new facts or changed circumstances. San Diego Historical Resources Board Procedures, Section 2(C), Revised January 24, 2008.

In the City of Pasadena, the Historic Preservation Commission is also advisory only (Pasadena Municipal Code § 2.75.045(a)), however before the commission considers a designation, the zoning director makes a preliminary determination. Pasadena Zoning Code § 17.62.050(A)(3). If that determination is against designation, it is appealable to the commission. Pasadena Zoning Code § 17.62.050(A)(4). In turn, commission designations are appealable to the council. Pasadena Zoning Code § 17.62.050(B)(1). The standard of review there is *de novo*. Pasadena Zoning Code § 17.62.050(B)(3). By comparison, preliminary determinations by the City of San Diego Office of the Mayor are neither codified nor appealable.

The City of Glendale Historic Preservation Commission is also advisory only. Glendale Municipal Code § 2.76.100(A). However, if the commission was authorized to designate historic resources, the Glendale Municipal Code uniform appeal procedures allow council, on condition, to remand decisions back to its boards and commissions.

[If] the council determines that *new and material evidence not previously presented* to the respondent is available and such evidence could not with reasonable diligence have been discovered and produced at the prior hearing before the respondent . . .

Emphasis added. Glendale Municipal Code § 2.88.060(A). The appeal procedures also allow the council to hear board and commission appeals *de novo*.

[Appeals hearings] shall be held as a part of the regular meetings of the council. The hearing shall be *de novo*, in that *an independent reexamination of the matter shall be made* . . .

Emphasis added. Glendale Municipal Code section 2.88.090. In sum,

Upon the hearing of the appeal the council *may refer the matter back* to the respondent board, commission or officer, with directions, for further consideration, *or it may reverse, affirm or modify* the determination or the action of the respondent, and it may make such decision or determination as may appear just and reasonable in the light of the evidence presented, and its decision or determination shall be final and conclusive.

Emphasis added. Glendale Municipal Code section 2.88.100.

Thus, it is not uncommon for California cities, comparable to the City of San Diego, to adopt *de novo* review of historical resource designations. Further, *de novo* appeals ordinances may be augmented with provisions giving deference to the collective expertise of historical boards, or other boards that specialize in land use and zoning. As recommended by the State Office of Historic Preservation, and as appear in other charter city municipal codes, these provisions, for purposes of drafting a local ordinance, would operate to:

- Allow City staff decisions to be appealed to the HRB, when staff declines to nominate a resource for designation.
- Permit HRB to reconsider designations but only after it denies a designation.
- Limit HRB appeals to the City Council, to when the HRB denies a designation.
- Require the City Council to override HRB designations by a supermajority.

III. Municipal Code § 123.0205 Should Explicitly Stay HRB From Changing a Designation While an Appeal is Pending with the City Council.

Finally, while considering amendments to the designation appeals process, San Diego Municipal Code section 123.0205 also should be reviewed, in tandem, and amended to clarify that the HRB may not amend or repeal its designations while an appeal is pending with the City Council. San Diego Municipal Code section 123.0205 governs the amendment of historical resource designations:

The Historical Resources Board may amend or rescind any designation of a *historical resource* in the same manner and procedure as was followed in the original designation. This action may be taken only if, and there is new information, the discovery of earlier misinformation, or a change in circumstances surrounding the original designation.

In 1988, this office opined, in a Memorandum to Ron Buckley, then-Secretary to the Historical Site Board, that the board loses its jurisdiction once an appeal is filed to City Council. This opinion drew an analogy to state law that an appeal from the trial court to the appellate court stays the lower court proceeding.

[T]he perfecting of an appeal *stays proceedings in the trial court* upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

Emphasis added. Cal. Code Civ. Pro. § 916 (a). “The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.” *In re Marriage of Varner*, 68 Cal. App. 4th 932, 936 (1988). Staying the HRB until the City Council decides an appeal is similarly beneficial because under the remand proposal, for example, the City Council could send a designation back to the HRB, or, under the *de novo* proposal, could reverse the designation. In either case, if the HRB were to amend the designation, the appeals decision could render the amendment moot.

To provide a stable procedure, and prevent confusion among Council members, the HRB, and the parties appealing, the municipal code should be more precise than it is. To wit, San Diego Municipal Code section 123.0205 should be amended to explicitly stay the HRB when appeals are pending with the City Council:

The Historical Resources Board may amend or rescind any designation of a *historical resource* in the same manner and procedure as was followed in the original designation. This action may be taken only if there is no appeal pending before the City Council, and there is new information, the discovery of earlier misinformation, or a change in circumstances surrounding the original designation.

CONCLUSION

The City Council has ample leeway to reform the appeals process for HRB historical resource designations. It may remand or conduct *de novo* reviews, or both. There is considerable precedent locally and statewide for *de novo* review of historical designation appeals. Some jurisdictions also include provisions that defer to the collective expertise of historical or other boards that specialized in land use and zoning.

MICHAEL J. AGUIRRE, City Attorney

By

Marianne Greene
Deputy City Attorney

MG:als
ML-2008-11

List of Attachments:

Attachment A: June 26, 2006, Land Use and Housing Committee, Meeting minutes.
Attachment B: June 14, 2006, Report to Council, Revisions to the Historical Resource Designation Appeal Process, Report No. 06-073.
Attachment C: Legislative history of San Diego Municipal Code § 123.

cc: Mary Wright, Deputy Director, City Planning and Community Investment
Cathy Winterrowd, Senior Planner, City Planning and Community Investment
Maria Burke Lia, Attorney-at-Law
John Lemmo, Chair, Historic Resources Board

Marie Burke Lia
Attorney at Law

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! MEMO !
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TO: Code Monitoring Team

FROM: Marie Lia

DATE: 3/10/09

RE: Historical Resources Appeal Process, February 24, 2009 Agenda

This Memo is intended to supplement the material contained in my 5/26/07 Memo to Betsy McCullough on this topic, which was attached to the 11/17/08 HRB Staff Report No. HRB-08-073 and will likely be distributed to you.

Background:

In November of 2004, during an appeal hearing of an involuntary historical designation action, Council Member Zucchet raised the issue of the Council's limited authority to consider these appeals and his belief that this was bad public policy. The Mayor agreed with him and the City Attorney noted that these appeal code provisions could be changed. The following Motion was approved:

"Accept Mayor Murphy's request that the land use and housing committee clarify whether the City Council should have greater ability to examine the underlying public policy concerning historical designations; and whether there should be a broader criteria established in order for the City Council to hear an appeal."

In April of 2005, I submitted my first memo on this subject to Betsy McCullough suggesting that appeals from the HRB be treated the same as all other discretionary permit appeals. The particular code section at issue is and was §123.0203(a). Subsequent to that first memo, other land use attorneys have joined me in this effort to respond to the Council's November 2004 request.

In June of 2006, this matter was considered by the Land Use and Housing Committee. Among the items we submitted for the Committee's consideration was an Appeal Rights Comparison Chart, a copy of which is attached to this Memo.

At the conclusion of the June 2006 LUH meeting, the City Attorney's office was asked to review both the HRB staff's position in this matter and our Alternative proposal. The City Attorney's office issued an opinion on this issue in November of 2006 and again in July of 2008. Both

opinions were consistent: that it was up to the Council to make this policy decision and that either alternative was within their authority to adopt.

After our meeting with your Committee, the Planning Commission will review and make their recommendations on this topic. We hope to get to the City Council soon after the Planning Commission hearing.

Our Alternative:

As indicated in the Proposed Code Change document submitted for your agenda, the grounds upon which the Council could reject a designation under our alternative are:

1. Factual errors in materials or information presented to the Board;
2. Violations of bylaws or hearing procedures by the Board or individual member, or
3. Presentation of new information, or
4. *The Findings required by Section 123.0202(f) are not supported by the information provided to the Historical Resources Board.*

The fourth finding is what we are proposing and is consistent with the Municipal Code provisions pertaining to Planning Commission appeals.

I had a transcript prepared of the discussion of this issue at the Historical Resources Board and it is apparent from the transcript that there is a great deal of misunderstanding of how appeal hearings are conducted. Many speakers believed that the City Council members would repeat the actions taken by the Historical Resources Board members, i.e. visiting the site, applying the Municipal Code's designation criteria based on their own expertise, etc. This is incorrect.

When a matter is appealed to a legally superior body, that body reviews the record that was before the lower decision makers to determine whether the record on appeal establishes the grounds upon which the appeal may be upheld. Currently, the Council reviews the appeal record to determine if there were factual errors in materials or information presented to the Board, if there were violations of bylaws or hearing procedures committed by the Board or a member or if there is new information that would justify upholding the appeal. If our alternative is adopted, the City Council would also be able to uphold the appeal if the findings that the Board adopted were not supported by the information provided to the Board. The Council will not repeat the actions taken by the Board; it will review the entire record on appeal and make the determination as to whether the appeal should be upheld based upon that record. It will do exactly what it does with Planning Commission appeals, it doesn't act as a duplicate Planning Commission, it acts as an appellate authority.

I hope this information is helpful and that your Committee will pass this matter along with your comments and recommendations to the City Council so we can return to them within five years of the date they sent this matter out for review. I am sorry a previous commitment prohibits me from attending your meeting in person.



MBL

CC: Cathy Winterrowd

APPEAL RIGHTS COMPARISON

Planning Commission to City Council

Historical Resources Board to City Council

Process Three Grounds for Appeal:

1. Factual Error
2. New Information
3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code

Grounds for Appeal from Designation:

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

Process Four Grounds for Appeal:

1. Factual Error
2. New Information
3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code
5. Matter of Citywide Significance

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

Sources: San Diego Municipal Code Sections 112.0506 (c) and 112.0508(c)

Source: San Diego Municipal Code Section 123.0203(a)

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! MEMO !
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TO: Nicholas O'Donnell, Community Planners Committee
FROM: Marie Lia
DATE: 2/23/09
RE: Historical Resources Appeal Process, February 24, 2009 Agenda

This Memo is intended to supplement the material contained in my 5/26/07 Memo to Betsy McCullough on this topic, which was attached to the 11/17/08 HRB Staff Report No. HRB-08-073, provided your Committee by Ms. Winterrowd.

Background:

In November of 2004, during an appeal hearing of an involuntary historical designation action, Council Member Zucchet raised the issue of the Council's limited authority to consider these appeals and his belief that this was bad public policy. The Mayor agreed with him and the City Attorney noted that these appeal code provisions could be changed. The following Motion was approved:

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In June of 2006, this matter was considered by the Land Use and Housing Committee. Among the items we submitted for the Committee's consideration was an Appeal Rights Comparison Chart, a copy of which is attached to this Memo.

At the conclusion of the June 2006 LUH meeting, the City Attorney's office was asked to review both the HRB staff's position in this matter and our Alternative proposal. The City Attorney's office issued an opinion on this issue in November of 2006 and again in July of 2008. Both

opinions were consistent: that it was up to the Council to make this policy decision and that either alternative was within their authority to adopt.

We are now on our way to the Council, having first obtained the Historical Resources Board's recommendation. Your Committee will be the next to comment and the DSD Code Monitoring Team will follow. After that, the Planning Commission will review and make their recommendations on this topic. We hope to get to the City Council soon after the Planning Commission hearing.

Our Alternative:

As indicated in the Proposed Code Change document submitted for your agenda, the grounds upon which the Council could reject a designation under our alternative are:

1. Factual errors in materials or information presented to the Board;
2. Violations of bylaws or hearing procedures by the Board or individual member, or
3. Presentation of new information, or
4. *The Findings required by Section 123.0202(f) are not supported by the information provided to the Historical Resources Board.*

The fourth finding is what we are proposing and is consistent with the Municipal Code provisions pertaining to Planning Commission appeals.

I had a transcript prepared of the discussion of this issue at the Historical Resources Board and it is apparent from the transcript that there is a great deal of misunderstanding of how appeal hearings are conducted. Many speakers believed that the City Council members would repeat the actions taken by the Historical Resources Board members, i.e. visiting the site, applying the Municipal Code's designation criteria based on their own expertise, etc. This is incorrect.

When a matter is appealed to a legally superior body, that body reviews the record that was before the lower decision makers to determine whether the record on appeal establishes the grounds upon which the appeal may be upheld. Currently, the Council reviews the appeal record to determine if there were factual errors in materials or information presented to the Board, if there were violations of bylaws or hearing procedures committed by the Board or a member or if there is new information that would justify upholding the appeal. If our alternative is adopted, the City Council would also be able to uphold the appeal if the findings that the Board adopted were not supported by the information provided to the Board. The Council will not repeat the actions taken by the Board; it will review the entire record on appeal and make the determination as to whether the appeal should be upheld based upon that record. It will do exactly what it does with Planning Commission appeals, it doesn't act as a duplicate Planning Commission, it acts as an appellate authority.

I hope this information is helpful and that your Committee will pass this matter along with your comments and recommendations to the City Council so we can return to them within five years of the date they sent this matter out for review. I am sorry a previous commitment prohibits me from attending your meeting in person.

MBL

CC: Cathy Winterrowd

APPEAL RIGHTS COMPARISON

Planning Commission to City Council

Historical Resources Board to City Council

Process Three Grounds for Appeal:

Grounds for Appeal from Designation:

1. Factual Error
2. New Information
3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

Process Four Grounds for Appeal:

1. Factual Error
2. New Information
3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code
5. Matter of Citywide Significance

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

Sources: San Diego Municipal Code Sections 112.0506 (c) and 112.0508(c)

Source: San Diego Municipal Code Section 123.0203(a)

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TO: Betsy McCullough
FROM: Marie Lia
DATE: 5/26/07
RE: HRB Appeals – City Council Consideration

As you know, on November 9, 2004, the City Council referred a particular matter, pertaining to Appeals from Historical Resources Board (HRB) designations, to the Land Use and Housing (LUH) Committee. Although I wasn't present at that hearing, I understand that the issue of concern to the Council on that date was the limited extent of their discretion over appeals from HRB designation decisions. As the result of that 2004 Council action, most if not all appeals from Historical Resources Board decisions have been on hold since that time.

On June 3, 2005, I submitted a Memo to you on this topic that was intended to present an approach for resolving this issue so that the appeal process could be reactivated and the backlog of appeals eliminated. On June 21, 2006, this matter was heard by the Council's Land Use and Housing Committee. In your staff report to the Committee, you included my June 3, 2005 Memo and commented upon it. On June 21, 2006, the Committee referred this issue to the full Council, but asked the City Attorney's Office to address certain issues in the interim.

The purpose of this Memo is to restate my proposed June 2005 approach for resolving this appeal issue as follows:

In order to review this issue, I compared the pre 2000 Municipal Code and the post 2000 Municipal code on this topic and found a series of provisions that might be considered relevant to this issue. I recall that you were very much involved in the 2000 Code and, therefore, you may be familiar with these provisions.

1. The former Historical Site Board Ordinance, SDMC 26.0201, pages 128-130 contained paragraph 26.0204 G, the last sentence of which read: "Upon the hearing of such appeal, the City Council may by resolution, affirm, reverse or modify the determination of the Board." This I would interpret to mean that the Council had full discretion to act on any appeal.
2. The current Historical Resources Board Ordinance, SDMC 123.0203 (a) limits the bases on which the City Council can reject designation to three grounds: factual error in

materials or information presented to the Board, violations of by-laws or hearing procedures by the Board or individual member, or presentation of new information. This would be characterized as limited discretion.

3. The current HRB Ordinance at SDMC 123.0203 (b) also retains the provision that the "City Council may by resolution affirm, reverse or modify the determination of the Board" and adds "and shall make written findings in support of its decision." It would appear that subsection (a) controls subsection (b) and that limited discretion is in place regardless of 123.0203 (b).

4. With regard to the Discretionary Permit Process in general, the current SDMC provides for different levels of the decision process as follows:

- Pursuant to SDMC 112.0503 Process Two (b), the designated staff person may approve, conditionally approve or deny the application without a public hearing. This can be interpreted as full discretion.
- Pursuant to SDMC 112.0504 Process Two Appeal Hearing (d), the Planning Commission may affirm, reverse or modify the staff decision. This can be interpreted as full discretion.
- Pursuant to SDMC 112.0505 Process Three (b), the Hearing Officer may approve, conditionally approve or deny the application. This can be interpreted as full discretion.
- Pursuant to SDMC 112.0506 Process Three Appeals (c), the grounds for appeal are four: (1) factual error, (2) new information, (3) *findings not supported by the information provided to the decision maker* or (4) the decision is in conflict with a land use plan, City Council policy or the Municipal Code.
- Pursuant to SDMC 112.0506 Process Three Appeals (e), the Planning Commission or Board of Zoning Appeals may affirm, reverse, or modify the decision being appealed. This full discretion is impliedly limited by the fact that one of the grounds for appeal must have been sustained.
- Pursuant to SDMC 112.0507 Process Four (b), the Planning Commission may approve, conditionally approve or deny the application. This can be interpreted as full discretion.
- Pursuant to SDMC 112.0508 Process Four Appeal (c), the grounds for appeal are five: (1) factual error, (2) new information, (3) *findings not supported by the information provided to the decision maker*, (4) the decision is in conflict with a land use plan, City Council policy or the Municipal Code or (5) the matter is of Citywide significance.
- Pursuant to SDMC 112.0508 Process Four Appeal (e) the City Council may affirm, reverse, or modify the decision being appealed. This full discretion is impliedly limited by the fact that one of the grounds for appeal must have been sustained.
- Pursuant to SDMC 112.0509 Process Five (c), the City Council may approve,

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conditionally approve or deny the application. This can be interpreted as full discretion.

One can assume that the terminology of SDMC 123.0203 (a), limiting the bases upon which the Council may reject designation, is intended to serve the same purpose as the grounds for appeal language in other discretionary permit appeal code sections. While it is true that the two processes differ in that involuntary designation actions are brought by the City against the property owner and discretionary permit applications are brought by the property owner seeking development rights from the City, the appeal processes have similar objectives. The appellant is seeking review by a higher level decision maker of a decision made below. It is not disputed that under both the pre 2000 Code and the post 2000 Code, the City Council is the higher level decision maker over the Historical Resources Board.

It would seem logical, therefore, for the grounds for appeal from HRB designation decisions should be similar to the grounds for appeal from Hearing Officers and the Planning Commission in that the missing ground, italicized when quoted above, "findings not supported by the information provided to the decision maker," should be inserted. That would give the Council the ability to uphold a designation appeal when the findings are not supported by the evidence presented to the HRB. This would give the Council the discretion that they evidently feel is lacking in the current HRB ordinance.

As you may recall, I and other land use attorneys presented this approach to the Land Use and Housing Committee and we intend to continue to pursue this approach when the matter is heard by the City Council. Thank you for consideration of our position in this matter

MBL

cc: James Dawe
Scott Moomjian
Robin Munro
Matt Peterson
Robert Wright
Mike McDade
Neil Hyttinen
Lynne Heidel

APPEAL RIGHTS COMPARISON

Planning Commission to City Council

Process Three Grounds for Appeal:

1. Factual Error
2. New Information
3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code

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1. Factual Error
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3. *Findings not Supported by Evidence Presented to Decision Maker*
4. Conflict with land use plan, City Council Policy or Municipal Code
5. Matter of Citywide Significance

Sources: San Diego Municipal Code
Sections 112.0506 (c) and 112.0508(c)

Historical Resources Board to City Council

Grounds for Appeal from Designation:

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

1. Factual Error in Materials or Information
2. Violation of By-laws or Procedures
3. New Information

Source: San Diego Municipal Code Section
123.0203(a)