

# Historic Preservation Handbook for Texans: Laws and Incentives at the Local, State and Federal Levels



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## Context

This document grew out of Historic Fort Worth, Inc.'s mission: A dedication to preserving Fort Worth's unique historic identity through stewardship, education and leadership. Education has long been a mainstay of Historic Fort Worth's activities, but it has mostly been within the Fort Worth City Limits. In 2015, the board of HFW recognized an opportunity to broaden its educational outreach throughout the state of Texas when it became clear to them that there was a lack of preservation law education amongst attorneys across the state especially in the area where preservation laws work as an economic catalyst for historic preservation. This is an area where knowledgeable attorneys can advise their clients on economic incentives for the rehabilitation of cultural resources and the protections provided by preservation law.

Most people can visualize the positive effects of historic preservation: restored buildings that had fallen on hard times, revitalized brown-field sites that were previously only known for their pollution, rural conservation of buildings and landscapes, and thriving Main Street programs across the United States. Here in Texas, historic preservation brings to mind the state's ongoing Courthouse Preservation Program, the highly successful Texas Main Street Program, and the numerous historical markers found along nearly every road and highway statewide. Yet what is often unseen are the laws and regulations that help to guide best practices in preservation and the preservation laws that act as economic generators for future historic preservation.

The goal of this document is to provide an educational tool for attorneys throughout Texas. With a better understanding of the laws that are the foundation of federal, state, and local preservation ordinances, attorneys and their clients will be able to better understand the full range of options available to protect a historic site and the economic incentives available through these preservation laws.

This project would not have been possible without a generous grant from the Texas Bar Foundation. Their continual efforts to educate the public about their rights and responsibilities under the law have contributed to the well-being of Texas citizens for over 50 years. Special thanks must also be given to Natalya Crowley and Joanne Barron for their keyboarding and document layout, Kate Schwartz and Justin Newhart, HFW Program Directors, Steve Klein, preservation consultant, who put much time, energy and effort into the creation of this the document, and to Jerre Tracy, Historic Fort Worth's executive director for the administrator of this project.

Historic Fort Worth also wishes to thank its partners: the National Trust for Historic Preservation (NTHP) and their Local and Statewide Partners, Advisory Council on Historic Preservation (ACHP), Texas State Historic Preservation Office (SHPO) and National Park Service (NPS) for their guidance and technical expertise. Each organization provides invaluable support to the public, and are excellent sources for consultation and guidance on the interpretation of preservation laws. Much of the source material in this document comes from information these organizations have compiled. This document's intention is to provide a synopsis of the documents that should be consulted and their locations for further reference. It is always recommended that users go to the source document for reference as there are constantly changes, updates and new court case precedents affecting preservation laws. Federal preservation laws are published in the federal register. However, sources such as the National Park Service, Advisor Council on Historic Preservation, National Trust for Historic Preservation and Texas SHPO have made these documents available on their website with interpretative information on the various preservation laws.

Our hope is that this tool will be an invaluable resource to further the rehabilitation of historic properties in Texas. Preserving our architectural, archaeological, and culture heritage for future generations is one of the most important issues of our time. The laws and legal principles laid out in this document provide a path forward in saving our cherished Texas cultural resources.

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1931 Texas and Pacific Warehouse Building, 401 West Lancaster Avenue Fort Worth, Texas

**Existing Historic Designations on the T&P Warehouse Building:**

- National Register of Historic Places
- Recorded Texas Historic Landmark
- Highly Significant Endangered Landmark of the City of Fort Worth

# INTRODUCTION

## Historic Resource Identification for Protection

The first step in understanding the application of preservation laws is to determine which properties are subject to preservation laws and the economic incentives that may be available depending on the specific circumstances of the historic resource. Federal, state, and local preservation laws are based on historic resource property identification which is subject to different criteria at the federal, state, and local level and dependent on the specific situation affecting the “historic property”. Historic resources include a wide range of properties ranging from buildings and other structures to archaeologically or culturally significant sites. In most cases, resources are identified through a formal process that lists buildings, structures, districts, objects, and sites in a historic register or inventory based on specific criteria. Historic resources (sometimes called “heritage” or “cultural” resources) may be listed in any of three types of registers: The National Register of Historic Places, a state register of historic places, or local listings of historic landmarks and districts. To be eligible for listing, properties must meet certain statutory criteria generally based on historical, architectural, archaeological, or cultural significance.

## Regulatory Approaches to Historic Resource Protection

Historic resources may be protected from both governmental and private actions at the federal, state, and local level. The nature of the restrictions and degree of regulation vary depending upon those involved and, in some cases, the type of property being regulated. In general, historic resource laws governing governmental actions do not require preservation every time. Rather, they provide a process for balancing preservation concerns with other governmental objectives. Historic preservation laws governing private actions generally seek to protect the historic resource by regulating alterations, demolitions, or other changes that could destroy or impair significant features of the resource. These laws, typically enacted as local historic preservation ordinance, do not prohibit change altogether, but rather establish a mechanism to ensure that the integrity of the resource is not compromised.

Finally, a few laws, generally enacted at the federal level, do not fit neatly into either category of resource protection laws. These laws are designed to address specific types of actions governing specific types of resources. Archaeological protection laws, Native American cultural resource laws, and laws protecting historic shipwrecks fall into this category.

Specific information about a particular law can generally be obtained from the federal, state, or local agency directly responsible for the law’s implementation. Besides the National Park Service and the Advisory Council on Historic Preservation—the primary federal agencies charged with the implementation of federal preservation laws—it may be useful to contact the Texas State Historic Preservation Office (SHPO), or the Texas Historical Commission (THC) as it is also referenced—the state agency responsible for historic preservation matters—or our local preservation or planning commission. Statewide and/or local nonprofit, historic preservation organizations are often equipped to provide detailed assistance. National Trust Offices can also provide information and appropriate contacts.

## The Regulation of Governmental Actions Affecting Resources

Protection of historic resources from potentially harmful governmental actions is generally accomplished through historic preservation acts and environmental protection laws. These laws do not require that federal, state, or local governments preserve historic resources where other competing governmental interests may be at

stake. Rather they require governmental agencies to comply with specific procedures to ensure that the effects of their actions are fully considered before embarking on any activity. Governmental agencies are generally directed to identify historic resources and weigh and assess competing factors, including historic resource protection along with other environmental and socio-economic concerns, in deciding how and whether a project or activity should proceed.

While most laws falling within this category are purely procedural in nature, (meaning that governmental bodies must follow a specific process to fulfill their statutory obligation), there are a few laws, enacted at both the federal and state level, that afford historic resources substantive protections (meaning that governmental bodies must take affirmative steps to protect the resource). These laws require agencies to develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate adverse effects on historic properties.

Public participation is essential to the enforcement of laws protecting historic resources from governmental actions. Many statutes give individuals and organizations the right to sue and the ability to recover attorneys' fees. Finally, and critically important, preservation laws provide for economic incentives which provide for the rehabilitation of historic resources which can provide a high level of protection.

# FEDERAL PRESERVATION LAWS

Three major laws protect historic resources from federal government actions: the National Historic Preservation Act, 16 U.S.C. §§ 470 *et. seq.* the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347; and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. Other statutes, more narrow in scope, include the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467, and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272 (e). In addition, a number of federal statutes relate only to specific resources.

## The National Historic Preservation Act

The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470a to 470w-6, (NHPA), as amended, is the key federal law that establishes a federal policy for the preservation of cultural and historic resources in the United States. The law establishes a national preservation program and a system of procedural protections, which encourage both the identification and protection of historic resources at the federal level, and indirectly, at the state and local level.

The NHPA can be broken down into three major components:

1. It authorizes the expansion and maintenance of the National Register of Historic Places, the official federal listing of “districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.”
2. It establishes a protective review process (known as “Section 106) review process”) to ensure that federal agencies consider the effects of federally licensed, assisted, regulated, or funded activities on historic properties listed or eligible for listing in the National Register. It is important to remember that historic properties only need to be eligible for listing to trigger the Section 106 review process. As a result federal agencies are required to evaluate properties that may be affected to determine if they are eligible for the National Register since the properties do not have to be listed.
3. It requires federal agencies to locate, inventory, and nominate properties to the National Register, assume responsibility for preserving historic properties, and use historic buildings to “the maximum extent possible.”

The NHPA creates a specific role for state and local governments, Native American tribes, and Native Hawaiian organizations in carrying out the Act’s specific directives. A state or tribe electing to establish a historic preservation program (for which federal grant funding is available) is responsible for identifying and nominating properties for listing in the National Register of Historic Places and working with federal agencies in implementing the Section 106 review process. (Regulations governing state, tribal, and local government programs under the NHPA are set forth at 36 C.F.R. Part 61). State historic preservation offices are also responsible for administering a federal assistance program for historic preservation projects and certifying local governments who wish to assume specific responsibilities under the NHPA. For example, a certified local government (CLG) may nominate a property for listing in the National Register. To be certified, local governments must meet certain criteria such as establishing a preservation commission and operating a preservation program that designates and protects historic properties.



The NHPA establishes a Historic Preservation Fund in the U.S. Treasury. Money from this fund is made available to the states through annual appropriations by Congress. At least 10 percent of a state's allocation must be transferred to certified local governments to fund local historic preservation projects.

### **National Register Criteria**

The National Park Service applies specific criteria to evaluate property nominated for inclusion in the National Register of Historic Places. These criteria, codified at 36 C.F.R. §60.4, often serve as the basis for listing in state and local registers as well.

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

- (a) That are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) That are associated with the lives of persons significant in our past; or
- (c) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinctions; or
- (d) That have yielded, or may be likely to yield, information important in prehistory or history.



The Alamo is listed in the National Register and is also a National Historic Landmark

### **The Secretary of the Interior's Standards**

The Secretary of the Interior's Standards for the Treatment of Historic Properties were inspired by the International Restoration Charter, adopted at the Second International Congress of Architects and Specialists of Historic Buildings held in Venice Italy in 1964. This resolution, also known as the Venice Charter, provided basic principles for the conservation of historic resources around the world. The development of the Venice Charter was an effort to treat historic resources not as unchangeable works of art but as important parts of our entire built environment.

The National Park Service (NPS), on behalf of the Secretary of the Interior, developed Standards for the Treatment of Historic Properties in an effort to establish concepts and guide decisions regarding maintaining, repairing, and altering historic properties in the U.S.

The Standards are intended to aid the public in making sound historic preservation decisions. The Standards and associated Guidelines offer four distinct approaches to the treatment of historic properties: preservation, rehabilitation, restoration, and reconstructions:

1. Preservation involves the maintenance and repair of existing historic materials and retaining the property's form as it has evolved over time.
2. Rehabilitation acknowledges the need to alter or add to a historic property to meet continuing or changing uses while at the same time retaining the historic character of the property. The Standards for Rehabilitation were the first standards developed by NPS and remain the most commonly applied.
3. Restoration depicts a historic property at a particular period in its history, and usually involves the removal of evidence of other time periods.
4. Reconstruction recreates missing or non-surviving portions of a historic property for interpretive purposes.

Choosing the particular treatment depends on factors such as the property's historical significance, physical condition, proposed use, building code requirements, and intended interpretation.

The property's relative importance in history can help to determine the appropriate treatment such as from a contributing building in a district to a National Historic Landmark designated for its national significance by the Secretary of the Interior. Other factors would include the preservation laws and applicable economic incentives which can determine applicable specific treatments, design guidelines and/or review process.

The physical condition of the building can also help determine the treatment. If distinctive materials, features, and spaces that convey the historical significance of the building are intact, then Preservation may be the most appropriate approach. However, if more extensive repairs are required, or if alterations or additions are required to change the use of a building, then Rehabilitation may be a more appropriate treatment for the building.

Some historic buildings will continue to be used for their original purpose, but many historic buildings can be adapted for new uses in a rehabilitation project without causing serious damage to their historic character. Some historic properties that were originally designed for a specialized use, such as jails, grain silos, ice houses, cold-storage warehouses, and manufacturing facilities may be more difficult to adapt to a new use without major alterations. However, there have been many innovative projects completed that met the Secretary of the Interior's Standards, were certified by the National Park Service, and received economic incentives.

Whether the project involves Preservation, Rehabilitation, Restoration, or Reconstruction, building code and accessibility requirements must be taken into consideration during the project planning process. Alterations and new construction to meet accessibility requirements should be designed to minimize the loss of historic materials and changes to the overall character-defining features of the building. Code-required work should also be carefully designed to preserve the building's historic materials and character-defining features. Abatement of hazardous materials such as asbestos and lead also has the potential to cause harm to historic finishes, if not carefully planned and executed. The installation of life safety upgrades, such as fire alarms,

egress stairways, and fire suppression systems should be carefully planned to avoid damaging the character-defining features of the historic resource.

Certain programs for historic properties mandate use of particular treatment guidelines and review. For instance, the Texas Historic Courthouse Preservation Program which funds restoration of historic county courthouses, goes through a review process with the Texas SHPO that follows the Secretary of the Interior's Standards. The 20% tax credit available under the Federal Historic Preservation Tax Incentives Program and the 25% tax credit under the Texas Historic Preservation Tax Credit Program require that work meet the Secretary of the Interior's Standards for Rehabilitation. The Secretary of the Interior's Standards for the Treatment of Historic Properties are generally advisory if the property does not fall under local, state, or federal review based on its significance and there are not economic incentives involved. However, the Texas Historical Commission applies the Standards when performing project reviews under state and federal laws and programs for historic properties as well as local jurisdictions where properties are locally designated.

## Section 106

Section 106 is the regulatory heart of the NHPA. Codified at 16 U.S.C. § 470f, Section 106 requires that federal agencies consider the effects of their undertakings on historic properties that may affect historic resources listed in, or eligible for listing in the National Register of Historic Places. The kinds of undertakings requiring Section 106 review are broad and inclusive and may affect historic resources either directly or indirectly. For example, a federal agency may be required to perform a Section 106 review to build a new complex in or near a historic district or before issuing a permit to fill in a wetlands area that would allow the construction of new houses that could harm the historic character of a nearby village. While a federal agency may delegate certain Section 106 responsibilities to a state or local government, the federal agency is ultimately responsible that may be held legally accountable for Section 106 compliance.

The statutory provision establishing the Section 106 review process is relatively succinct. It states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, building, structure, or object that is included in or eligible for inclusion in the National Register. This does not prohibit the agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties. The agency official shall insure that the Section 106 process is initiated early in a project planning, so that a broad range of alternatives may be considered during the planning process.

Federal agencies are directed to determine whether any properties listed or eligible for listing in the National Register will be adversely affected by proposed "undertakings." Consultation is initiated with the State Historic Preservation Office and the Advisory Council on Historic Preservation, an independent federal agency, may or may not choose to participate in cases involving adverse effects. Appendix A to part 800 sets forth criteria used by Council to determine their participation.

For the most part, the Advisory Council, whose members include heads of different federal agencies, a governor, mayor, a Native American or Native-Hawaiian member, and preservation experts (the National Trust for Historic Preservation and the National Conference of State Historic Preservation Officers serve as ex officio members), participates as a facilitator rather than a regulator of federal agency actions. Located in Washington,

D.C., the Council, through its staff, works with federal agencies and state historic preservation offices to meet their Section 106 responsibilities. The agency also assists federal agencies in satisfying their stewardship requirements under the NHPA (Section 110) and encourages coordination and consistency of federal agency laws and programs with national policy on historic preservation.

Section 106 review process may encompass the identification of protected resources, determinations as to adverse effects, and consultation with the appropriate state historic preservation officer, the tribal historic preservation officer, and in some cases, the Advisory Council, about ways to avoid or reduce those effects. In many adverse effect cases, a legally binding Memorandum of Agreement is executed by the consulting parties, setting forth specific protective measures that must be taken. In situations where agreement cannot be reached, the matter is put before the Council, who in turn issues formal comments that may be accepted or rejected by the agency involved. In some cases issues are resolved with the SHPO and consulting parties not resulting in Council involvement.

While Section 106 is an effective tool in focusing attention on federal agency actions affecting historic resources, it does not prevent federal agencies from taking actions that could ultimately harm historic resources. Section 106 only requires that federal agencies comply with certain procedural requirements before issuing a permit or funding a project affecting historic resources.

In other words, Section 106 will not necessarily prevent a federal agency from funding a housing project that entails demolishing a complex of historic buildings. It does, however, require the agency to identify historic resources and explore alternative measures, in consultation with the state historic preservation officer, that may mitigate or avoid whatever harm the project would have on the buildings. The agency, for example, may be required to address alternatives such as moving the entire housing project to a different location or shifting the location of the project on the proposed site so that an archaeological resource or historic structure can be preserved.

In cases where alternatives to demolition are not options, the agency may agree to adopt certain measures that would mitigate the harm identified. For example, an agency may document the historic buildings and erect a plaque at their location. If other historic resources besides those being demolished will be adversely affected, the agency may agree to redesign the project so that it is more in keeping with the scale and style of the remaining resources.

Regulations implementing Section 106 have been promulgated by the Advisory Council on Historic Preservation. These regulations set forth the specific procedures that federal agencies must follow to satisfy the requirements of Section 106. The regulations, as amended, are published at 36 C.F.R. Part 800. They may be viewed at the ACHP's website at [www.ach.gov](http://www.ach.gov). This website also provides guidance and interpretation.

### **National Environment Policy Act**

Although the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, (NEPA), is primarily viewed as an environmental law, it governs major federal agency actions affecting not only natural resources, but also cultural resources, including properties listed in the National Register of Historic Places. NEPA states, in part:

It is the continuing responsibility of the Federal government to use all practical means, consistent with other essential considerations of national policy, to assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings, preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.

To ensure that environmental concerns are disclosed and considered to the fullest extent possible, NEPA directs federal agencies to “include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action.” Federal agencies must consult with other relevant agencies regarding the proposed action and make copies of their environmental statements available to the President, the Council on Environmental Quality (CEQ), and the public.

Depending upon the magnitude of the impact, agency responsibilities under NEPA may be achieved through the preparation of an Environmental Assessment, or a more detailed Environmental Impact Statement, where significant impacts have been identified. Regulations implementing NEPA, codified at 40 C.F.R. Part 1500, set forth the process for conducting an environmental review, the specific documents that must be prepared, as well as public notice requirement and timing for public review and comments.

In many cases, the statutory protections under NEPA and the NHPA overlap. As with Section 106 of the NHPA, NEPA governs federal agency actions. Moreover, like Section 106, NEPA is essentially a compliance statute, providing only procedural protection against federal agency actions resulting in significant impacts. Coordination of section 106 and NEPA responsibilities is encouraged under the Advisory Council’s regulations implementing the Section 106 review process.

Nonetheless, because of slight differences in the scope of protection afforded, in certain situations only one of these laws may be invoked. While NEPA applies to all historic and cultural properties it regulates only “major federal actions,” such as the adoption of federal policies and programs or the approval of federally funded, licensed, or permitted projects. In contrast, the NHPA only governs properties listed or eligible for listing in the National Register of Historic Places. The NEPA applies to historic and non-historic federal agency actions.

### **Section 4(f)**

Section 4(f) of the Department of Transportation Act is considered the strongest preservation law at the federal level. Codified as 49 U.S.C. § 303, it provides substantive protection for historic properties by prohibiting federal approval or funding of transportation projects that require the “use” of any historic site, public park, recreation area, or wildlife refuge, unless (1) there is “no feasible and prudent alternative to the project,” and (2) the project includes “all possible planning to minimize harm to the project.”

The term “use” includes not only the direct physical taking of property, but also indirect effects that would “substantially impair” the value of protected sites. For example, the effect of a proposed highway on the economic vitality of a nearby historic district that would isolate the district from nearby commercial activity would probably require assessment under Section 4(f). (The provision has been called “Section 4(f)” since its initial adoption in 1966 as Section 4 (f) of the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931, 933 (1966)).

Section 4(f) applies to all transportation agencies within the U.S. Department of Transportation, including the Federal Highway Administration (FHWA), which funds highway and bridge projects, the Federal Transit Administration (FTA); the Federal Aviation Administration (FAA); and the Coast Guard, which owns or operates many historic lighthouses and often has regulatory authority affecting bridges. Although statutory protections under the NHPA, NEPA, and Section 4(f) overlap, there are important distinctions. Unlike Section 106 and NEPA, Section 4(f) applies only to the “approval” of transportation projects. While Section 106 and NEPA requires agencies to “take into account” historic properties, Section 4(f) directs the Secretary of the Department of Transportation to avoid harming such resources unless no feasible or prudent alternative exists.



Note, however, that in an effort to streamline the Section 4(f) review process, the Secretary may find a “de minimis impact” whenever a project has been determined, under Section 106, to have no adverse effect on a historic site or that no historic properties would be affected.

The Department of Transportation’s regulations implementing Section 4(f) for the FHWA and FTA are set forth at 23 C.F.R. § 771.135. The regulations seek to clarify when Section 4(f) applies and to coordinate Section 4(f) requirements with environmental review procedures under the NHPA and/or NEPA.

### **The Regulation of Private Actions Affecting Historic Resources**

Historic resources may be protected to a limited extent from private actions through federal and state laws. Many historic resources, however, are protected through local laws that govern changes to private property. Under local historic preservation ordinances, historic property owners are required to obtain a permit from a preservation commission or other authority before altering or otherwise affecting the property being regulated.

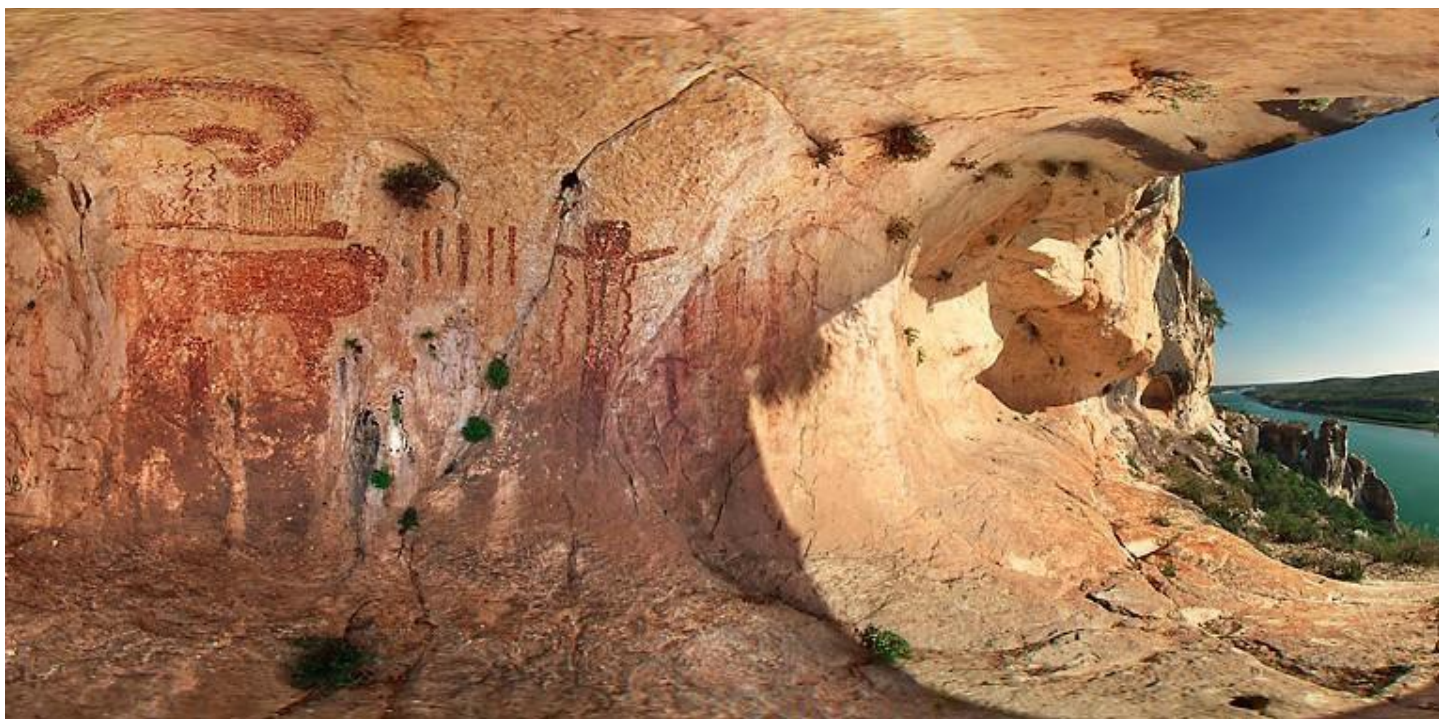
Failure to obtain a permit may result in the issuance of a stop-work order, the imposition of fines and other penalties, and in some cases, a court injunction. These laws typically provide a much stronger level of protection for historic resources than the procedural protections that apply to federal governmental actions.

### **Additional Federal Preservation Laws Containing Enforcement Provisions and Penalties**

As discussed above, the preservation of historic resources is generally accomplished under federal preservation statutes through procedural laws. These laws do not require that historic resources be preserved but rather insist that a federal agency consider historic resources before proceeding with a particular course of action. For the most part, the emphasis is generally on process rather than substance. This means that the agency must only comply with certain procedures. Preservation is not necessarily required.

A few laws, however, contain enforcement provisions, authorizing the imposition of civil and/or criminal penalties for violations of specific provisions. The best known laws falling within this category include the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, (ARPA), and the Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001-3013, (NAGPRA) which will be discussed in greater detail in the following section on Archaeological Resource Protection. ARPA establishes a permitting process and imposes both civil and criminal penalties for violations of its terms. NAGPRA establishes a process for among other things, the repatriation of Native American human remains and cultural objects held by museums or federal agencies and imposes penalties for individual violations. Both statutes are discussed in more detail later.

Although rarely invoked, penalty provisions are also contained in the Antiquities Act of 1906, 16 U.S.C. § 431-433, and the Historic Sites Act of 1935, 16 U.S.C. § 461-467. While the Antiquities Act does not establish a permitting process per se, it authorizes the imposition of a \$500 fine and /or imprisonment up to 90 days against any person who “appropriates, excavates[s], injure[s], or destroy[s] any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Department of Government having jurisdiction over the lands on which said antiquities are situated.” The Historic Sites Act, correspondingly, allows the imposition of a \$500 fine against any person found violating the act or implementing regulations.



The White Shaman Mural on the Pecos River. The Antiquities Act was passed to protect such sites from looters.  
Photo courtesy of The Rock Art Foundation

### **Archaeological Resource Protection**

Laws protecting archaeological resources have been enacted at the federal and state level, and to much a lesser extent at the local level. Federal laws typically regulate archaeological activity on land owned by the federal government through a special permitting process supported by the ability to impose criminal and/or civil penalties for individual violations. In more recent years, archaeological protection laws have been extended to private lands, largely in response to increasing threats combined with a growing awareness that damage to archaeological sites is irreversible.

The Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, (ARPA), is the primary statute governing archaeological resource protection at the federal level. This law protects archaeological resources on federal and Native American lands through a permitting process accompanied by enforcement provisions.

Under ARPA, it is unlawful to remove, excavate, or alter any archaeological resources from federal or Indian lands without a permit issued by the Department of the Interior. Permits are approved only for research purposes and all artifacts must remain the property of the United States or Native American tribes.

In addition, ARPA prohibits the selling, purchasing, exchanging, transporting, and trafficking of archaeological resources that were removed in violation of law. Significantly, this prohibition extends not only to artifacts found on public and Indian lands, but also to artifacts taken from private land in violation of state law.

ARPA's penalty provisions are critical to its effectiveness as a tool for resource protection. The statute authorizes the imposition of civil and criminal penalties, including both imprisonment and fines up to \$100,000 for repeat offenders. All archaeological resources, along with any vehicles or equipment used to carry out the violation can be forfeited. The act also explicitly authorizes the federal government to pay rewards for information leading to the finding of a civil violation or criminal conviction.



Objects found in a Native American grave site are protected under the Archaeological Resources Protection Act.

Primary regulations governing the protection of archaeological resources are set forth at 43 C.F.R. Part 7. Regulations pertaining to the preservation of American antiquities are codified at 43 C.F.R. Part 3 and regulations concerning the care of federally-owned and administered archaeological collections are located at 36 C.F.R. Part 79. These laws and additional information are available on the National Park Service's website at <http://www.nps.gov/Archeology/sites/FEDARCH.HTM>.

A few federal laws protect archaeological resources in particular instances. The Reservoir Salvage Act of 1960, 16 U.S.C. §§ 469-469a, requires federal agencies to notify the Secretary of the Interior upon the discovery of any significant archaeological resources threatened with destruction due to dam construction or terrain alterations. The law authorizes the Secretary to undertake salvage operations as deemed necessary. The Archaeological & Historical Preservation Act of 1975, 16 U.S.C. §§ 469-469c-1, extends the scope of the 1960 Act to include all federal and federally-assisted or licensed projects that threaten historical and archaeological data with destruction. The responsible federal agency may elect to undertake salvage or other protective measures or allocate up to 1 percent of its project funds for use by the Secretary of the Interior for such efforts.

The Antiquities Act establishes a permitting system for the excavation and gathering of "objects of antiquity" on federal lands designated as "National Monuments." Limited in scope, permits may be issued only for the benefit of "reputable museums, universities, colleges, or other recognized scientific or education institutions." The law imposes nominal penalties (violators may be fined \$500 or jailed for up to 90 days) for the unlawful excavation, injury, or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity on federal lands without the permission of the federal land manager." The Historic Sites Act of 1935, 16 U.S.C. § 462 (k), also authorizes the imposition of a \$500 fine plus costs for violations of rules adopted by the Secretary of the Interior under this law. Archaeological resource protection may also be accomplished under Section 106 of the National Historic Preservation Act, 16 U.S.C §§ 470-470w-6, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. These laws protect archaeological resources from potentially adverse federal agency actions by requiring agencies to identify archaeological resources and by urging either in place preservation or removal, as appropriate.

## **Laws Protecting Native American Cultural Resources**

In addition to the more general laws governing historic resource and/or archaeological protection, specific laws have been enacted at the federal and state level governing the disposition of Native American artifacts and human remains. These laws seek to place control or ownership of these items in the appropriate Indian tribe or Native Hawaiian organization.

(NAGPRA), codified at 25 U.S.C. §§ 3001-3013, establishes a process for protecting and distributing Native American cultural items found on federal or tribal lands either through “intentional excavation” or “inadvertent discovery.” Among other things, the law specifically seeks to place ownership or control of such items with the appropriate Indian tribe or Native Hawaiian organization and establishes a process to resolve competing claims. Consistent with this objective, the law also imposes specific requirements on museums and federal agencies (excluding the Smithsonian Institution) to assist Indian tribes and Native Hawaiians in the identification and eventual repatriation of burial remains and related items within their collections. NAGPRA further directs the Secretary of the Interior to establish a review committee to monitor and review the implementation of the specific documentation and repatriation requirements and provides for enforcement of its terms through the assessment of civil penalties. Regulations implementing NAGPRA are set forth at 43 C.F.R. Part 10. The NPS website has the regulations and further information: <http://www.nps.gov/nagpra/mandates/INDEX.HTM>.

A number of states (particularly in the West) have enacted specific laws to protect against the removal or destruction of human remains of Native Americans or the possession, selling or displaying of such remains as well as associated artifacts, in addition to more general laws governing cemeteries as a whole. Inadvertent disturbances must generally be reported to the state, which in turn must consult with the appropriate tribe governing the disposition of the site. Violations are generally punishable through fines and/or imprisonment proportionate to the specific offense.

Some states have also enacted laws to protect historic cemeteries. These laws frequently address issues such as theft, vandalism, and trespass and may prohibit the alteration or relocation of historic cemeteries in particular instances.

### **Public Buildings**

A number of laws, particularly at the federal level, have been enacted in recognition of the link between public policy regarding the location of governmental facilities and efforts to preserve historic properties. Public buildings such as courthouses and city halls provide an important visual landmark for urban communities and often serve as an important catalyst for further economic investment. Locating federal facilities in downtown areas can spur economic development, while relocating federal facilities outside downtown areas can significantly contribute to urban decay and suburban sprawl.

### **The Public Buildings Cooperative Use Act**

(PBCUA) governs the construction, acquisition, and management of space by the General Services Administration (GSA) for use by federal agencies. Codified at 40 U.S.C. § 601-616, the PBCUA outlines the authority vested in the Administrator of the General Services Administration and his or her responsibilities in exercising that authority.

To encourage the use of historic buildings by federal agencies, the law directs the Administrator to “acquire and utilize space in suitable buildings of historic, architectural, or cultural significance, unless use of the space would not prove feasible and prudent compared with available alternatives.” This requirement extends to, but is



not limited to, all buildings that are listed or eligible for listing in the National Register of Historic Places. Regulations implementing the Public Building Cooperative Use Act are set forth at 41 C.F.R. § 19.000, *et. seq.*, and § 10551.001, *et. seq.*

The GSA and the National Park Service administer the Historic Surplus Property Program that gives state, county, and local governments the ability to obtain surplus federal properties that are listed or eligible for listing in the National Register of Historic Places at no cost as a historic monument. Please reference:

<http://www.gsa.gov/portal/content/102015>.

The disposition of surplus property is governed by the Federal Property and Administrative Services Act, 40 U.S.C. 550(h). This law authorizes the conveyance of historic properties to state and local governments for use as a historic monument.

## **Section 110**

Section 110(a) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(a), imposes additional responsibilities on federal agencies that own or control historic properties or sites such as historic office buildings, military installations, or battlefields and cemeteries. Among other things, federal agencies are required to locate, inventory, and nominate properties to the National Register, assume responsibility for preserving historic properties, and use historic buildings to the “maximum extent possible.”

In addition, agencies responsible for the impairment or demolition of a historic building or site must document the property in accordance with professional standards. When National Historic Landmarks are involved, Section 110 also requires that federal agencies undertake, to the maximum extent possible, “such planning and actions as may be necessary to minimize harm to such landmark” and request comments from the Advisory Council on Historic Preservation.

Guidelines issued by the Secretary of the Interior regarding federal agency responsibilities under Section 110 are published at 63 Fed. Reg. 20496-20508 (Apr. 24, 1998). Special rules allowing for the waiver of Section 110 requirements in the event of natural disasters or emergencies are set forth at 36 C.F.R. Part 78.

Please reference: <https://www.nps.gov/fpi/Section110.html> on the NPS website for detailed information on the requirements of Section 110.

## **Executive Orders**

A number of executive orders relevant to preservation have been enacted over the years by Presidents. Executive orders are not permanent and can be changed or cancelled by the President. These orders impose additional responsibilities on federal agencies with respect to historic property.

Executive Order 11593, enacted in 1971, required federal agencies to operate their policies, plans, and programs so that federally owned or controlled sites, structures, and objects of historical, architectural, or archaeological significance are “preserved, restored, and maintained.” (See Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), reprinted at 16 U.S.C. § 470 note). Among other things, the order directed federal agencies to locate, inventory, and nominate properties to the National Register and professionally document any listed property that may be substantially altered or affected and place such records in the Library of Congress as part of the Historic American Buildings Survey or Historic American Engineering Record. In addition, federal agencies were required to take necessary measures to provide for the maintenance and planning of federally-owned property listed in the National Register, including the preservation, rehabilitation, and restoration of such sites. Most of



the requirements of this order have been enacted into law as part of the 1980 Amendments of the NHPA in Section 110. As stated previously, please reference <http://www.nps.gov/fpi/Section110.html>.

### **Expanding on the NHPA and PBCUA**

Executive Order No. 12072 (1978), entitled “Federal Space Management,” underscores the policies set forth under the PBCUA and directs federal agencies “to give first consideration to centralized community business area[s]” when meeting federal space needs in urban areas in order “to strengthen the nation’s cities and to make them attractive places to live and work.” On March 7, 1996, the General Services Administration issued interim regulations, 61 Fed. Reg. 911.0 (Mar. 7, 1996) (to be codified at 41 C.F.R. Part 101-17), reaffirming the order’s policies and goals and setting in motion a process for adopting revised regulations consistent with that order.

### **Executive Order 13006**

Executive Order 13006, issued in 1996, directs federal agencies not only to locate their operations in established downtowns but to give first consideration to locating historic properties within historic districts. (See 61 Fed. Reg. 26071 (1996)).

The order requires the federal government to “utilize and maintain, wherever operationally appropriate and economically prudent, historic properties and districts, especially those located in central business areas.” It also directs federal agencies to give “first consideration” to historic buildings when “operationally” appropriate and economically prudent” and requires that any rehabilitation or new constructions be “architecturally compatible with the character of the surrounding historic district or properties.” This order was codified into law as an amendment to the NHPA on May 26, 2000. See Pub. Law 106-208 (Section 4) (amending 16 U.S.C. § 470h-2(a)(1)).

### **Executive Order 13007**

Executive Order 13007 published at 61 Fed. Reg. 26711 (1996), seeks to protect Native American religious practices. It directs federal land-managing agencies to accommodate the use of sacred sites by Native Americans for religious purposes. In addition, such agencies must avoid adversely affecting the physical integrity of sacred sites and provide reasonable notice when an agency’s actions may restrict the ceremonial use of a sacred site or otherwise adversely affect its physical integrity. Because some Native American sites may qualify for listing in the National Register of Historic Places, this order may in some instances overlap with Section 106 and Section 110 of the NHPA. Recognition of the right to exercise traditional religious properties under the First Amendment is also set forth under the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996.

### **Executive Order 13287**

Executive Order 13287, known as “Preserve America,” states that the federal government “must recognize and manage the historic properties in its ownership as assets that can support department and agency missions while contributing to the vitality and economic well-being of the nation’s communities and fostering a broader appreciation for the development of the United States and its underlying values.” All agencies are required to build preservation partnerships with state and local governments, Indian tribes, and the private sector to promote local economic development through the use of historic properties. See 68 Fed. Reg. 10635-38 (2003).

## **Restrictions on the Regulation of Historic Property: Protecting the Individual from the State**

In reviewing preservation laws, it is as important to understand the limitations on these laws as it is to understand the laws themselves. These limitations are usually imposed by courts interpreting constitutional requirements that protect the individual from overly burdensome governmental actions. The following section explains the court system and the types of constitutional issues that are generally raised.

### **Judicial Review**

Historic preservation laws, whether enacted at the federal, state, or local level are subject to review by courts, generally called “judicial review.” The decisions resulting from this review become law until vacated or reversed by a higher court.

The importance or particular relevance of an individual court case can vary from place to place depending on a variety of factors, such as which court issued the decision and what kind of laws and issues were addressed. For example, a State Supreme Court decision addressing constitutional issues may have broad significance, creating either binding or persuasive authority. Whereas, a trial court decision focusing on the application of a notice provision may have little relevance outside the context of the particular controversy at issue. Therefore it is necessary to have a basic understanding of how the judicial system works and the general significance of the issue being decided in order to assess the importance of a particular decision.

Separate court systems are maintained at the federal and state level. Federal court decisions focus on disputes involving federal constitutional issues. State court decisions generally involved controversies over the application of state or local laws, which may involve both statutory and/or constitutional issues.

### **Statutory Claims**

Historic preservation litigation generally involves both statutory and constitutional claims. Statutory claims may address issues such as whether “substantial evidence” or a “rational basis” exists to support the commission’s decision. Commission decisions are generally reviewed under standards set forth in state administrative procedure acts.

As discussed earlier, the issue of legislative authority arises most frequently in connection with local preservation laws subject to state enabling authority. If an ordinance is not enacted in accordance with state enabling law, the entire ordinance may be invalidated. Cases have been litigated, for example, on the ability of a commission to deny permission to demolish a building or to control the design of new buildings constructed within a historic district.

Even if an ordinance has been duly enacted, questions may arise concerning whether a commission has acted within the scope of authority conferred on it by the ordinance or whether it has followed appropriate procedures in taking a particular action as required under local law. For example, did the commission follow a community’s open meeting laws (often referred to as “sunshine laws”) or follow requisite notice and hearing requirements?

Finally, claims may arise concerning the appropriateness of a commission’s decision. In other words, does the evidence in the record support the commission’s findings and did the commission assign appropriate weight to the evidence presented. Most courts will defer to the expertise of the commission and uphold decisions to designate property for historic resource protection or to affirm or deny applications for certificates of appropriateness if there is a reasonable basis in the record or if the decision is supported by substantial evidence.

In reviewing preservation laws, it is important to recognize that federal, state, and local laws are generally interpreted through implementing regulations and guidelines. Guidelines are typically advisory in form and are generally used to illustrate what kinds of activities may or may not be permissible under preservation ordinance. Design criteria, for example, are often adopted in the form of guidelines.

Regulations, in comparison, have the full force of law and must be enacted within the confines of the law being interpreted. They must be consistent with the requirements of the law and the procedural provisions of the governing law, applicable administrative procedure acts, and federal and state constitutions. Procedures governing the review of alterations, the demolition of historic resources, and applications for economic hardship are generally adopted in regulatory form.

### **Constitutional Restrictions**

Historic preservation laws must be within the limitations of state and federal constitutional provisions that protect the rights of individuals and organizations, and thus constitutional claims are frequently raised. Constitutional challenges to historic preservation laws may arise under the Takings, the Due Process and the Equal Protection Clauses of the Fifth and Fourteenth Amendments, or the Free Exercise and Free Speech Clauses of the First Amendment to the U.S. Constitution. The following discussion focuses on federal constitutional requirements. Additional protection may be afforded under state constitutions as well.

### **Police Power Authority**



Penn Central Station in 1911

All preservation laws must be enacted in accordance with the police power. The police power is the inherent authority residing in each state to regulate, protect, and promote public health, safety, morals, or general welfare. The police power is enjoyed by the states, rather than local jurisdictions, and cities and towns can enact preservation laws only if the state has given them specific authority to do so. As noted earlier, this authority is typically bestowed on local jurisdictions either through specific enabling legislation or more general home rule power.

The basic constitutional question is whether historic preservation is a legitimate function of the government. The U.S. Supreme Court in its 1978 decision in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), laid to rest the argument that restrictions on property for the purpose of preserving structures and areas with special historic, architectural, or cultural significance were not a valid use of governmental authority. Many state courts have explicitly found historic preservation to be a legitimate use of the police power.

### **Regulatory Takings**

Property owners challenging historic preservation laws sometimes argue that such laws, either generally or in their application in a specific case, amount to a taking of private property. The term “taking” comes from the Fifth Amendment to the U.S. Constitution, which states “...nor shall private property be taken for public use without just compensation.” Under the Supreme Court’s interpretation, the takings clause extends to governmental regulations as well as physical takings of property and accordingly, if a regulation is so burdensome as to amount to a “taking,” then compensation must be paid.

Taking cases, overall, fall into one of three categories—physical occupations, exactions or conditions on development, and permit denials. The level of judicial scrutiny varies among each of these categories depending upon the level of intrusiveness on the part of the government. In general, the more closely the government actions resembles “confiscation” rather than simply a restriction on use, the closer the court will look at the governmental purpose behind the alleged taking and its corresponding impact on the property.

### **Physical Occupations**

This first category of taking claims involves situations where the government invades or occupies private property. The occupation may be “in fact,” such as the required installation of wires or cable boxes on an apartment building or “constructive,” such as the frequent flying of planes over private property. Because of the close link between physical occupations and actual expropriations through eminent domain, the Supreme Court has established a “per se” rule, requiring just compensation in all physical occupation cases.

### **Exactions and Conditions on Development**

This category of takings claims involves challenges to conditions imposed by government in exchange for the issuance of a development permit. For example, a local government may condition the issuance of a building permit for a new residential subdivision on the construction of roads servicing that subdivision. In such cases, the Supreme Court has said that there must be an “essential nexus between the burdens placed on the property owners and a legitimate state interest affected by the proposed development.” In other words, there should be a reasonable correlation between the conditions placed on the property owner and the public interest being served.

A nexus, perhaps, might not be found if a preservation commission required historic property owners to build a sidewalk in front of their house as a condition to the issuance of a certificate of appropriateness to build an addition on the back of their home. (See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (nexus between a lateral beach access condition and the Coastal Commission’s stated goals ruled insufficient)).

In addition, the Supreme Court has ruled that a governmental imposed dedication of land for public use must be “roughly proportional” to the impacts on the community that will result from the proposed development. This rule precludes placing onerous requirements on property owners seeking governmental approval.

In *Dolan v. City of Tigard*, 512 U.S. 687 (1994), for example, the Supreme Court found a taking since Tigard had failed to establish that the development exaction of a greenway and bicycle path would mitigate the flooding and traffic impacts caused by a proposed store expansion in a roughly proportionate manner.

## Permit Denials

The vast majority of preservation takings cases fall within the “permit denial” category. Under this scenario, a property owner argues that a taking has occurred as a result of the denial of an application concerning the use of his or her property. In determining whether a taking has occurred, it is important to identify the “relevant parcel.”

The Supreme Court has said that reviewing courts must look at the “parcel as a whole” rather than the land directly affected by the regulatory action. Thus, for example, in analyzing a takings claim, courts should look at the entire historic estate rather than the segment of the estate on which a historic preservation commission has ruled that development may not occur.

The “parcel as a whole” analysis is especially significant in view of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which established the rule that a “total deprivation of beneficial use” is a *per se* or categorical taking. In other words, if a regulation renders property completely valueless (i.e. a “total wipeout”), then a taking requiring “just compensation” results. Without the “parcel as a whole” rule, property owners could claim that a categorical taking has resulted with respect to the portion of property directly affected by the challenged regulatory action. See, e.g., *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 532 U.S. 812 (2000), in which the owner argued, unsuccessfully, that the denial of permission to develop the lawn of a historic apartment building amounted to a categorical taking under Lucas. Historic preservation laws must be within the limitations of state and federal constitutional provisions that protect the rights of individuals and organizations.

Although decided over 25 years ago, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), is the leading case governing the constitutionality of permit denials under the takings clauses of the federal and state constitutions. As Supreme Court Justice Sandra Day O’Connor wrote in her concurring opinion to *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J. concurring), “our polestar...remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings.” Her views were echoed by the majority in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which held that outside the exceptional “wipe out” situation found in Lucas, taking claims must be analyzed under Penn Central’s ad hoc, multi-factor framework, and again, in *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

## The Penn Central Test: Character of Governmental Action

This prong focuses on the nature of the action in dispute. As noted above, permanent occupations are treated as *per se* takings and governmental actions involving exactions or conditional approval are generally subject to a higher level of scrutiny. Historic preservation regulations are rarely challenged on this issue. Indeed, in Penn Central, the U.S. Supreme Court recognized that preserving historic structures is “an entirely permissible goal” and the imposition of restrictions on historic property through historic preservation ordinances is an “appropriate means of securing” that purpose.



## Economic Impact

The vast majority of preservation cases involving takings claims focus on the question of economic impact. To succeed under this factor, the property owner must demonstrate that the challenged regulation will result in the denial of the economically viable use of the land. This inquiry focuses on the impact of the regulation on the property and not the property owner.

Taking claims involving the mere designation of properties as historic resources pursuant to historic preservation ordinances under both federal and state constitutions have uniformly been rejected. As the Pennsylvania Supreme Court observed in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 619 (Pa, 1993), “in fifteen years since Penn Central no state has ruled that a “taking occurs when a state designates a building as historic.”

Taking claims involving the denial of permission to alter or demolish historic structures are also routinely dismissed. Both federal and state courts have ruled that governmental actions under historic preservation laws that prevent landowners from realizing the highest and best use of their property are not unconstitutional. A taking will not result when the owner can realize a reasonable rate of return on his or her investment or can continue to use the property in its current condition or upon rehabilitation.

Several courts have also ruled that a property owner must establish that he or she cannot recoup his or her investment in the historic property through sale of the property “as is” or upon rehabilitation.

## Investment-Backed Expectations

Under the final Penn Central factor, the property’s owner must show that the challenged regulatory action interferes with his or her “distinct investment-backed expectations.” Although the exact meaning of this factor is still being debated, the general consensus is that the individual circumstances surrounding the property in question, such as the owner’s investment motives or his or her primary expectation concerning the use of the property are relevant considerations. To prevail, the expectation must be objectively reasonable rather than a “mere unilateral expectations.”

In *Palazzolo v. Rhode Island*, the Supreme Court ruled that the acquisition of property-subsequent to the adoption of a law, such as a historic preservation ordinance, does not bar a takings claim. This does not mean, however, that the existence of a preservation law or designation of a property as historic prior to acquiring title is not a relevant factor.

Conversely, the argument raised by property owners, that the application of preservation laws unconstitutionally interferes with their investment-backed expectations in situations where the property in question has been designated after the property was purchased, has also been rejected. Courts have found that an owner’s expectation to be free from regulation is not reasonable.

## Statutory Responses

In some situations, statutory provisions may protect individuals from potential regulator takings. Many jurisdictions, for example, include provisions in their preservation ordinances that establish a separate administrative process for considering cases of undue hardship that may lead to potential takings claims. Commonly referred to as economic hardship provisions, they enable local governments to address hardship claims in individual cases and help prevent invalidation of commission decisions on constitutional grounds. Economic hardship provisions have been helpful and harmful to historic properties. On the one hand, scores of historic buildings have been demolished through the application of eminent domain proceedings under urban

renewal, transportation, and other public works programs. On the other hand, dilapidated historic resources have been protected from total ruin by government seizure and subsequent transfer to preservation organizations committed to rehabilitating the structures.

The use of eminent domain or condemnation authority has become an issue of increased importance since the U.S. Supreme Court handed down its controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court ruled that the seizures of houses for use in a major, private development project that would bring jobs served a public purpose. An applicant may be required to submit detailed information to show that retention or sale of the property is economically infeasible. The standard for measuring economic hardship may vary from one jurisdiction to the next.

Most jurisdictions, however, use the same standard as that for a regulatory taking, finding economic hardship when an owner has been denied all economically viable use of his or her property. A number of states have enacted so-called “takings” laws mandating a governmental assessment of the impact of a proposed action on individual property owners to avoid situations that may ultimately result in a compensable taking. A proposed regulation or governmental action may fail to be enacted based upon its projected impact on constitutionally-protected property rights.

In a very limited number of states, compensation may be required upon a showing by a private owner that the value of his or her property (and, in some cases, a portion of that property) has been diminished by a certain percentage (sometimes as low as 10 percent). While highly controversial, the impact of takings laws on historic preservation has not been documented. Nonetheless, because historic preservation laws may affect private property, these laws are likely to have some impact on efforts to regulate historic property and should be consulted where applicable.



Fort Concho. A National Historic Landmark listed in the National Register.

## **Eminent Domain**

Under the Fifth Amendment, a federal, state, or local government may confiscate privately owned properties for public use, provided that “just compensation” is paid. Although controversial, this authority has been helpful to increase tax revenues in economically distressed areas and satisfy the Fifth Amendment’s “public use” requirement.

In response to the public outcry against eminent domain, a number of states have amended their state constitutions and eminent domain laws. These amendments restrict seizures of privately-owned property for economic development if the property is to be transferred to another private entity. Many of these laws narrow the definition of “public use” and tighten existing laws relating to the identification of blighted areas. Some also strengthen procedures relating to the condemnation process.

Although many of these laws help limit the use of eminent domain authority to redevelop areas with historic buildings, local governments, even under the most restrictive statutes, still enjoy considerable authority.

## **Procedural Due Process**

The Fifth and Fourteenth Amendments to the U.S. Constitution require that no person be deprived of “life, liberty, or property” without due process of law. General preferred to as “procedural due process,” this constitutional requirement is designed to protect individuals from arbitrary governmental action by ensuring that the process of making, applying, and enforcing laws is fair. The amount of protection afforded usually depends upon the type of action being taken, the interest of the individual involved, the extent to which the governmental action affects the interest at stake, and to a lesser extent, the government’s need to work efficiently and expeditiously.

The most fundamental requirement of procedural due process is the opportunity to be heard. The U.S. Supreme Court has made clear that a trial-type hearing is not required in every case. A hearing will be deemed sufficient if it provides all interested persons sufficient opportunity to present their cases fairly in a meeting open to the public.

In preservation cases, a hearing is generally held before property is designated for protection under a local preservation ordinance and in considering an application to alter or demolish a property once designated. Such hearings are usually “informal,” meaning that witnesses are not sworn in and cross examination is not required. Many jurisdictions, however, follow specific statutory procedures relating to the timing and process for conducting hearings that address such issues as the presentation of the staff report, the presentation of the applicant and expert witnesses, and consideration of testimony of their interested persons or organizations.

Embraced within the hearing requirement are a number of other individual rights. In a preservation context, for example, a property owner generally has the right to fair notice of a proposed action, such as the designation of his or her property as a historic resource, and the factors under consideration. The owner should be given an opportunity to present reasons in favor of, or opposed to, the proposed action as well as witnesses and relevant evidence. Finally, a record of the proceedings should be made, and a formal decision based on the factors prescribed should be issued.

Notice must be both timely and sufficiently clear so that affected individuals will be able to appear and contest issues in a meaningful way. The type of notice given generally depends on the interest at stake. Notice is

generally provided in one of three forms: individual mailed notice; published notice (usually through a local newspaper); and posted notice (usually a sign on the property at issue).

In preservation cases, notice is generally provided in advance of hearings regarding the designation of historic property or consideration of an application to alter or demolish such property. Property owners or occupants of property directly affected by a proposed designation of property or by decisions relating to an application for a certificate of appropriateness are generally entitled to individual notice by mail. Although not necessarily a constitutional requirement, many communities also mail individual notices to nearby property owners. Notice requirements, however, may vary depending on the law of a particular state.

The right to be heard also includes the right to an impartial proceeding. Commission members must be unbiased. They must avoid prejudging a case or exhibiting personal animosity against any particular individual. When a conflict of interest exists, the commission member should remove himself or herself from the decision-making process. Commission members must also avoid extra contacts, including any oral or written communications that are not part of the public record and which other interested parties have not been given reasonable notice.

While allegations have been made that historic preservation commissions, as a whole, are institutionally biased in favor of preservation, this argument has generally failed in recognition that the specialized backgrounds of many individual commission members actually help to ensure fair and informed decision making.

A number of preservation laws have been challenged under the due process clause as unconstitutionally vague, i.e., they are too vague to give fair notice of the laws being imposed. Courts, however, have uniformly rejected these challenges. Historic preservation ordinances have been upheld, both “facially” and “as applied,” so long as procedural safeguards have been enacted to control a preservation commission’s discretion and so long as the meaning of general criteria and standards is discernible from the facts and circumstances. For example, a requirement that any new construction in a historic district be consistent in scale and design with existing historic structures should be able to withstand constitutional attack since that requirement will not be considered in a vacuum but rather in the context of nearby properties and the character of the district as a whole.

It is important to recognize that federal and state constitutions set forth only the minimum requirements that must be met in adopting and implementing historic preservation laws. State and local laws governing procedural requirements as well as any court decisions interpreting specific constitutional or statutory requirements, in addition to those required under the constitution, include state enabling laws, state sunshine laws, federal or state administrative procedure acts, local land-use laws including preservation ordinances, and implementing regulations including any rules of procedures, or others.

### **Equal Protection**

The Fourteenth Amendment to the U.S. Constitution, among other things, protects against any state action that would “deny to any person within its jurisdiction the equal protection of the laws.” This means that similarly situated property should be treated similarly under the law. Different treatment, however, of similar property will be upheld if reasonable grounds exist for the disparity.

Equal protection claims rarely succeed in historic preservation cases. In *Penn Central*, the Supreme Court ruled that a landmark ordinance that single out selected properties for landmark designation was not discriminatory since the ordinance “embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.” The Supreme Court found it significant that more than 400 other landmarks and 31 historic districts had been designated under the city’s overall plan.

Nonetheless, the uniform application of written criteria and standards is critical to the integrity of governmental actions. While courts have consistently ruled that criteria governing the designation and re-view of proposed actions affecting historic resources need not be precise to pass constitutional muster, it is clear that they must be fairly and uniformly applied. Note that many jurisdictions base their standards on the Secretary of the Interior's Standards for Rehabilitation.

## **The First Amendment**

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..." The Establishment Clause generally requires government neutrality toward religion. It prohibits laws that advance religion or express favoritism toward religion or that foster "an excessive entanglement" with religion. Thus, for example, a law that provides special funding for religious schools or exempts religious property from building code requirement may be found to violate the Establishment Clause.

The Free Exercise Clause, on the other hand, prohibits governmental entities from substantially burdening the free exercise of religion, unless the government can establish that the burden is "the least restrictive means" of furthering a "compelling governmental interest" such as public health or safety. However, "neutral laws of general applicability" need not be justified by a "compelling governmental interest," even if "the law has the incidental effect of burdening a particular religious practice." A law designed to promote secular objectives, for example, such as protecting historic buildings from demolition, would not burden the free exercise of religion even though a congregation may be required to spend additional money to rehabilitate rather than demolish and rebuild a historic house of worship.

While relatively few preservation-related cases have been brought under the First Amendment, claims may arise in response to the designation and regulation of historic religious property. Although infrequent, free speech claims may arise in the context of sign regulations.

## **Free Exercise of Religion**

While strong arguments exist in support of the regulation of historic religious property, the law in this area is still evolving. While not always consistent, the few court decisions addressing this question in the context of preservation laws provide some guiding principles.

The controlling U.S. Supreme Court decision on the free exercise issue is *Employment Division v. Smith*, 494 U.S. 872 (1990). In that decision, the Supreme Court reaffirmed prior case law which held that a government may not "substantially burden" an individual's free exercise of religion unless the government can establish that the burden is the "least restrictive means" or furthering a "compelling governmental interest." The Supreme Court, however, carved out a major exception to that rule. The *Smith* Court stated that "neutral laws of general applicability" need not be justified by a "compelling state interest" even if they substantially burden the exercise of religion.

Four distinct issues should be addressed in considering the constitutionality of the regulation of historic religious properties in view of *Smith*. First, what is the religious basis for asserting a free exercise violation? Second, is the law a "neutral law of general applicability?" If the law is found not to be neutral, then it must be determined whether, third, the law or action "substantially burdens" the free exercise of religion. Finally, one must consider whether the action was taken in "furtherance of a compelling state interest," and, if so, whether the action is "the least restrictive means" of furthering that interest. Because historic preservation is generally



not viewed as a compelling state interest, free exercise cases in this area are lost once a court has determined that the free exercise of religion has been substantially burdened.

### Religious Basis for Objection

The Supreme Court has made clear that the individual or institution seeking exemption from governmental laws under the First Amendment must first show that the conduct in question is grounded in religious belief. In other words the question of whether a religious property owner has a viable free exercise claim depends on the religious nature of the objection. Not every change that a religious property owner desires to make to its property implicates the Free Exercise Clause. Alterations to historic religious property based on practical considerations rather than theological choice warrant no more protection than changes to secular property. For example, courts have ruled that maximizing the value of real estate owned by religious organizations or covering a historic house of worship with vinyl siding does not constitute “exercise of religion.”

Although distinguishing between religious and non-religious changes to historic religious property may be difficult, determinations are generally based on whether a proposed change stems from a “sincerely held belief,” such as the need to replace a cruciform-shaped window with the Star of David. If a religious property owner establishes that the belief is “sincerely held” and the change is “religious in character,” then the government must accept those assertions as true even if it considers them to be illogical or incomprehensible.

### Neutral Law of General Applicability

Historic preservation laws are generally viewed as “neutral laws of general applicability.” The object of such laws is to promote the preservation of historic properties, rather than the suppression of religious conduct. Moreover, they seek to preserve all historic properties, whether secular or religious, and without regard to the religious orientation of the property owner. See, e.g. *Rector, Warden & Members of the Vestry of St. Bartholomew’s Church v. New York City*, 914 F. 2d 348 (2d. Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (New York City’s landmark law is neutral of general applicability); *First Church of Christ v. Ridgefield Historic District Comm’n*, 737 A. 2d 989 (Conn. App. 1999), (Ridgefield historic preservation ordinance is neutral law of general applicability); and *City of Ypsilanti v. First Presbyterian Church of Ypsilanti*, No. 191397 (Mich. Ct. App. Feb. 3, 1998) (Ypsilanti preservation ordinance is “a law of general application which does not burden the church any more than other citizens, let alone burden [the church] because of its religious beliefs.”).



Bethlehem Lutheran Church, Round  
Top, TX

The Supreme Court in *Smith*, however, recognized two limitations on its general rule that substantial burdens on the free exercise of religion need not be justified by a compelling governmental interest: (1) where the government “has in place a system of individual exemptions;” and (2) where the substantial burdens involves another constitutionally protected right. There is little guidance on the law in this area. Constitutional experts maintain that exceptions under historic preservation laws, such as “economic hardship provisions,” do not trigger the “individualized exemptions” limitation because they do not invite “religiously motivated discrimination.” See, e.g., Laura S. Nelson, “Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Protection,” 21 *Cardozo Law Review* 740-753 (Dec. 1999). Compare *Keeler v. Mayor & City Council*, 940 F. Supp. 879 (D. Md. 1996) (exemptions in Clumberland historic preservation ordinance made law not neutral and generally applicable as a matter of law). While some religious property owners have argued that historic preservation laws fall into the “hybrid” constitutional rights limitation on the basis that such laws infringe on both free exercise and free speech rights, no court has applied this limitation in the context of historic properties.



Mission Concepcion in San Antonio is listed in the National Register and is a National Historic Landmark.

**Substantial Burden on Religion.** Court decisions addressing this issue are both modest in number and conflicting in result. Nonetheless, the prevailing view is that enforcement of historic preservation laws against historic religious property owners does not impose a “substantial burden on religion.” In *Rectors, Wardens & Members of St. Bartholomew’s Church v. New York City*, 914 F.2d 348 (1990), the leading federal court case on this issue, the Second Circuit, found that the application of the landmark law to a church-owned structure did not impose an unconstitutional burden on the free exercise of religion, even though the law “drastically restricted the church’s ability to raise revenues to carry out its various charitable and ministerial programs.” See also, *City of Ypsilanti v. First Presbyterian Church of Ypsilanti*, No. 191397 (Mich. Ct. App. Feb 3, 1998), in which Michigan Court of Appeals recognized that the alleged “burdens are still only incidental effects of the ordinance...[and do] not burden, [the religious organization] any more than other citizens, let alone the religious organization because of its religious beliefs,” and *Diocese of Toledo v. Toledo City-Lucas County Plan*

*Commissions*, Case No. 97-3710 (Ohio Ct. Common Pleas Mar. 31, 1998) (church failed to establish that denial of permit to demolish a historic house to construct a parking lot amounted to “an undue burden on the Diocese’s right to freely exercise religion” or that “the denial prevents the Diocese from continuing existing charitable religious activities.”)

Note that some courts have dismissed free exercise claims on the basis that the claim is not yet “ripe” for review, meaning that judicial review would be premature because the jurisdiction being sued has not had the opportunity to make a final, concrete decision on what alterations or other actions it will permit a religious entity to make on the subject property. There is still some potential that a constitutional violation will not occur. See, e., *Metropolitan Baptist Church v. Consumer Affairs*, 718 A. 2d 119 (D.C. 1998), and *Church of Saint Paul & Saint Andrew v. Barwick*, 496 N.E. 2d 183 (N.Y. 1986).

**Compelling State Interest.** In the event that a preservation law is deemed “non-neutral” or not of “general applicability,” an the regulation of historic religious property would result in a “substantial burden” on the free exercise of religion, any restrictions under the law must be justified by the virtually insurmountable “compelling state interest” test, which only applies to government interests such as public safety. No court thus far has ruled that historic preservation meets that test.

### The Washington Cases

In a trilogy of cases from the State of Washington, the Washington Supreme Court has either construed the first amendment more restrictively against the government or recognized additional protections for historic religious property owners beyond those guaranteed by the federal constitution. Among other things, the Washington court found that Seattle’s preservation law was not a neutral law of general applicability and that even the nomination of religious-owned historic property violates the free exercise clause. These decisions reflect a marked departure from controlling U.S. Supreme Court precedent on the free exercise clause.

### The Establishment of Religion

In addition to prohibiting substantial burdens on the free exercise of religion stemming from non-neutral, generally applicable laws, the First Amendment to the U.S. Constitution also prohibits the establishment of religion. This prohibition does more than preclude the federal government or a state from setting up an “official” church. It also prohibits the adoption of laws that aid religion, or that give preference to one religion over another religion, or religion in general over non-religion. In essence, government must be neutral toward religion.

The Establishment Clause and the Free Exercise Clause work in tandem with each other, striving for the appropriate balance between church and state. On the one hand, the government may not enact laws or fund programs that are favorable to, or which give preference to, religious entities. On the other hand, government may not enact laws or fund programs that discriminate against religious entities. An issue in many Establishment Clause cases, in effect, is where to draw the line between religious preference and religious exercise. For example, under what circumstances may a governmental entity fund the restoration of a historic church?

While the answer is rarely clear cut, the U.S. Supreme Court has provided some guidance on how to evaluate Establishment Clause claims. To survive constitutional scrutiny, the challenged governmental action or program must (1) serve a secular governmental purpose and (2) have a primary effect that neither advances nor inhibits religion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To avoid having an impermissible “primary effect,”

the governmental action must not “(1) result in governmental indoctrination; (2) define its recipients by reference to religion; or (3) create an excessive entanglement.” *Agostini v. Felton*, 521 U.S. 203 (1997).

In interpreting these requirements, the Supreme Court has said that government may “accommodate” religion, but only where accommodation is necessary to remove governmental intrusions into personal religious beliefs or practice (which, in turn, may require analysis under the Free Exercise Clause). Moreover, although a law may incidentally benefit religion, it must have a secular effect. Finally, consistent with this approach, the Court has recognized that some intermingling between church and state is inevitable in today’s world. However, excessive entanglement is impermissible. Governmental actions that require substantial intrusion into the doctrinal affairs of religious entities are not allowed.

Applying these factors, a federal district court upheld city funding of repairs and improvements for three historic churches in Detroit against an Establishment Clause claim. See *American Atheists v. City of Detroit Downtown Development Authority*, 503 F. Supp. 2d 845 (E.D. Mich. 2007).

### **Statutory Protections**

Efforts have been taken at both the federal and state levels to provide statutory protection for religious property owners. The primary law at the federal level is the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc. Signed into law in 2000, this act prohibits any government from enacting or applying land-use laws, including historic preservation laws, to property owned or used by individuals or religious institutions in a manner that would “substantially burden” religious exercise without a compelling state interest, such as public health and safety. The RLUIPA also requires “equal treatment” of religious and non-religious entities and prohibits discrimination against religious institutions or assemblies. Successful claimants are entitled to attorney’s fees and possibly damages.

Although the RLUIPA applies to a broad range of religious activity, it does not provide immunity from historic preservation and other land-use laws. Courts have uniformly rejected attempts to make the term “substantial burden” meaningless, by finding that it applies to broad range of effects that inhibit or constrain religious exercise. Rather, they view the “substantial burden” requirement as an important limitation on the law’s scope and have dismissed claims where the burdens on religious exercise have been incidental or similar to the type of burdens experienced by any property owner. No single standard for measuring “substantial burden” has been adopted. Most federal appeals courts agree, however, that substantial burden must be interpreted in a manner consistent with First Amendment law and thus require a showing of coercion or significant restraint on religious exercise. See J. Miller, *Regulating Historic Religious Properties under the Religious Land Use and Institutionalized Persons Act* (National Trust for Historic Preservation, 2007).

Finally, governmental entities should be aware that even if a claimant establishes a substantial burden on religious exercise, accommodations made by a local entity to relieve the burden must be accepted unless they are “unreasonable” or “ineffective.” This is an important limitation in matters involving historic properties, because it should lead to negotiations that result in preservation-based solutions.

The RLUIPA has had a noticeable effect on local government activities involving historic properties. In *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 709 (E.D. Mich. 2004), a federal district court dismissed a RLUIPA claim because the preservation commission’s denial of a permit to demolish a student worship facility did not substantially burden the organization’s free exercise rights.



The court reasoned that the commission's action did not "force [the organization] to choose between pursuing its religious beliefs and incurring criminal penalties or forgoing government benefits." It also did not prevent the organization "from engaging in religious worship, or other religious activities."

The vast majority of court challenges brought under the RLUIPA, to date, have primarily focused on land-use challenges involving the exclusion of religious properties from certain locations or discriminatory actions by prison officials in matters involving institutionalized persons.

By way of background, the RLUIPA was adopted in response to the U.S. Supreme Court's ruling in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the act's processor, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et. seq., was unconstitutional as applied to the states. Among other things, the Court found that Congress had exceeded its authority in enacting the RFRA, by mandating that the Free Exercise Clause afford more protection than that required by the Supreme Court under *Employment Division v. Smith*. (Note that RFRA is still applied to federal agency actions. See *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006)).

As with the RFRA, the RLUIPA was adopted in response to the Court's ruling in *Smith*. Although the law's constitutionality as applied to challenges to state or local land-use and preservation actions has not been resolved, the U.S. Supreme Court upheld the law as applied under its "institutionalized persons" prong in 2005. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

At least 11 states have also enacted varying forms of the RFRA, enabling religious property owners to seek redress from state and local governments that substantially burden their religious rights without a compelling governmental reason. Although preservation actions have been challenged in court under both federal and state RFRA grounds, no court has ruled in favor of a religious property owner on such grounds. See, e.g., *First Church of Christ v. Historic District Commission*, 737 A.2d 989 (Conn. App. 1999), *cert. denied*, 742 A.2d 358 (Conn, 1999) (upholding denial of application to install vinyl siding on historic church against state RFRA claim).

A limited number of state and local governments have responded to concerns raised by religious property owners over the land marking of their property with the adopting of historic religious property exemptions from historic preservation laws.

Strong arguments exist that religious rights statutes violate the Establishment Clause of the First Amendment, which requires neutrality toward religion. (See discussion on the Establishment Clause above). The California Supreme Court, however, upheld a provision in a California preservation statute that enables religious property owners to exempt themselves from local preservation laws, against such a claim. See *East Bay Asian Local Development Corp v. State of California*, 13 P.3d 1122 (Cal. 2000), *cert. denied*, 532 U.S. 108 (2001).

## Free Speech

First Amendment claims have also surfaced in the context of alleged violations of free speech resulting from efforts to regulate signs or other activities in historic districts. As with free exercise of religion claims, there are only a handful of court decisions on this particular issue in a preservation context. However, a substantial body of state and federal case law exists on the question of the constitutionality of sign regulations, in particular, and free speech, overall.

In general, the First Amendment to the U.S. Constitution bars the regulation of speech, including signs, on the basis of context. Thus, a commonly-wide ban on all political signs or a ban that excluded political signs but allowed commercial signs would be unconstitutional. See *Ladue v. City of Gilleo*, 512 U.S. 43 (1994). In some



cases, even the imposition of permitting requirements may also be viewed as unconstitutional. See *Donald Luck v. Village of Coldspring*, 475 F. 3d 480 (2d Cir. 2007) (ruling that a provision under the town's preservation ordinance, which required a permit prior to displaying a political sign, was unconstitutional as an impermissible prior restraint on free speech).

In considering the neutrality of sign regulations, it is important to recognize that "non-commercial" signs and other forms of "pure" speech involving political or religious messages will be afforded greater protection than commercial speech. However, this does not mean, in turn, that regulations favoring non-commercial speech over commercial speech will necessarily be upheld. For example, the U.S. Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410: 1993), struck down an ordinance banning all commercial news racks while permitting noncommercial news racks on the basis that the city's action lacked a close relationship to its stated purpose of addressing aesthetic and safety concerns. While distinctions between on-premise (business identification) signs and off-premises (billboards and other types of advertising) signs is generally permissible, any exceptions within those categories must be carefully justified.

Generally speaking, a government can impose reasonable time, place, and manner restrictions on speech if those restrictions are "content-neutral." Laws that have "an incidental effect" on some speakers or messages and not others will be upheld as content-neutral so long as they serve some purpose unrelated to the content of the regulated speech. Historic preservation and aesthetic considerations are judicially recognized police power objectives.

Restrictions on speech must also be "narrowly tailored" to meet governmental objectives. A law need not employ the least restrictive means to satisfy the governmental objective at issue. Nonetheless, restrictions on speech should not be "substantially broader than necessary." The vast majority of free speech questions arise in the context of sign regulations in historic districts, however, free speech questions have surfaced in other contexts as well. Free speech claims have been raised, although unsuccessfully, in preservation cases involving a total ban on newspaper vending machines in a historic district, the distribution of advertising leaflets in a historic district, restrictions on off-premise, person-to-person canvassing and the use of sidewalk tables to distribute leaflets and sell shirts, and the regulation of murals, per se, and the denial of permission to paint a mural on the wall of a commercial building in a historic district.

## **Voluntary Approaches to Historic Resource Protection**

A variety of programs encourage the preservation of privately owned historic resources through voluntary action ranging from preservation easements to tax incentives. These programs often play a critical role in historic preservation encouraging protection for significant resources where regulatory protection measures do not exist or by augmenting existing regulatory programs by providing a higher degree and/or more lasting protections.

## **Direct Acquisition**

For many years historic resources within the United States have been protected through voluntary efforts accomplished primarily by acquisition. Often limited to places associated with important people or significant historic events, these resources are often purchased by government entities or nonprofit organizations and generally operated as house museums.

While this approach to preservation is still used today, alternative methods have been developed to preserve historic resources without converting them to museum use, which requires a significant financial investment. Historic resources may be purchased through revolving funds and then resold after restrictions have been

imposed. Historic properties may also be protected by acquiring easements or partial interests in property, which give preservation organizations or public entities the right to approve changes to properties for a period of years or in perpetuity.

### **House Museums**



Samuel T. Rayburn House. Listed in the National Register and is a National Historic Landmark.

Many of our nation's most important historic properties are preserved as house museums. This form of protection generally involves restoration of the interior and exterior of the building and preservation of the surrounding landscape. Because house museums are generally open to the public, they often play a key role in attracting tourism to specific areas.

Historic museums may be owned and operated by public and/or private organizations. The level of protection often depends upon the resources available to restore the property or make necessary repairs. In some instances, property may be donated to preservation organizations, along with special endowments to ensure its maintenance over time, through charitable giving, or estate planning techniques.

In considering how best to protect a historic resource, such as a house, it is important to address the viability of the resource over time. In some instances, property may be better protected if used as a house or office rather than preserved as a house museum with limited resources.

### **Revolving Funds and Land Trusts**

While revolving funds may be established by either private or governmental entities, they are generally operated at the private level by historic preservation and other charitable organizations who can accept tax-deductible donations. Revolving funds are typically established through donations, grants, or loans of money that generate income sufficient to finance the acquisition of threatened properties. Upon acquisition, the property is either rehabilitated and sold or sold with protective covenants or preservation easements. The proceeds from the resale are then used to replenish the fund.

Revolving fund money may be used to purchase historic property directly or to finance the purchase or rehabilitation by another entity or individual. Organizations with revolving funds may serve as a lender when other sources of money are unavailable or the terms for other loans are too restrictive or expensive. In addition

to providing direct loans, organizations may also, through their revolving funds, provide loan guarantees or participate in the lending of money with other financial institutions.

Historic, archaeological, environmental, and other resources may also be protected through land trusts. By acquiring parcels of land and/or partial interest in property, nonprofit organization with limited funds can provide long-term stewardship of important resources. Land trusts often work directly with private landowners, soliciting donations of land, development rights, and conservation easements. When critical parcels of land cannot be obtained, donations may be sought to purchase the land.

### **Federal Tax Incentives**

Tax incentive programs generally address three important objectives: they provide monetary support for owners of property subject to preservation laws; they counter private and public land-use policies that tend to favor demolition and new construction; and they encourage the rehabilitation of historic structures. While no one incentive program accomplishes all three objectives, meaningful tax incentives have been adopted at the federal, state, and increasingly, the local level. Frequently, these incentives are combined to make a historic rehabilitation project economically viable. Please reference NPS website <http://www.nps.gov/tax-incentives.htm>.

The federal government encourages the preservation and rehabilitation of historic structures and other resources through tax incentives. By rehabilitating eligible buildings or investing in such projects, tax-payers can recoup dollar for dollar expenditures in the form of a credit from tax owed if certain criteria and standards are met. Taxpayers may also deduct from their taxable income, in the form of a “charitable tax deduction,” the value of donated full or partial interests in historic property. Perhaps the best known incentive to preserve historic property is the federal historic rehabilitation tax credit. This incentive gives property owners either 10 or 20 percent tax credit on rehabilitation expenses, depending upon the classification of the building at issue. “Certified historic structures” (residential investment and commercial property) are eligible for a 20 percent credit while non-certified, non-residential property placed in service before 1936 is eligible for a 10 percent credit. See I.R.C. § 47.

Several specific conditions must be satisfied to qualify for the credit. In addition to being historic, the building must be income producing, not an owner-occupied residence, and “placed in service” before the beginning of the rehabilitation, meaning the structure must have been used as a building before being rehabilitated. Most importantly, the building must be “substantially rehabilitated” and the rehabilitation must be “qualified rehabilitation.” In other words, rehabilitation costs must exceed the adjusted basis of the building or \$5,000, and the work performed must meet preservation standards. See I.R.C. § 47 and Treas. Reg. §§ 1.46, *et. seq.*

Credits from “passive activities” (those in which the taxpayer is not involved on a regular, continuous, and substantial basis) may not be used to offset income and taxes owed from “non-passive activities.” For example, partner investors in rehabilitation projects would not be able to apply the rehabilitation credit against wages and portfolio income such as stock dividends and interest on bank accounts. A credit, however, may be carried over to future tax years to offset taxes from passive activities. An accountant familiar with IRS rules and regulations should be consulted as depending on the specific circumstances and conditions approaches may vary.

A rehabilitation tax credit may not be taken until the building has been certified as historic and the rehabilitation has met specific standards. Certifications of historic significance and certifications of an approved rehabilitation are obtained from the National Park Service after review by the appropriate state historic preservation office. Regulations governing the certification process are set forth at 36 C.F.R. Part 67.

The New Markets Tax Credit Congress established a new program under § 121 of the Community Renewal Tax Relief Act of 2000, which provides funding opportunities for historic business districts in low-income communities. Through a competitive process, the Community Development Financial Institutions Fund (CDIF), a division of the U.S. Treasury, awards tax credit allocation to qualified Community Development Entities (CDEs), which in turn, award credits to tax-payers that invest money in a CDE program. The taxpayer can receive up to 39 percent in new markets tax credits over a seven-year period. A CDE is an investment fund, also certified by the CDIF, whose primary mission is to serve or provide investment capital for low-income areas. Through CDEs, which can include, for example, community development corporations, community development banks, small business investment corporations, and other entities, taxpayers invest in businesses serving low-income areas in the form of loans, equity investments, and financial counseling. By creating alliances with financial institutions, real estate developers, nonprofit corporations, and other taxpayers, the CDF has access to sufficient capital and business acumen to ensure economic success.

The National Trust for Historic Preservation's for-profit subsidiary, The National Trust Community investment Corporation (NTCIC), is a CDE. Through the NTCIC, which has been awarded two allocations for tax credits, taxpayers can participate directly in historic rehabilitation projects or invest in conduit funds that serve, for example, historic Main Street businesses.

### **Federal Rehabilitation Tax Credit Program**

The Federal Rehabilitation Tax Credit Program was created in 1976 and is overseen by the National Park Service (NPS) in partnership with the Internal Revenue Service (IRS) and the Texas Historical Commission. It is a tax credit worth 20% of the eligible rehabilitation costs. For a building to be eligible for this federal tax credit, it must meet these requirements. (1) The building is listed in the National Register of Historic Places, or the building is determined eligible for the National Register and does not need to be officially listed until later. (2) The structure must be a building (no dams, grain silos, bridges etc.). (3) It must be income producing. No owner occupied residences are eligible. (4) The rehabilitation must be a "substantial rehabilitation" not just a small remodeling project. The rehabilitation cost should usually exceed \$5,000. (5) Most costs are eligible for tax credit such as structural work, building repairs, electrical, plumbing, heating and air conditioning, roof work, and painting, architectural and engineering fees, site survey fees, legal expenses, development fees, and other construction-related costs. (Landscaping, furniture, new additions, parking lots and sidewalks are not eligible). (6) After the rehabilitation the building must be "returned to use." (7) The Project must meet the Secretary of the Interior's standards for rehabilitation.

### **Application Process**

Application must be submitted before the project is completed. Work may begin before the application has been submitted, but it is best to get the application has been submitted, but it is best to get the application submitted during the planning stages so it can be confirmed that the project is meeting the Secretary of Interior's Standards. If the building is not on the National Register you must determine if it is eligible for it.

**Part 1 Evaluation of Significance-** If the building is listed on the National Register; this is indicated on the application. If the building is not on the National Register, you must provide documentation that it is eligible.

**Part 2 Description of Rehabilitation-** Plans depicting the proposed works as well as photographs are required showing the major character-defining features of the building prior to the start of work. The proposed work is evaluated using the Secretary of the Interior's Standards for Rehabilitation.



**Part 3 Request for Certification of Completed Work-** Documents that show the work was completed as proposed and meets the Standards are submitted for review and certification. After this the building is eligible for the tax credit.

The Texas State Historic Preservation Tax Credit Program was created by Texas House Bill 500 and went into effect on January 1, 2015. The program is overseen by the Texas Historical Commission (THC) and the Texas Comptroller of Public Accounts. The administrative rules are in Texas Administrative Code, Title 13, Part II, Chapter 13. The Texas Historic Preservation Tax Credit Program is worth 25% of eligible rehabilitation costs. Applicants are encouraged to apply to both the Texas Historic Preservation Tax Credit Program and The Federal Rehabilitation Tax Credit Program. The state law is discussed further in the state preservation law section.

The President's Advisory Council on Historic Preservation states that historic preservation is often less costly than new construction, and also a better investment through the "revitalization of urban areas for both residences and businesses." The Jefferson Davis Hospital in Houston is a good example. It was rehabilitated, and through the combination of federal rehabilitation tax credits, together with low income housing credits, resulted in an investment of \$6.3 million. Historic Preservation is a big part of construction in many Texas communities. In 2013, \$772 million was spent on historic preservation, \$740.8 million of that being in private residential and non-residential properties. Most rehabilitation done in Texas is done by private property owners. The work done to these properties is exempt from sales tax and there are often other tax exemptions at the local level.

### Charitable Giving Rules



Ball-Eddleman-McFarland House Historic Fort Worth, Inc.

The federal government encourages the donation of historic property through its charitable giving rules. Generally speaking a taxpayer is entitled to a deduction from taxable income or taxable estates and gifts, the amount of money or the fair market value of property donated to a charitable organization. With respect to charitable contribution deductions from income, the value of the deduction may depend upon the taxpayer's adjusted gross income and the type of property donated. Deductions for estate and gift tax purposes, however, are generally unlimited.



For historic preservation purposes, charitable organizations include governmental entities, if the contribution is made exclusively for public purposes, and a variety of educational and nonprofit organizations. See I.R.C. § 170 (c) (1) & (2). To qualify as a charitable organization, nonprofit organization must obtain a determination letter from the Internal Revenue Service attesting to their status as a tax-exempt organization under Section 501 (c)(3) of the Internal Revenue Code.

Historic resources are generally donated as part of lifetime and estate planning objectives, including the deferral and reduction of the overall tax burden of the property owner and his or her survivors as well as the continued preservation of the property into the future. The fundamentals of lifetime and estate planning are beyond the scope of this publication. Generally speaking, however, a historic property owner can ensure the preservation of a historic resource by donating the structure to preservation or other charitable organization. A historic house, for example, may be given to a preservation organization for use as a museum or for future sale with restrictions that protect the building in perpetuity. Alternatively, historic property may be donated to a non-preservation organization with preservation restrictions already in place. In some cases a “charitable remainder” gift of historic property may be made to an organization, allowing for the retention of a “life estate” to allow the immediate family to reside in the house until the death of the donor.

Historic resources may also be preserved through the donation of partial interests in property commonly referred to as preservation or conservation easements. As discussed above, owner of historic properties who donate easements or partial interests in their property to qualified preservation or conservation organizations may be eligible for a charitable contribution deduction under Section 170 of the Internal Revenue Code I.R.C. § 170(h); I.R.C. § § 2055(f) and 2522; and Treas.Reg. § 1.170A, *et. seq.* Among other requirements, the donor must agree, in the form of a recordable deed, to relinquish his or her rights to demolish, alter, or develop the property, in perpetuity, to a qualified organization. Upon donation, the donor and all subsequent property owners will not be able to change the property without the express permission of the recipient organization.

The value of the easement is the difference between the property’s fair market value before donation of the easement and its fair market value afterward. In order to obtain the charitable deduction, the donor must retain a professional appraiser to value the donated easement, unless the donation is worth less than \$5,000.

### **Combining Incentives**

The economic viability of rehabilitation projects is sometimes dependent upon the combining of the federal historic rehabilitation tax credit with other federal and state programs. In addition to the New Markets Tax Credit program, discussed above, investors in the rehabilitation of low-income rental housing properties, for example, may be eligible for a low-income housing tax credit, renewal community tax incentives, empowerment zone tax incentives, or other incentives. Taxpayers often seek both federal and state rehabilitation tax credits (see Texas Historic Commission Preservation Tax Incentives at <http://www.thc.texas.gov/preserve/projects-and-programs/preservation-tax-incentives> for state rehabilitation tax credit information) and, in some cases, a preservation easement may also be donated. For further information, a tax attorney should be consulted.

### **Other Related Laws and Issues**

A number of miscellaneous laws come into play in any resource protection program. While many of these laws address concerns unrelated to historic resource protection, they often include provisions that may either enhance or curtail preservation efforts.

## Federal Accessibility Laws

The federal government and state have enacted laws that prohibit discrimination against persons with disabilities. While historic property owners, in general, must meet each law's specific requirements, alternative measures of compliance may be applied if the historic resource would otherwise be threatened or destroyed. The most comprehensive example of this type of legislation, to date, is the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, (ADA). This law prohibits discrimination to individuals with disabilities in a wide range of circumstances including private sector employment, public services, transportation, telecommunications, and most significantly for historic resources, places of public accommodation.

The level of compliance under the ADA generally depends on the classification of the facility. The ADA requires, for example, that government buildings, "places of public accommodation" such as hotels and restaurants, and "commercial facilities," including office buildings and warehouses, be "readily accessible" to be disabled. The law establishes specific accessibility requirements for new construction and alterations to existing structures and, requires the removal of existing architectural or communication barriers when their removal is "readily achievable." Finally, all public entities must make any service, program, or activity readily accessible and usable by persons with disabilities.

In general, owners, lessees, or operators of historic buildings, structures, or sites must comply with the ADA. Alterations to "qualified" historic buildings and facilities, including the construction of new additions or renovation of existing spaces, for example, should be made readily accessible to the maximum extent feasible. Alternative measures of compliance may be used if the historic resource would be threatened or destroyed. In most cases, the entity making the alteration must consult with the state historic preservation officer regarding accessibility requirements. Architectural barriers such as steps or narrow doors and communication barriers such as high mounted telephones must be removed from historic resources that are used as "public accommodations," if "readily achievable." If the barrier removal would destroy the historical significance of building, however, alternative methods of compliance may be provided. Public entities are also not required to take any action that would threaten or destroy a property's historic significance. The ADA is primarily enforced through suits brought by individuals who believe that they have been discriminated against. In addition, the U.S. Attorney General may initiate compliance review and sue for injunctive relief and monetary damages. Note that federal buildings and federally-funded facilities covered by the Architectural Barriers Act of 1968 (ABA) must satisfy the Uniform Federal Accessibility Standards as well as Section 106 of the NHPA. State and local access codes also may be enforced in other ways.

The Federal Access Board adopted revised ADA Accessible Guidelines (ADAAG) in 2004. It has subsequently been amended since then including regulations in 2010 which were adopted in 2012. The ADAAG includes a scoping document for ADA facilities, which govern facilities in the private sector (places of public accommodation and commercial facilities) and the public sector (state and local government facilities); a scoping document for ABA facilities, which addresses facilities in the federal sector, and a common set of technical criteria that each scoping section will reference. In contrast to prior guidelines, specific standards applicable to historic properties are interspersed throughout the publication rather than contained in a single section.

The ADAAG is advisory until formally adopted by a regulatory agency, at which time they have the force of law. Current regulations for the ADA are set forth at 28 C.F.R. §§ 5.149-151 (state and local governments) and 28 C.F.R. § 36.4-1-406 (public accommodations). The U.S. Department of Transportation, the General Services Administration, and the U.S. Postal Service have adopted portions of the ADAAG as regulatory standards and as such, must be followed in the implementation of their own programs. Information on the

ADAAG and applicable standards are available at the Access Board's website at [www.access-board.gov](http://www.access-board.gov). ADA regulations officially adopted and enforceable can be found on the Justice Department's website at [www.usdoj.gov/crt.ada](http://www.usdoj.gov/crt.ada).

## Environmental Hazard Laws

Special environmental liability laws enacted at the federal and state level apply to individuals who own, or have a financial interest in property with environmental hazards. Historic preservation organizations directly involved in real estate activities as owners, developers, or holders of preservation easements may be directly liable for environmental problems associated with such property. Historic preservation organizations lending money secured by real property may also be liable under certain circumstances.

The most sweeping law governing liability for hazardous substances is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund" act), 42 U.S.C. §§ 9601-9675, which authorizes the federal government to clean up hazardous substance releases and recover damages and associated costs from those who own or "control" the property. In addition to other environmental hazards, the following federal laws address lead-based paint hazards:

- The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856 (which imposes specific abatement and disclosure requirements governing lead-based paint in residential property);
- The Lead Paint Poisoning Prevention Act of 1971, 42 U.S.C. § 4821, *et. seq.* (which sets forth specific inspection and lead-based paint abatement requirements on federally-owned and assisted housing); and
- The Toxic Substances Control Act, 15 U.S.C. § 2601, *et. seq.* (which directs federal agencies to enact regulations governing lead-based paint training programs and certification procedures for contractors involved in lead-based paint removal, and requires the development of standards for laboratory testing, technical assistance, and public education, and the performance of lead paint exposure studies).

The Department of Housing and Urban Development (HUD) issued new regulations governing lead paint abatement and removal in 1999, which became effective in September 2000. Codified at 24 C.F.R. Part 35, the regulations set forth specific requirements for risk assessment, treatment, and ongoing maintenance of lead paint on any federally-assisted or federally-owned residential property constructed before 1978. Specific requirements vary depending on the funding source and agencies involved, but they may include risk assessment, repair or removal of deteriorated paint, and contaminated dust "clearance." For detailed information on lead paint requirements, visit HUD's website at [www.hud.gov/lead/leadpboff.cfm](http://www.hud.gov/lead/leadpboff.cfm) or contact the National Lead Information Center at 1-800-424 LEAD.

Liability for hazardous wastes may be found under the following federal and state laws:

- The Resource Conservation and Recovery Act, 42 U.S.C. §6.901, *et. seq.* (which regulates the treatment, storage and disposal of hazardous wastes);
- The Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 (which addresses the removal and containment of asbestos); and
- The Occupational Health and Safety Act, 29 U.S.C.A. §§ 651-678 (29 C.F.R. §§ 1910.1001 AD 1929.58) (which establishes asbestos standards applicable to employers before, during and after a rehabilitating project).

Finally, liability may be imposed under the Toxic Substances Control Act, 15 U.S.C. § 2601, *et. seq.*, mentioned above, which applies to abandoned or improperly used or disposed sources of toxic substances, such as PCBs, and the Clean Water Act, 33 U.S.C. §1251, *et. seq.*, which governs unlawful discharges to surface or ground water. Several states have enacted some form of “superfund” legislation, imposing liability on property owners for cleanup costs associated with hazardous waste, and specialized laws addressing lead paint contamination, asbestos, and so forth. A number of states have passed “brown-field” laws to make reclamation of historic urban sites easier. These laws limit an individual’s or organization’s exposure to legal liability from contamination when they volunteer to clean up contaminated sites in certain areas. In some cases, technical or financial assistance may also be available.

## **Transportation Funding**

Every six years Congress enacts a new transportation funding bill that sets forth the financial and legal framework that states must follow to qualify for federal matching funds for all transportation projects. The Transportation Equity Act for the 21<sup>st</sup> Century, dubbed TEA-21, and its predecessor, The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), authorized a wide range of highway, safety, mass transit, and other surface transportation-related programs. Both programs, for example, supported spending on bus and rail lines, bike paths, and sidewalks.

They also stressed the importance of intermodalism—which focuses on the quality of connections between different modes of transportation, and transportation planning—which requires the development of long-range plans to improve the efficiency and effectiveness of transportation in metropolitan areas.

A key component of both transportation bills, from a historic preservation perspective, proved to be a provision for “transportation enhancements” funding. Under TEA-21, for example, states were required to set aside 10 percent of their “surface transportation funds” for enhancement projects such as historic preservation, landscaping, and scenic beautification. Also included in TEA-21 was a “National Historic Covered Bridge Preservation Program,” which provided special funding to states on competitive basis for the preservation, rehabilitation, or restoration of covered bridges.

Congress replaced TEA-21 with the “Safe, Accountable, Efficient Transportation Equity Act—a Legacy for Users” (SAFETEA-LU) in 2005. SAFETEA-LU, among other things, continued the transportation enhancement program. It expired at the end of Fiscal year 2009. The list of qualifying enhancement activities is set forth at 23 U.S.C § 101(a) (35). Congress renewed its funding formulas ten times after its expiration date, until replacing it with Moving Ahead for Progress in the 21<sup>st</sup> Century act in 2012. The Fixing America’s Surface Transportation Act followed in 2015.

## **Road Design Standards**

Standard governing road design can threaten historic resources and adversely affect local community character in unexpected ways. These standards, for example, may require that certain roads in historic district be widened, that trees be taken down, or curbside parking in downtown areas be removed. Roads included in the National Highway System (NHS) must comply with guidelines adopted by the U.S. Department of Transportation in consultation with the American Association of State Highway and Transportation Officials (AASHTO). Roads that are not part of the NHS are subject to state design standards.

While AASHTO standards and other design standards are advisory in form, they are generally treated as legal requirements and rigidly applied. This practice has been the target of considerable criticism in the past, since the AASHTO standards did not generally recognize important concerns such as environmental protection and

historic preservation. For example, the minimum width requirements for roads and bridges, based on projections for high speed driving, were often unnecessarily large and out-of-scale with many historic areas and rural communities. However, some positive changes have occurred over the past few years.

Publications such as *Flexibility in Highway Design* (1997) and *A Guide for Achieving Flexibility in Highway Design* (2004) highlight important considerations and solutions for highway projects affecting historic or scenic areas. The State of Vermont has developed its own set of guidelines for historic roads and bridges and some states have departed from AASHTO standards in specific cases involving historic roadways such as the historic Columbia River highway in Portland, Oregon.

### **Laws Affecting the Organization and Operation of Historic Preservation Organizations**

Historic preservation organizations generally qualify for tax exempt status under Section 501 (c) (3) of the Internal Revenue Code. Under that provision, corporations “organized and operated” exclusively for charitable and educational purposes may qualify for federal income tax exemption.

As a nonprofit, charitable organization, funds can be raised more easily because any contributions made to such organizations are tax deductible. Organizations enjoying tax-exempt status under federal laws are generally eligible for exemption under state and local laws as well.

Historic preservation organizations enjoying tax-exempt status must be careful not to jeopardize that status by engaging in activities contrary to their charitable purpose. Among other things, an organization must be operated “exclusively” or “primarily” for one or more tax-exempt purposes and an organization’s net earnings may not inure to the benefit of any private individual such as an officer or director. Finally, an organization’s activities must be for the public benefit as a whole. Lobbying activities, while not prohibited, are subject to specific limitations under the tax code.



# STATE OF TEXAS PRESERVATION LAWS

## The Antiquities Code of Texas

The Antiquities Code of Texas (the Code) was enacted in 1969 to protect archaeological sites and historic building on public land. The law was precipitated by an incident in the late 1960s wherein a sunken 16<sup>th</sup> century Spanish treasure ship was plundered without regard for proper archaeological controls, and significant historical information was lost. Please reference the code at <http://www.thc.texas.gov/project-review/antiquities-code-texas>.

Texas Natural Resource Code, Title 9, Chapter 191 establishes the Antiquities Code of Texas, which is the governing legislation of historic preservation activities throughout the state.

The Antiquities Code declares that it is the public policy and in the public interest of the State of Texas to locate, protect, and preserve all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archaeological, educational, or scientific interest, including but not limited to prehistoric and historical American Indian or aboriginal campsites, dwellings, and habitation sites, archaeological sites of every character, treasure imbedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of their contents, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants, prehistory, history, natural history, government, or culture in, on, or under any of the land in the State of Texas, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas.

The Antiquities Code also establishes the legal authority for the Texas Historical Commission (THC) as it is known at state level or State Historic Preservation Office (SHPO) as it is known at federal level, to protect historic resources throughout the state. The THC shall:

- (1) Maintain an inventory of the items recovered and retained by the State of Texas, showing the description and depositor of them;
- (2) Determine the site of and designate landmarks and remove from the designation certain sites, as provided in Subchapter D of this code;
- (3) Contract or otherwise provide for discovery operations and scientific investigations under the provisions of Section 191.053 of this code;
- (4) Consider the requests for and issue the permits provided for in Section 191.054 of this code;
- (5) Prepare and make available to the general public and appropriate state agencies and political subdivisions information of consumer interest describing the functions of the commission and the procedures by which complaints are filled with and resolved by the commission and the procedures by which complaints are filled and resolved by the commission; and
- (6) Protect and preserve the archaeological and historical resources of Texas

The Code requires state agencies and political subdivisions of the state—including cities, counties, river authorities, municipal utility districts, and school districts—to notify the Texas Historical Commission (THC) of ground-disturbing activity on public land. The law also established the designation of State Antiquities

Landmarks, which may be applied to historic buildings as well as archaeological sites. The Antiquities Code (Texas Natural Resource Code, Title 9, Chapter 191) and accompanying Rules of Practice and Procedure (Texas Administrative Code, Title 13, Chapter 26) can be found under Statutes, Regulations, and Rules at [www.thc.texas.gov/project-review/statutes-regulations-rules#state](http://www.thc.texas.gov/project-review/statutes-regulations-rules#state).

Examples of projects that require review under the Antiquities Code of Texas include:

- Construction of reservoirs by river authorities and water districts
- Construction of recreational parks or the expansion of existing facilities by city governments
- Energy exploration by private companies on public land
- Rehabilitation or demolition of a building owned by a state agency or university that is at least 50 years old
- Rehabilitation or demolition of a building owned by a political subdivision of the state that is listed in the National Register of Historic Places, individually or as part of a historic district, or that has other state or local designations

The THC issues antiquities permits for archaeological studies or work at designated buildings and structures. The Antiquities Permit Application forms for Archaeology and for Historic Buildings & Structures may be downloaded from the Forms page on the THC's website [http://www.tch.texas.gov/about/forms#cat\\_301](http://www.tch.texas.gov/about/forms#cat_301).

An archaeological permit may be issued only to a professional archaeologist who meets the definition of a principal investigator as defined in Rule of Practice and Procedure for the Antiquities Code of Texas. Similarly, the project professional for historic buildings and structures permits generally must be an architect meeting the qualifications listed in the Rules, or under certain circumstances, other qualified professionals or contractors.

## General Powers of the Texas Historical Commission

Sec. 442.005 of the Antiquities Code lays out the powers for the THC. It directs the commission to furnish leadership, coordination, and services to county historical commissions, historical societies, and the organizations, agencies, institutions, museums, and individuals of this state interested in the preservation of archaeological or historical heritage and shall act as a clearinghouse and information center for that work in Texas. The THC is responsible for the administration of the Antiquities Code of Texas, Chapter 191, Natural Resources Code, and shall strive to establish effective working relationships among individuals primarily interested in history, architecture, and archaeology.



The Old University Building on the campus of Stephen F. Austin University in Nacogdoches is a State Antiquities Landmark

Other services that the THC provides are:

- Professional consultant services to museums and to agencies, individuals, and organizations interested in the preservation and restoration of archaeological or historic structures, sites, or landmarks.
- Administer the federal National Historic Preservation Act of 1966, as amended and may prepare, maintain, and keep up to date a statewide comprehensive historic preservation plan.
- Certify to another state agency the worthiness of preservation of any historic district, site, structure, or object significant in Texas or American history, architecture, archaeology, or culture.
- Provide matching grants to assist the preservation of a historic structure significant in Texas or American history, architecture, archaeology, or culture. It is also instructed to provide grants to preserve collections of small history museums in the state if the collections are significant in Texas or American history, architecture, archaeology, or culture.

- Provide uses for its facilities and leadership to stimulate the development and protection of archaeological or historical resources in every locality of this state.
- Conduct educational programs, seminars, and workshops throughout this state covering any phrase of historic preservation.
- Conduct cooperative studies and surveys of the various aspects of historical heritage.
- Maintain the historic character of the sites and structures entrusted to its care. This includes using its resources to develop the historic sites through promotional and educational activities, including the purchase of items for resale or donation and the purchase of plants and landscaping services. The THC may accept a gift of real property, whether of historical value or not. When the gift is received, the commission may:
  1. Arrange for the preservation, maintenance, and public exhibition of the property; or
  2. At the commission's discretion, sell the property at fair market value and use the proceeds to carry out any purpose of this chapter in the code.

### **State Antiquities Landmarks**



1879 Houston Waterworks

The THC designates State Antiquities Landmarks (SALs). Buildings designated as SALs are listed in the Texas Historic Sites Atlas. Designated landmarks are protected under the Antiquities Code of Texas. Historic buildings must be listed first in the National Register to become a State Antiquities Landmarks; however, archaeological sites do not have this requirement.

SAL designation does not mean that sites or buildings cannot be altered or destroyed. However, the landowning agency must consult with the THC about such proposed actions through the permit process, and the THC will determine whether the work will be allowed.

Although buildings designated as SALS are listed in the Texas Historic Sites Atlas, information about designated archaeological sites is not available to the general public to protect the sites from vandalism and destruction.

### **Certified Local Governments Program**

The Certified Local Governments (CLG) Program is a partnership between local, state, and federal governments. Its purpose is to promote all kinds of historic preservation, from county courthouses and federal buildings to neighborhoods. Texas municipalities that achieve CLG status from the National Park Service are eligible to receive valuable technical assistance, training, and matching grants tied to developing and maintaining a local comprehensive preservation program.

Projects eligible for grant funding may include architectural, historical, archaeological surveys, oral histories; nominations to the National Register of Historic Places; staff work for historic preservation commissions, design guidelines and preservation plans; educational and public outreach materials such as publications, videos, exhibits and brochures; training for commission members and staff; and rehabilitation or restoration of National Register listed properties.

To become CLG, the THC and NPS must certify that the local government has agreed to the following;

- Enforce appropriate state or local legislation for the designation and protection of historic properties.
- Establish an adequate and qualified historic preservation review commission under state or local legislation.
- Provide adequate public participation in the local historic preservation program.
- Maintain a system for the survey and inventory of local historic properties.

### **Comprehensive Planning Requirements**

The Texas Local Government Code allows municipalities to have comprehensive plans. Comprehensive plans outline the goals of the local community that designated them. The plan is supposed to “plan for the orderly growth and development of the city and its environs” and “facilitate the movement of people and goods, and the health, safety and general welfare for the citizens of the city.” The Texas Local Government Code also requires zoning regulations as part of the comprehensive plans, which can be helpful in the establishment of cultural districts, which help to promote historic preservation.

#### **Texas Statewide Preservation Plan**

Every 10 years the Texas Historical Commission along with its partners creates a state wide plan for historic preservation. Please reference the THC website <http://www.thc.texas.gov/preserve/projects-and-programs/texas-statewide-preservation-plan>. There are eight main goals involved in this plan:

#### **Goal 1: Survey and Online Inventory**

- Increase in historic and cultural resources surveyed statewide by 2020



- Functioning map-based web database that links all surveys and inventories (all state agencies, local inventories, National Register eligibility determinations, etc.)
- THC Atlas and other relevant inventories are continually updated and managed to keep pace with the increase in survey data and improvements in technology
- New THC website to assist customers in locating information quickly and easily

## Goal 2: Emphasize Cultural Landscapes

- Statewide survey includes cultural landscapes
- Increased tourism partnerships and opportunities through preservation and promotion of cultural landscapes
- Increased preservation capacity through training and resources for local cemetery committees
- Local communities participate in the Historic Texas Highway Program

## Goal 3: Implement Policies and Incentives

- Newly adopted master plans include preservation policy
- 50 or more restored historic courthouses
- Increased community involvement and utilization of Section 106
- Main Street cities are Certified Local Government

## Goal 4: Leverage Economic Development Tools for Preservation

- Increased % of economic development tools being used for historic preservation
- Historic Preservation is proven conclusively and promoted as an economic engine
- Increased visitation statewide at historic sites

## Goal 5: Learn and Experience History through Places

- 4<sup>th</sup> and 7<sup>th</sup> grade children learn community/regional culturally inclusive history through place
- Adults within a community learn local history and value of preservation
- Increased visitation at historic sites statewide
- Increased participation of underrepresented people in historic preservation

## Goal 6: Connect Preservation to Related Fields

- Historic preservation is a core strategy in sustainability and green building practices

- Preservation is a topic at non-preservation conferences/events/ trainings
- Resources and training provided to real estate professionals

#### **Goal 7: Cultivate Political Commitment**

- Establish Preservation Caucus in Texas Legislature
- Increased opportunities for effective engagement with political leadership at the state level
- Legislature supports preservation programs and projects

#### **Goal 8: Building Capacity of Preservation Community**

- Establish Preservation Caucus in Texas Legislature
- Increased opportunities for effective engagement with political leadership at the state level
- Legislature supports preservation programs and projects

### **The Texas Main Street Program (TMSP)**

The Texas Main Street Program was brought to Texas by Anice Read more than 35 years ago. It is one of the oldest and largest in the country with 89 designated communities as of 2017. Their mission is “to provide technical expertise, resources and support for Texas communities in the preservation and revitalization of historic downtowns and commercial neighborhood districts in accord with the National Main Street Four Point Approach ® of organization, economic restructuring, design and promotion.” The TMSP is part of the Community Heritage Development Division of the Texas Historical Commission and operates in affiliation with the National Main Street Center, an independent subsidiary of the National Trust of Historic Preservation.

### **Covenants and Easements**

Covenants are filed with the clerk of the county that the property is located and involve both local and state participation. They will be discussed further under local preservation laws. Some property owners are also eligible for tax benefits; usually the owners receive a tax deduction “for the amount of the reduced economic value of the property due to the restrictions...The Texas Historic Commission (THC), along with local preservation organizations, is involved in the execution of covenants and easements.” Owners of properties protected by a covenant or easement should remain in touch with the THC’s Division of Architecture throughout the duration of the agreement. The project reviewer should be contacted early in the process for any anticipated work on the historic resource.

### **Heritage Tourism**

The THC may promote the appreciation of historic sites, structure, or objects in the state through a program designed to develop tourism in the state.

The THC shall promote heritage tourism by assisting persons, including local governments, organizations, and individuals, in the preservation, enhancement, and promotion of heritage and cultural attractions in this state. The program must include efforts to:

1. Raise the standards of heritage and cultural attractions around the state;
2. Foster heritage preservation and education;
3. Encourage regional cooperation and promotion of heritage and cultural attractions; and
4. Foster effective local tourism leadership and organizational skills.

### **The Historic Courthouse Preservation Programs (THCPP)**

Historic county courthouses are an important part of Texas history. Established in June 1999 by the Texas Legislature and Governor George W. Bush through House Bill 1341, the THCPP provides partial matching grants to Texas counties for the restoration of their historic county courthouses. Since it began, the program has contributed more than 10,600 jobs and \$288 million in income to the Texas economy. Construction activity related to the program has generated over \$40.3 million in state and local taxes and more than \$550 million in wages in Texas. Please reference THC website <http://www.thc.texas.gov/preserve/projects-and-programs/texas-historic-courthouse-preservation>.

Restored county courthouses serve as a catalyst to economic revitalization in the business districts that surround courthouse squares throughout the state. Counties with restored historic courthouses also see an impact in the form of increased tourism, accessibility, safety, energy efficiency, and much more.

To participate in the grant program, applicants must have prepared a Master Plan for preserving and maintaining their historic county courthouse. Hiring a professional preservation architect to assist in this process will help county representatives evaluate the current state of the courthouse and set priorities for rehabilitating and maintaining the building.

A good master plan includes a history of the building, historic photos and drawings, a thorough evaluation of existing conditions and a plan for the future, with an estimated budget for all the proposed work. The master plan must be submitted to the THC for review and may either be accepted, with suggested changes made and resubmitted, or rejected. Proposed work must comply with the Standards for the Treatment of Historic Properties. The document is a general plan of action and does not include detailed construction plans and specifications.

Following the award of funds, a grant project is administered by THC in partnership with the county and its representatives. The rules adopted for program administration are found in the Texas Administrative Code, Chapter 12. Further guidance on project oversight procedures are provided in the THCPP grant manuals.

Important Points:

- The grants funds are provided on a reimbursement basis.
- No grant funds may be used for work undertaken prior to the date of the grant award.
- Grants may be made for the purpose of completing construction plans and specifications.

- Grant recipients must execute a Funding Agreement and initiate their projects within 6 months of the award date.
- Counties compensate and contract directly with a preservation architect and a construction contractor using methods that comply with state purchasing laws.
- The THC establishes the standards and the quality of the work performed on the project.
- The scope of the project may be adjusted by THC in consultation with the county in consideration of the state funds available.

### **Texas Historic Preservation Tax Credit Program**



The Jefferson Davis Hospital in Houston

The Texas Historic Preservation Tax Credit Program was created by the Texas House Bill 500 and went into effect on January 1, 2015. The program is overseen by the Texas Historical Commission (THC) and the Texas Comptroller of Public Accounts. The administrative rules are in Texas Administrative Code, Title 13 Part II, Chapter 13. The Texas Historic Preservation Tax Credit Program is worth 25% of eligible rehabilitation costs. Applicants are encouraged to apply to both the Texas Historic Preservation Tax Credit Program and the Federal Rehabilitation Tax Credit Program. Please reference THC website <http://www.thc.texas.gov/preserve/projects-and-programs/preservation-tax-incentives/texas-historic-preservation-tax-credit>.

There are a few differences between the Texas tax credit program and the federal program. The building must be officially listed by the time the state tax credit is taken. The building must already be individually listed on the National Register of Historic Places or listed as contributing building to a historic district listed on the National Register, be a Recorded Texas Historic Landmark, or a State Antiquities Landmarks. All other eligibility requirements are the same as the Federal requirements. Application for Texas State Tax Credit Projects completed between September 1, 2013 and January 1, 2015 were eligible to apply retroactively.

The application process:

- Part A: Evaluation of Significance- (Corresponds to the federal program's Part 1 application).

- Part B: Description of Rehabilitation- (Corresponds to the federal program’s Part 2 application).
- Part C: Request for Certification of Completed Work- (Corresponds to the federal program’s Part 3 application).

“A Certificate of Eligibility for the state historic tax credit is provided to the owner. This certificate must be presented to the Texas Office of the Comptroller to receive the state tax credits.” During this step an updated version of Part A is also submitted.

## **Discovery & Scientific Investigation**

Sec. 191.053 lays out the procedure for contracting for discovery and scientific investigation.

The THC may contract with other state agencies or political subdivisions and with qualified private institutions, corporations, or individuals for the discovery and scientific investigation of sunken or abandoned ships or wrecks of the sea, or any part of the contents of them, or archaeological deposits or treasure imbedded in the earth.

## **Permits**

Sec. 191.054 allows the THC to:

- (a) Issue a permit to other state agencies or political subdivisions or to qualified private institutions, companies, or individuals for the survey and discovery, excavation, demolition, or restoration of, or to conduct scientific or educational studies at, in, or on landmarks, or for the discovery of eligible landmarks on public land if it is the opinion of the committee that the permit is in the best interest of the State of Texas.
- (b) Restoration shall be defined as any rehabilitation of a landmark except normal maintenance or alterations to non-public interior spaces.
- (c) The permit shall:
  - 1) Be on a form approved by the attorney general;
  - 2) Specify the location, nature of activity, and the time period covered by the permit; and
  - 3) Provide for the termination of any right by the investigator or permittee under the permit on the violation of any of the terms of the permit.

## **Categorical Exclusions**

There exist categorical exclusions to notifying the THC of a preservation related project under Antiquities Code, since the law states many activities conducted on nonfederal public land may have little, if any, chance to damage archaeological sites, and therefore should not require notification under this section. However, there may be circumstances that invoke other laws or protections for any given project.

1. Water injection into existing oil and gas wells;



2. Upgrading of electrical transmission lines when there will be no new disturbance of the existing easement;
3. Seismic exploration activity when there is no ground penetration or disturbance;
4. Building and replacing fences that do not require construction or modification of associated roads, fire breaks, or previously disturbed ground;
5. Road maintenance that does not involve widening or lengthening the road;
6. Installation or replacement of meter taps;
7. Controlled burning of fields;
8. Animal grazing;
9. Plowing, if the techniques are similar to those used previously;
10. Installation of monuments and sign posts unless within the boundaries of designated historic districts;
11. Maintenance of existing trails;
12. Land sales and trades of land held by the permanent school fund and permanent university fund;
13. Permanent school fund and permanent university fund leases, easements, and permits, including mineral leases and pooling agreements, in which the lessee, grantee, or permittee is specifically required to comply with the provisions of this chapter;
14. Oil, gas, or other mineral exploration, production, processing, marketing, refining, or transportation facility or pipeline project in an area where the project will cross state or local public roads, rivers, and streams, unless they contain a recorded archaeological site or a designated state land tract in Texas' submerged lands;
15. Maintenance, operations, replacement, or minor modification of an existing oil, gas, or other mineral exploration, production, processing, marketing, refining, or transportation facility or pipeline; and
16. Any project for which a state permit application has been made prior to promulgation of rules under this section.

### **Texas Accessibility Standards**

The Texas Accessibility Standards (TAS) need to be coordinated with the federal Americans with Disabilities Act Accessibility Guidelines (ADAAG) and any local government accessibility guidelines.

TAS contains scoping and technical requirements for accessibility to sites, facilities, buildings, and elements by individuals with disabilities. The requirements are to be applied during the design, construction, additions to, and alteration of sites, facilities, buildings, and elements to the extent required by regulations issued by the

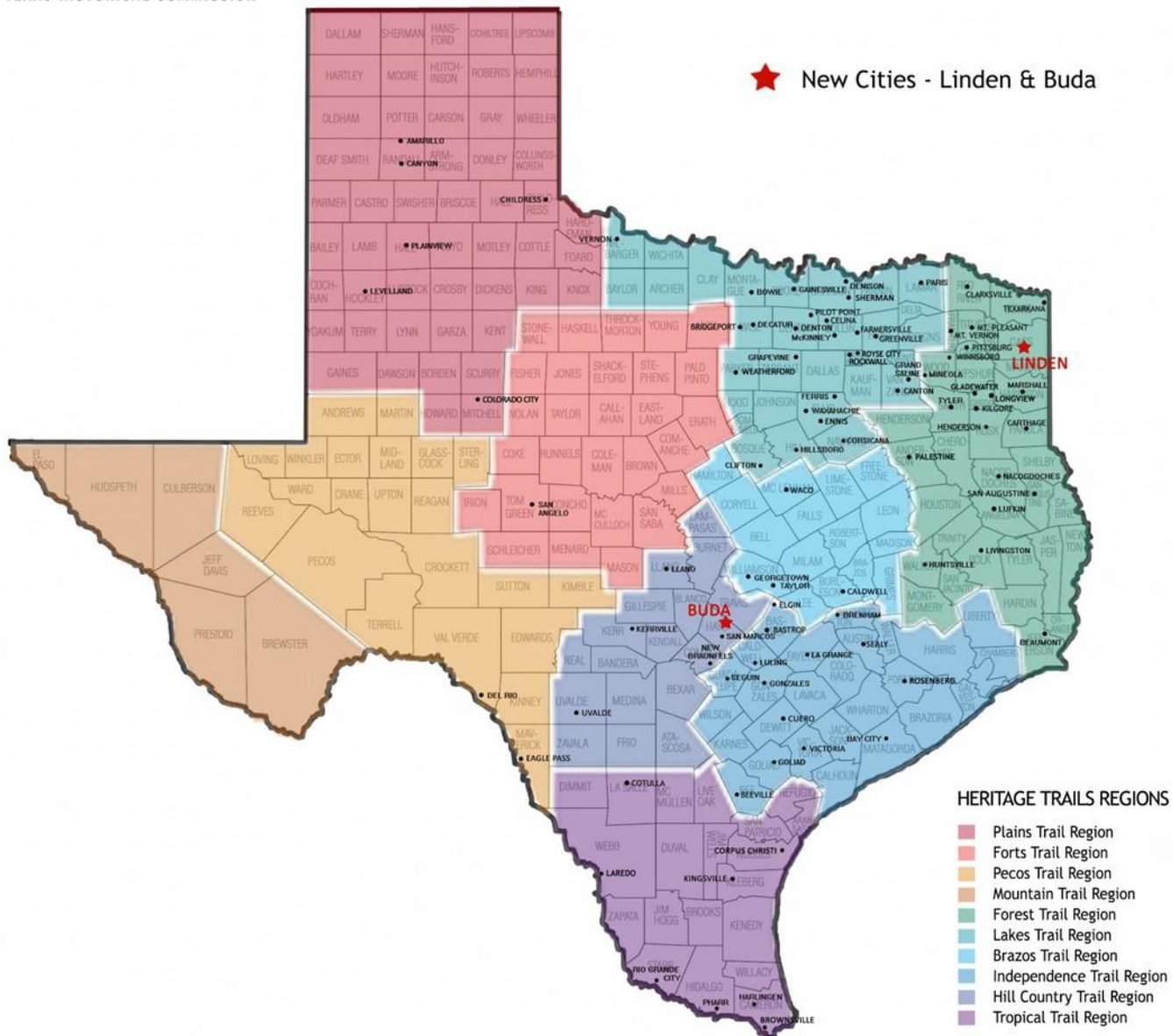
Texas Department of Licensing and Regulation under the authority of Texas Government Code, Chapter 469. These standards are intended to be consistent to those contained in the 2010 Standards for Accessible Design, and are generally the same except as noted in italics.

In addition to these requirements, TAS states covered entities must comply with the regulations issued by federal agencies, the U.S. Department of Justice and the U.S. Department of Transportation under the Americans with Disabilities Act. There are issues affecting individuals with disabilities which are not addressed by these TAS requirements, but which are covered by federal agencies, the U.S. Department of Justice and the U.S. Department of Transportation regulations 101.2 Effect on Removal of Barriers in Existing Facilities.

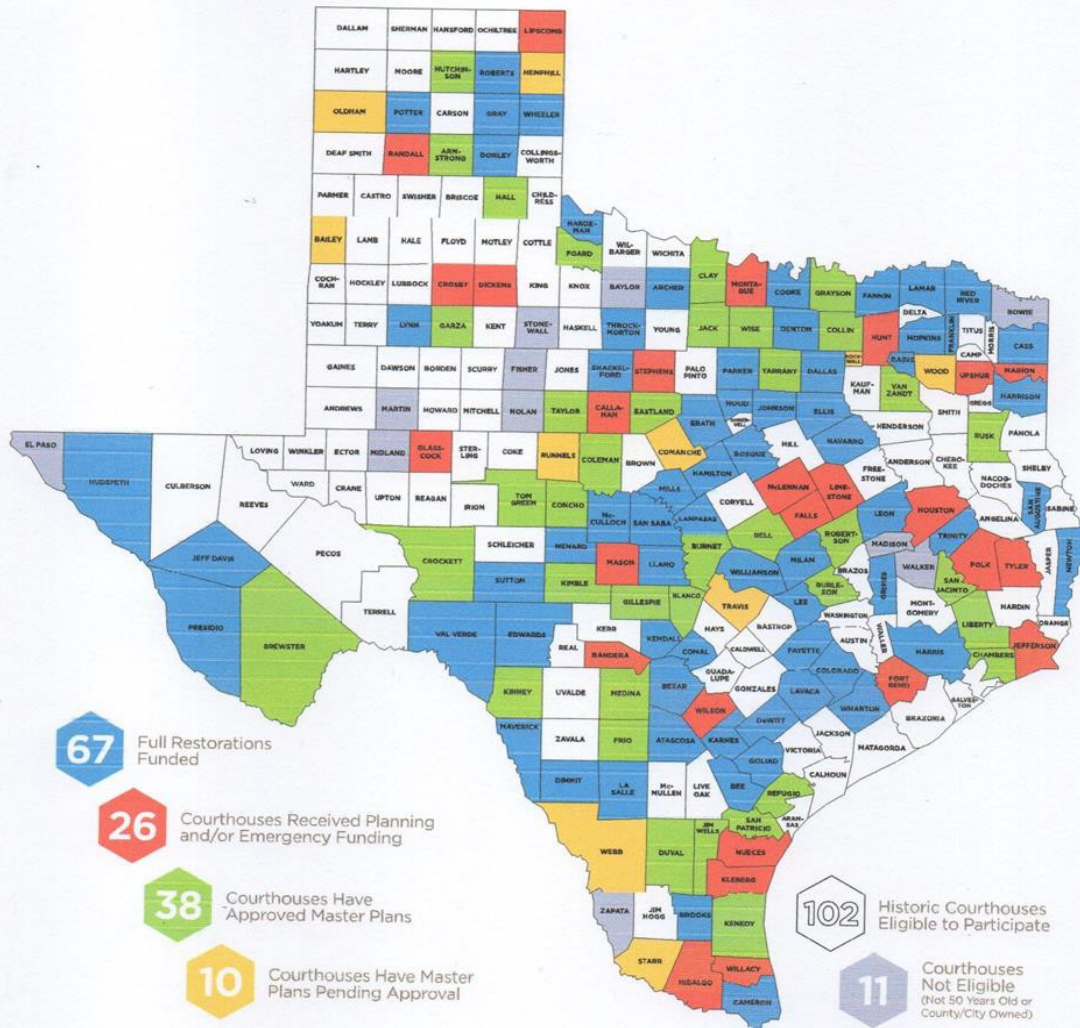
TAS does not address existing facilities unless altered at the discretion of a covered entity. The Texas Department of Licensing and Regulation has authority over existing facilities that are subject to the requirement for removal of barriers under Texas Government Code, Chapter 469. In addition, the U.S. Department of Justice has authority over existing facilities that are subject to the requirement for removal of barriers under Title III of the ADA. Applicability of standards for removal of barriers under Title III of the ADA is solely within the discretion of the U.S. Department of Justice and is effectively only to the extent required by regulations issued by the U.S. Department of Justice.

Please reference TAS at <https://www.license.state.tx.us/ab/2012TAS/2012tascomplete.pdf> for specific information.

# MAIN STREET CITIES 2017



# TEXAS HISTORIC COURTHOUSE PRESERVATION PROGRAM





# **LOCAL PRESERVATION LAWS**

## **Designation and Protection of Resources**

The State Government of Texas allows cities to “regulate the construction, reconstruction, alteration, or razing of buildings and other structures” in “designated places and areas of historical, cultural, or architectural importance and significance” through ordinances. These ordinances typically establish historic districts and create a preservation commission to review proposed alterations to designated structures and areas within the districts. Violations of such ordinances are Class C misdemeanors. Courts with jurisdiction over Texas have repeatedly upheld such ordinances. The City of Fort Worth uses this state code as the basis of their zoning of historic and cultural districts.

## **Locally Designated Landmarks and Historic Districts**

Properties may also be designated as individual landmarks or as contributing structures within a historic district pursuant to a local historic preservation ordinance. Unlike listing in the National Register, designation under local ordinances often affects a property owner’s ability to change his or her property in ways that would harm its historic or architecturally significant character. Sometimes properties designated under local ordinances may be eligible for significant tax benefits, such as reductions in local property taxes.

Locally designated properties may also enjoy flexible application of land-use laws through the waiver of use and bulk restrictions or benefit by transferable development rights programs. Locally designated landmarks provide the only real “teeth” for protecting historic structures. It is only the local landmark laws that can prevent demolition and inappropriate alterations.

## **Comprehensive Plans**

The Texas Local Government code allows municipalities to have comprehensive plans that outline the goals of the local community that designed the plan. For instance, the City of Fort Worth has elected to create a City Planning Commission, which is responsible for creating a comprehensive plan and then recommending it to the City Council of Fort Worth. The Commission also regularly reviews the plan and recommends any changes to the City Council.

## **Local Preservation Programs**

Fort Worth has many wonderful historic resources including cattle baron mansions, diverse neighborhoods, the Stockyards, downtown skyscrapers, parks, churches, and schools. Fort Worthians gathered 14,000 petition signatures in 1993 in order to establish the City of Fort Worth’s historic preservation zoning ordinance.

This ordinance was passed unanimously by the City Council of Fort Worth in May 1995. “The City of Fort Worth’s Ordinance for Historically, Culturally, Architecturally, and Archaeologically Significant Properties provides the following three levels of protection for historically significant properties: Highly Significant Endangered (HSE), Historic and Cultural Landmark (HC), and Demolition Delay (DD).” The ordinance also defines the criteria for determining which buildings are categorized as significant properties.

The Mayor and City Council appoint 9 members to the Historic and Cultural Landmarks Commission. In order to be appointed members must have both professional and volunteer qualifications in various fields that include historic preservation, architecture, interior design, and construction. The HCLC reviews applications for HSE, HC, and DD overlay zoning, for Certificate of Appropriateness, and for tax exemptions.



For a designation as HSE, HC, or DD the property may be nominated by the owner, the City Manager, the City Council, or the Historic Cultural Landmark Commission. Property owners will be notified in writing before their property is designated. There will also be a public hearing before the Historic and Cultural Landmarks Commission, the Zoning Commission, and the City Council where the owners can express their opinion about the proposed designation.

### **Demolition Delay (DD) Ordinances**

Demolition Delay Ordinances help save historic resources from possible destruction and are a very useful tool to people wishing to save historic sites. A demolition is any act or process that, in whole or in part, destroys, razes or permanently impairs the structural integrity of a building, structure, object, or site which has been designated a historic landmark.

In Fort Worth DD properties can be subject to up to 180-day delay before a demolition permit can be granted.

In Dallas buildings that meet the criteria within a demolition overlay district are subject to a 45-day delay before a demolition permit could be granted.

In Waco, a demolition delay for a historic landmark is a ruling by the Historic Landmark Preservation Commission, upon application for a certificate of appropriateness, which delays the granting of a demolition permit for a historic landmark property for a reasonable period of time in order to allow time for efforts to preserve the building, structures, object or site.

### **Historic and Cultural Landmark (HC)**

Criteria for HC designation in Fort Worth:

1. Distinctive in character, interest or value; strongly exemplifies the cultural, economic, social, ethnic, or historical heritage of the City of Fort Worth, State of Texas or the United States
2. An important example of a particular architectural type or specimen in the City of Fort Worth
3. Has been identified as the work of an important architect or master builder whose individual work as contributed to the development of the City of Fort Worth
4. Embodies elements of architectural design, detail, materials, or craftsmanship, which represent a significant architectural innovation
5. Bears an important and significant relationship to other distinctive structures, sites, or areas, either as an important collection of properties or architectural style or craftsmanship with few intrusions, or by contributing to the overall character of the area according to the plan based on architectural, historic or cultural motif
6. Possesses significant archaeological value that has produced or is likely to produce data affecting theories of historic or prehistoric interest
7. Is the site of a significant historic event

8. Is identified with a person or persons who significantly contributed to the culture and development of the City of Fort Worth, State of Texas or the United States
9. Represents a resource, whether natural or man-made, which greatly contributes to the character or image of a defined neighborhood or community area
10. Is designated as a Recorded Texas Landmark or State Antiquities Landmark, or is included on the National Register of Historic Places

In Fort Worth, Historic Cultural Landmarks are only required to meet three out of the ten criteria for measuring historic significance. Sites with two or more significant buildings may be designated Historic and Cultural Landmark districts. HC properties are also eligible for certain benefits including an exemption from City Tax on improvements. HC properties are subject to the same requirements concerning renovation and demolition as HSE buildings.

### **Highly Significant Endangered (HSE)**

Historic resources that fall into this category are Fort Worth's most important historic sites. These sites must meet at least five out of ten of the criteria laid out in the ordinance for measuring historic significance. HSE designated sites are eligible for many benefits. If eligible improvements are made to a property designated HSE a tax exemption is granted. It is only allowable for HSE buildings to be demolished if the building loses its historic significance or the owner would face a proven financial hardship if the building were not demolished. The HCLC must approve any rehabilitation or exterior changes of an HSE site. HSE buildings are not required to be open to the public.

### **Certificate of Appropriateness**

As an example in Austin, the Historic Landmark Commission (HLC) reviews proposed exterior and site changes to City Historic Landmarks and properties in Local Historic Districts to assist owners in retaining the character-defining architectural features of important historic sites and districts.

In Austin, an approved Certificate of Appropriateness from the HLC is required in advance of performing all non-routine exterior and site work, including installation of signage. A building permit will not be released without an approved Certificate of Appropriateness review by the City HPO or the HLC.

A Certificate of Appropriateness is required in Austin for all non-routine exterior work, including alterations to historic materials or the visual appearance of a site or building façade. These include additions to existing buildings, construction of new buildings, repainting of Landmarks with new colors, changes in roof color or materials, major landscape work including pools, and changes in sidewalks and driveways. HLC review is usually not required for ordinary maintenance work such as repainting with existing colors and performing routine repairs using like materials. It is always best to check with the City's HPO to determine whether a historic review is required.

### **Local Historic District Example**

In Houston, historic district designation is an official recognition by the City of Houston that a neighborhood is an area of local historic importance. The designation is usually based on a combination of the following factors: the history of the neighborhood; the identity of the people who settled the neighborhood (were they of a

particular ethnic group, did they play a special role in the city's development, etc.); the age, type and quality of the buildings in the neighborhood and the extent to which the original buildings still exist.

The City of Houston defines a historic district as “a geographical area designated by the City Council that possesses a significant concentration, linkage or continuity of buildings, structures, objects or sites united by historical, cultural, architectural or archaeological significance to the city, state, nation or region.”

At least 67 percent of all property owners within a proposed historic district must sign petitions expressing support for district designation in order for the historic district to be established. If less than 67 percent of the owners sign the petitions, the city planning director may modify the proposed boundaries to create a historic district in which 67 percent of the owners are in favor of designation. Each neighborhood must file an application with the City of Houston Department of Planning and Development. Help is usually available from your local Historic Preservation Officer staff or from local non-profit.

Potential Houston historic landmarks and historic districts must meet at least one of the following criteria for designation: Buildings, structures or objects that are not at least 50 years old may be designated as historic if it is found that the building, structure, or object is of extraordinary importance to the city, state or nation for reasons not based on age.

Historic designations:

- Help maintain neighborhood property values
- Make properties eligible for city tax benefits
- Protect neighborhoods and bring recognition
- Shows support for the preservation of historic properties and neighborhoods around the city

Designation can help protect properties. By giving neighborhoods advance notice of development, it will help ensure that any development fits in and enhances the character of a neighborhood. It will not keep anyone from selling their property, nor will it keep anyone from remodeling or otherwise improving their property.

### **Local Tax Incentives for preservation**

Many Historic Site Tax Exemptions are local tax exemptions so there are different regulations depending on which part of the country and state you are in. The Texas Tax code allows tax exemptions for buildings “exempt from taxation part or all of the assessed value of a structure or archaeological site the land necessary for access to and use of the structure or archaeological site” when the site is designated as a Recorded Texas Historic Landmark or state archaeological landmark or a “historically or archaeologically significant site in need of tax relief to encourage its preservation.” Fort Worth has used this tax code to adopt a tax exemption program for historic properties.

The City of Fort Worth grants historic tax exemptions to properties that are designated Historic and Cultural Landmarks (HC) and to Highly Significant Endangered properties (HSE). “Property owners who substantially rehabilitate their HC properties are eligible for a City tax exemption in the form of a 10-year City tax freeze on the pre-renovation value of both the land and the improvements. Rehabilitation of an HC building must be demolished unless the building has lost historical significance, or the owner would suffer a proven economic hardship.” Property owners who substantially rehabilitate their HSE properties are eligible for up to 15-year exemption on City taxes on the rehabilitated improvements and up to a 15-year freeze on the value of the land

for calculation of City taxes. At the end of the incentive period, the land and building will be taxed on assessed value.

In the City of San Antonio, residential properties that have undergone substantial rehabilitation are eligible for a City tax freeze on the assessed value prior to rehabilitation for up to 10 years. Commercial properties that have undergone substantial rehabilitation are eligible for what is called a 5 Zero/5 Fifty tax exemption. This means for the first five years after the rehabilitation the property is exempt from the city property taxes. Then for the next five years the owner receives a tax credit at 50% of the post-rehabilitated city property tax. The tax exemption remains with the property regardless of who the property owner is.

In order to qualify for the City of Houston's historic tax exemptions, a property must be listed as a City of Houston Landmark, Protected Landmark, or a "contributing" or "potentially contributing" structure located in a designated City of Houston Historic District. To get the tax exemption one must be making restoration and/or renovation to at least 50% of the property's assessed value or the tax percentage is between 50-100% depending on the amount of qualified expenditures. Historic tax exemptions are processed through the City's Finance Department. The owner must show the department that the renovations were made for restoration.

### **Historic Preservation Covenants and Easements**

Historic preservation covenants and easements are voluntary agreements between a property owner and qualified organization. Their goal is to protect historic resources by restricting future development on site. Essentially, the agreement specifies what portions of the property are protected, how long the protections remain in effect, and what controls or reviews are required for proposed changes.

Property owners are also often able to apply for tax benefits because an easement is held on their property. Easements can apply to the exterior, interior, or both, as well as to cultural landscapes, battlefields, and archaeological sites. Generally, the owner grants a portion of or interest in his or her property rights to an organization whose mission includes historic preservation.

Once recorded, the easement becomes part of the property's chain of title and is attached to the property in perpetuity, thus binding not only the current owner, but all future owners as well.

The typical easement or covenant document usually has a section discussing who is giving the money to whom and exactly how much money that will be, how long the covenant or easement will last, and for what purposes the money should be used. Benefits of preservation easements are:

- Allows an individual to retain private ownership of a property and obtain potential financial benefits.
- The easement binds not only the current owner but future owners, thus ensuring the property will be maintained and preserved by future owners.
- Easements can be created to meet the needs of the property owner, the individual resource, and the mission of the protecting organization.
- Owners may be eligible for a federal income tax deduction equivalent to the value of the rights given away to a charitable or government organization as well as possible benefits from reduced estate, gift, or local property taxes.

- The IRS has defined what types of buildings or properties are eligible for preservation easements. For more information on easements, see the National Park Service's website at [www.2.cr.ns.gov](http://www.2.cr.ns.gov). It is highly recommended that an easement be created with the assistance of the Texas Historical Commission, an attorney who specializes in historic preservation law, and your accountant.

Historic Fort Worth, Inc. is a local organization that has established a façade easement program. HFW holds an easement on the Blackstone Hotel in downtown Fort Worth. The owner of the building retains use of the entire property but agrees to donate part of the bundle of rights inherent in the property ownership in return for favorable tax treatment. In return for Historic Fort Worth's regular condition inspection of the façade (exterior) of the property, the owner may claim the value of the easement as a charitable donation for income tax purposes. The Blackstone Hotel was granted a façade easement in 2000. The building was built in 1929 in the Art Deco Style with terracotta ornamentation.

### **Researching Historic Resources**

From preservation law standpoint it may be helpful to research historic resources. It is important to check as many sources as possible. Historic records were made by humans and are subject to errors. Sources that are a good place to start are tax records, deed records, City Directories, Sanborn Fire Insurance Company Maps, newspaper articles, and oral and local histories.

Many Texas counties and cities have had Historic Resources Surveys conducted. These surveys may be available in your local public library or in the THC Archives. Some surveys have lots of information and others little. It is encouraged that any research be shared with a city's Historic Preservation Office, local preservation non-profit or historical society and the local library.

Another possible place to get basic information is the Tax Assessor's Office. Records may even be online now. For example, Tarrant County had Tax History cards. Information on the cards can range from the 1800s to the late 20<sup>th</sup> century. There may be a footprint of the original structure (this may help determine if any alterations to the structure were made). To find out if anyone owned the structure before the first people on the list take the name of the first listed individual as well as the volume and page number of the deed record to the county Courthouse. The deeds are available at the county courthouse or online. A parcel of land could change ownership numerous times before anything was ever constructed on it. However a significant increase in the value of a property between one transaction and another can be a strong indicator that improvements were made during that time period.

Another way to find information is through Mechanic Liens. Mechanic's Liens may reveal the name of the contractor and/or architect that designed or constructed the structure. When searching for these liens use the property owner's name as the Grantor.

In Fort Worth, for instance, generally before 1927 the Mechanic's Liens were listed in the general indexes. After that date they were organized in a separate index. Another way to verify the date of construction or if a date of construction has not been established is to go to the local history department of the local library. The library may have City Directories from the late 1800s to the present. Before going to the library make sure you check that street name has not changed as it was common for street names to change as a city grew. To see if the names of the street has changed find the original plat map of the addition where the structure is located (the name of the addition will be included in the structure's legal description which can be found in abstracts or deed and tax records).



Many county courthouses in Texas have burned down over the years, resulting in a significant loss of property deed records. Many of the deed records were recreated but some of the early addition plat maps were not. Once you have confirmed the name of the street, pick a City Directory to see if the address is listed there. If it is listed, look in earlier Directories to see when the address is not listed and that will give an indication of when the structure was constructed.

Sometimes, not all parts of a city were listed in the Directories even if there were structures on the street. Address numbers also changed as structures were added to the street. Structures were also moved from one location to another adding confusion regarding dates of construction.



Thistle Hill-Historic Fort Worth, Inc.

This means it is important to verify the construction date in as many ways as possible. The Sanborn Fire Insurance Company Maps can be another way to verify construction dates and are available online from the Perry-Castañeda Library, U.T. at Austin or possibly through local libraries.

Another way to tell the date of construction is by going online to the county's Tax Appraisal District. However, these dates are not always reliable. Old building permits can tell the cost of construction and the names of contractors and other vendors. Often these permits are incomplete, but date back to the 1920s in Fort Worth. Many public libraries have old newspapers available on microfilm and many newspapers are now available online. Newspapers can be sources for photos, notices of building permits, or real estate notices that relate to a structure. Historic photos and postcards can be a valuable source of information when researching. These can be found in many places including the public library, the local historical commission, the local newspaper archives, university archives, and from family members of former owners. However, dates written on the back of photos may not be reliable. Librarians and archivists may also be a wealth of information.

The City Directories may be very helpful in giving information about who lived or worked in a structure. First look at the address section of the directories to see who lived or occupied the building. Compare these names with the names previously gathered in tax and deed research. If the names differ, then it may be that the structure was not owner-occupied but was rented by others. By looking in the alphabetical section of the directories, you may be able to find out the owner's or occupants' occupation, the name of their spouse or the number of other individuals living in the structure. Occasionally, there are also theses and dissertations written about individual cities or communities so it is important to also check the libraries of local colleges and universities.

# GLOSSARY

1. **Adaptive Reuse:** the reuse of a building or structure, usually for a purpose different from the original. The term implies that certain structural or design changes have been made to the building in or for it to function in its new use.
2. **Advisory Council on Historic Preservation (ACHP):** The independent federal agency established by the National Historic Preservation Act to comment on federal undertakings and to encourage federal agencies to consider historic resources in their project planning.
3. **Affirmative Maintenance:** Requirement in historic preservation ordinances that building's structural components are maintained.
4. **Americans with Disabilities Act (ADA):** Law prohibiting discrimination to persons with disabilities, by requiring, among other things, that places generally open to the public, such as restaurants and hotels, are made accessible. Special rules apply to historic buildings and facilities.
5. **Archaeological Resources:** Sites that can provide information about prehistoric or historic human occupation (activities). Generally, it is considered that the information will be found below the surface of the ground, but it is not always the case. Archaeological resources range from sites which contain numerous artifacts and features beneath the ground's surface to those which contain only a few small artifacts scattered on the ground.
6. **Archaeological Resources Protection Act (ARPA):** Primary federal statute governing archaeological resources.
7. **Building Code:** Law setting forth minimum standards for the construction and use of buildings to protect the public health and safety.
8. **Certificate of Appropriateness (CA):** A document approving work on local landmarks or properties in historic districts based on consistency with applicable design guidelines or standards. Certificate issued by a local government to indicate its approval of an application to alter, demolish, move, or add on to a protected resource.
9. **Certified Historic Structure:** A building (and its structural components) which is of a character subject to the allowance for depreciation provided in Section 167 of the Internal Revenue Code of 1954 which is either (a) individually listed in the National Register of Historic Places; or (b) located in a registered historic district and certified by the Secretary of the Interior as being of historic significance to the district.
10. **Certified Local Government (CLG):** A local government whose local historic preservation program has been certified pursuant to Section 101 (c) of the National Historic Preservation Act. The CLG enforces a local historic preservation ordinance and meets other requirements specified by the Texas Historical Commission or the National Park Service. The City of Fort Worth participates in the CLG program.

11. **Comprehensive Plan:** Official plan adopted by local governments that guides decisions making over proposed public and private actions affecting community development.
12. **Contributing Resource:** A resource that retains a significant amount of its historic and/or architectural integrity and therefore contributes to the overall significance of a property.
13. **Contributing Structure:** Building or structure in a historic district that generally has historic, architectural, cultural, or archaeological significance.
14. **Covenant:** A deed restriction limiting the owner's use of his/her property.
15. **Demolition by Neglect:** Process of allowing a building to deteriorate to the point where demolition is necessary to protect public health and safety.
16. **Demolition Delay (DD):** Properties that have been identified as resources in a city that merit protection under its preservation ordinance. Under this designation, DD properties are subject to a delay in the issuance of a wrecking permit. The delay is intended to provide the opportunity to explore alternatives to demolition.
17. **Design Guidelines:** The document that establishes the standards by which a landmarks commission evaluates applications for Certificates of Appropriateness (CA).
18. **Designation:** Act of identifying historic structures and districts subject to regulation in historic preservation ordinances or other preservation laws.
19. **District:** A significant concentration or linkage of buildings, structures, sites, or objects united historically or aesthetically by plan or physical development.
20. **Due Process:** Protection of constitutionally protected rights from arbitrary governmental action. Requires notice and opportunity to be heard.
21. **Easement (preservation or conservation):** Partial interest in property that can be transferred to a nonprofit organization or governmental entity by gift or sale to ensure the protection of a historic resource and/or land area in perpetuity. In addition, the owner may obtain substantial tax benefits. Generally, the owner grants a portion of, or interest in their property rights to an organization whose mission includes historic preservation. Once recorded, an easement becomes part of the property's chain of title and is attached to the property in perpetuity, thus binding not only the owner who grants the easement but all future owners as well.
22. **Economic Hardship:** Extreme economic impact on individual property owner resulting from the application of a historic preservation law.
23. **Eligible Property:** Property that meets the criteria for inclusion in the National Register of Historic Places but is not formally listed.

24. **Eminent Domain:** The right of government to take private property for a public purpose upon payment of “just compensation.”
25. **Enabling Law:** Law enacted by a state setting forth the legal parameters by which local governments may operate. Source of authority for enacting local preservation ordinances.
26. **Environmental Assessment or Impact Statement:** Document prepared by a state or federal agency to establish compliance with obligations under federal or state environmental protection laws to consider impact of proposed actions on the environment, including historic resources.
27. **Executive Order:** Official proclamation issued by the President that may set forth policy or direction or establish specific duties in connection with the execution of federal laws and programs.
28. **Facial Claim:** Term used to describe argument that law is unconstitutional in all situations.
29. **Finding:** Factual or legal determination made by an administrative body or court upon deliberation.
30. **Guidelines:** Interpretive standards or criteria that are generally advisory in form.
31. **Highly Significant Endangered (HSE):** In Fort Worth a designation given to a property that is among the City’s most important historic sites. HSE properties are those that the City Council has deemed endangered and that meet at least five out of ten criteria set out in the historic preservation zoning ordinance. An example of an HSE property is the T&P Warehouse Building.
32. **Historic and Cultural Landmark (HC):** In Fort worth a designation given to a property that meets at least three out of ten criteria measuring historic significance. Individual properties can be designated HC and areas containing two or more significant buildings can be designated as Historic and Cultural Landmark Districts. The Fairmount Southside Historic District is an example of an HC district.
33. **Historic Cultural Landmark Commission (HCLC):** In Fort Worth a nine-member board appointed by the mayor and City Council. The HCLC reviews applications for Highly Significant Endangered, Historic and Cultural Landmark, and Demolition Delay overlay zoning, as well as applications for Certificates of Appropriateness and tax exemptions. The HCLC also has the authority to nominate properties for historic designation.
34. **Historic District:** An area that generally includes within its boundaries a significant concentration of properties linked by architectural style, historical development, or a past event.
35. **Historic Resources:** An area that generally includes within its boundaries a significant concentration of properties linked b architectural style, historical development, or a past event.
36. **Historic Site Tax Exemptions:** An exemption form City taxes granted on improvements to a property that is designated HSE or HC in Fort Worth.
37. **Keeper of the National Register:** Individuals in the National Park Service responsible for the listing in and determination of eligibility of properties for inclusion in the National Register of Historic Places.

38. **Land Trust:** A nonprofit organization engaged in the voluntary protection of land for the purpose of providing long-term stewardship of important resources, whether historical, archaeological, or environmental, through the acquisition of full or partial interests in property.
39. **Land Use:** General term used to describe how land is or may be utilized or developed or other law that is worthy of preservation because of its particular historic, architectural, archaeological, or cultural significance.
40. **Lien:** A claim or charge on property for payment of debt, obligation, or duty.
41. **Memorandum of Agreement:** Document executed by consulting parties pursuant to the Section 106 review process that sets forth terms for mitigating or eliminating adverse effects on historic properties resulting from agency action.
42. **National Environmental Policy Act (NEPA):** Primary federal law requiring consideration of potential impacts of major federal actions on the environment, including historic and cultural resources.
43. **National Historic Landmark (NHL):** A historic property evaluated and found to have significance at the national level and designated as such by the Secretary of the Interior.
44. **National Historic Preservation Act (NRHP):** The nation's official list of buildings, structures, sites, objects, and districts that are significant in American history, architecture, archaeology, engineering, or culture, maintained by the National Park Service under the authority of the National Historic Preservation Act.
45. **Native American Graves and Protection and Repatriation Act (NAGPRA):** Federal law providing for the repatriation of Native American human skeletal material and related sacred items and objects of cultural patrimony.
46. **Non-Contributing Resource:** A building, site, structure, or object that does not add to the historic significance of a property.
47. **Passive Activity Rules:** Prohibits the use of deductions and credits from "passive" activities (those in which the tax payer is not involved on a regular continuous, and substantial basis) to offset income and taxes owned from "non-passive" activities.
48. **Police Power:** The inherent authority residing in each state to regulate, protect, and promote the public health, safety, morals, and general welfare.
49. **Precedent:** A prior case or decision similar or identical in fact or legal principle to the matter at hand that provides authority for resolution in a similar or identical way.
50. **Procedural Laws:** Those laws that prescribe the method in which rights and responsibilities may be exercised or enforced.



51. **Public Buildings Cooperative Use Act (PBUCA):** Federal law governing the construction, acquisition, and management of federal space for use by federal agencies.
52. **Rational Basis:** Standard of review applied by appellate courts that affords high deference to the wisdom or expertise of an administrative body.
53. **Reconstruction:** The act or process of recreating by new construction the exact form and detail of a vanished building, structure, or object, or part thereof, as it appeared at a specific period of time.
54. **Recorded Texas Historic Landmark (RTHL):** A state designation given to a property that is deemed worthy of preservation for its architectural and historical associations. An example of such a property in Fort Worth is the Munchus House at 1130 E. Terrell Avenue.
55. **Regulations:** Rules promulgated by an administrative agency that interpret and implement statutory requirements.
56. **Rehabilitation:** The act or process of returning a property to a state of utility through repair or alteration which makes possible an efficient contemporary use while preserving those character-defining features that are significant to its historical, architectural and cultural values.
57. **Rehabilitation Tax Credit:** Federal income tax credit on expenses for the substantial rehabilitation of historic properties.
58. **Restoration:** The act or process of accurately returning a historic property and its setting to an appearance it had during a set period of time by removing later work or replacing missing earlier features.
59. **Revolving Fund:** Fund established by a public or nonprofit organization to purchase land or buildings or make grants or loans to facilitate the preservation of historic resources.
60. **Secretary of the Interior's Standards for Rehabilitation:** Ten basic principles established by the Secretary of the Interior which are recommended in the planning and rehabilitation of historic buildings.
61. **Section 106:** Provision in National Historic Preservation Act that requires federal agencies to consider effects of proposed undertakings on properties listed or eligible for listing in the National Register of Historic Places.
62. **Section 4(f):** Provision in Department of Transportation Act that prohibits federal approval or funding of transportation projects that require "use" of any historic site unless (1) there is "no feasible and prudent alternative to the project," and (2) the project includes "all possible planning to minimize harm."
63. **Site:** The location of an event, a prehistoric or historic occupation or activity, or building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, architectural, or archaeological value regardless of the value of any existing structure.

64. **Site Plan:** Proposed plan for development submitted by the property owner for review by planning board or other governmental entity that addresses issues such as the siting of structures, landscaping, pedestrian and vehicular access, lighting, signage, and other features.
65. **Special Permit:** Device allowing individual review and approval of a proposed development.
66. **Stabilization:** Measures taken to re-establish a weather-resistant enclosure and the structural stability of an unsafe or deteriorating property while maintaining the essential form as it exists at present.
67. **State Antiquities Landmark (SAL):** A state designation of a property that provides protection under the Texas Antiquities Code. Listing on the National Register of Historic Places is a prerequisite for State Antiquities Landmark designation of a building.
68. **State Historic Preservation Officer (SHPO):** Official appointed or designated, pursuant to the National Historic Preservation Act, to administer a state's historic preservation program.
69. **Structure:** A functional construction usually made for purposes other than creating human shelter. An example of a structure in Fort Worth that is listed on the National Register is the Paddock Viaduct, located across the Trinity River north of the Tarrant County Courthouse.
70. **Subdivision:** Act of converting land into buildable lots. Ordinances generally set forth standards for layout of streets, utility systems, storm-water management, and so forth.
71. **Substantial Evidence:** Standard of review applied by courts in reviewing governmental decisions. A decision will be upheld if supported by such evidence that a reasonable mind would accept as adequate to support a certain conclusion.
72. **Substantive Laws:** General term applied to laws that require meetings of governmental agencies and other authorities to be open to public.
73. **Survey:** The systematic documentation of historic resources in a given area. This documentation includes field surveys where information is gathered regarding the current physical condition of the resources through written and photographic means as well as the gathering of archival information before and during the survey process.
74. **“Taking” of Property:** Act of confiscating private property for governmental use through “eminent domain” or by regulatory action.
75. **Tax Abatement:** A reduction, decrease, or diminution of taxes owed, often for a fixed period of time.
76. **Tax Assessment:** Formal determination of property value subject to tax.
77. **Tax Credit:** A “dollar for dollar” reduction on taxes owed.
78. **Tax Deduction:** A subtraction from income (rather than taxes) that lowers the amount upon which taxes must be paid.

79. **Tax Exemption:** Immunity from an obligation to pay taxes, in whole or in part.
80. **Tax Freeze:** A “freezing” of the assessed value of property for a period of time.
81. **Texas Historical Commission (THC):** The state agency for historic preservation. Its mission is to protect and preserve the state’s historic and pre-historic resources for the use, education, enjoyment and economic benefit of present and future generations. It administers the National Register, Certified Local Government, Tax Act, marker, and numerous other programs at the state level.
82. **Transferable Development Right:** Technique allowing landowners to transfer rights to develop a specific parcel of land to another parcel.
83. **Undertaking:** As used in the National Historic Preservation Act, a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (a) those carried out by or on behalf of the agency; (b) those carried out with Federal financial assistance, (c) those requiring a Federal license, permit, or approval, and (d) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal Agency. Federal agency actions requiring review under Section 106 of the National Historic Preservation Act.
84. **Zoning:** Act of regulating the use of land and structures according to district. Laws generally specify allowable use for land, such as residential or commercial, and restrictions on development such as minimum lot sizes, set back requirements, maximum height and bulk, and so forth.