

**OFFICE OF HISTORIC PRESERVATION
DEPARTMENT OF PARKS AND RECREATION**

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July 12, 2005

Mayor Tom Bates and City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Dear Mayor Bates and Members of the City Council:

The State Office of Historic Preservation (OHP) has broad responsibility for the implementation of federal and state historic preservation programs in California. The City of Berkeley participates in the Certified Local Government (CLG) program, a National Park Service program administered in California by OHP. The CLG program is a partnership among the federal, state, and local governments to carry out the purposes of the National Historic Preservation Act of 1966. As part of the CLG program, the city must seek the comments of the State Historic Preservation Office when it amends or revises its historic preservation ordinance in order to ensure that the changes still carry out the intent of the Act. In addition, the OHP provides technical assistance to local governments about historic property surveys, general plans, preservation elements/plans, CEQA, and historic preservation ordinances.

Background

I have been asked by Dan Marks, Director of Berkeley's Planning and Development Department for comments about the proposed revised zoning ordinance and the Landmarks Preservation Ordinance (LPO) that are under your consideration this evening. In July 2004 I provided comments on the Landmarks Preservation Commission's proposed revisions to the zoning ordinance and LPO (attached). In the intervening year an alternative revision to the LPO has been proposed by the city's Planning Commission. Mr. Marks has provided me copies of the existing zoning ordinance and LPO, the proposal by the Landmarks Preservation Commission, and the proposal by the Planning Commission.

Observations

After reviewing the competing documents I have two observations that relate to the city's historic preservation program. The first is that the content of both versions carry out the intent of the National Historic Preservation Act as prescribed by the CLG program. However, the preparation of drafts by two city commissions, one being the LPC itself, and the other the Planning Commission, brings into question the healthiness of the city's historic preservation program. I find it unusual for one city commission to prepare an ordinance that would be administered by another city agency if adopted.

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The second is that the proposed revisions reduce the level of protection currently afforded historical resources in Berkeley. This observation is not intended to address the substance or merits of the proposed revisions, but to advise the city that the proposed LPO appears to meet the definition of a project under §15378(a) of the CEQA Guidelines. In addition, the Categorical Exemption found at §15308 (Actions by Regulatory Agencies for Protection of the Environment) is not appropriate; §15300.2(f) states that a categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource. The preparation of an environmental document would allow the issues to be widely aired and would allow for broader public comment.

Recommendations

I have read both proposals; I met with city staff and SPC members June 29, 2005; I have read City Manager Phil Kamlarz's staff report for tonight's city council meeting; and I have read the memorandum sent to you June 29, 2005 by the LPC. I find it poor procedure to pick and choose language from two competing draft proposals, and I decline to offer substantive comments. In addition, I recommend the city council direct staff to engage the services of an outside, impartial consultant preservation planner with the aim of preparing one document for public review. If the city elects to follow that path, OHP staff will be available to provide assistance as appropriate.

Please contact me if you have questions or comments. I can be reached at (916) 653-9116 or at lwoodward@parks.ca.gov.

Sincerely,



Lucinda Woodward, Supervisor
Local Government and Information Management Unit

Cc: Dan Marks

Attachment

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July 1, 2004

Gisele Sorensen
Senior Planner/LPC Secretary
City of Berkeley
2120 Milvia Street
Berkeley, CA 94704

Dear Ms. Sorensen:

**RE: REVIEW OF CITY OF BERKELEY'S REVISED ZONING ORDINANCE AND
LANDMARKS PRESERVATION ORDINANCE**

It was a pleasure for Marie Nelson and me to meet with you, Zach Cowan, and Dan Marks to review the proposed revisions to the city's zoning ordinance and landmarks preservation ordinance. It is our view that the proposed revised ordinances carry out the intent of the National Historic Preservation Act as prescribed by the Certified Local Government program.

Despite our overall acceptance of the revisions, we do recommend some changes to the documents, mainly to provide clarity. These are outlined below:

- **Definitions.** Both documents would be improved if definitions sections addressing essential terms were included. Our historic preservation ordinance consultants, Clarion Associates, LLC, have advised us that nationally, court cases have shown that it is not sufficient to rely on common sense where terms may be subject to judicial challenge. Most ordinances define such obvious terms as "applicant," "planning director," and "preservation commission." Other terms might include "member of the public," "landmarks," "historic districts," "structure of merit," "good architectural design," "architectural merit," "environmental review," "good repair," and "unsafe or dangerous conditions." These are just a sampling of what is usually included in a definitions section.
- **Severability clause.** I recommend adding.
- **National Register and California Register.** In several places throughout both documents, the term "determined to be eligible for the National Register of Historic Places or the California Register of Historical Resources" is used, but it does not say who has the authority to make this determination. A determination of National Register eligibility is made through a federal regulatory process, including Section 106 of the National Historic Preservation Act (36 CFR Part 800), the National Register nomination process (36 CFR Part 60), and the

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historic preservation tax credit application process (36 CFR Part 67). A determination of California Register eligibility is made by the State Historic Resources Commission, pursuant to PRC 5024.1 and California Code of Regulations, Title 14, Chapter 11.5. It needs to be made clear that "determined eligible," an outcome of a regulatory process, is not the same as "appears to meet National Register criteria" which is a professional opinion.

- **State Historic Resources Inventory.** It is not at all clear what this is. Is this the city's inventory, or is it the Berkeley properties in the California Historical Resources Information System? A definition needs to be included. You might want to consider limiting review of properties to those meeting certain criteria. In many communities their local inventory includes properties that have been surveyed but found not to be significant.
- **LPC Meetings.** The CLG procedures require that the commission meet a minimum of four times a year. A minimum number of meetings should be included in the ordinance. This issue has come up in communities where for political reasons staff has not convened their commission.
- **Archeology.** In Section 3.24.030 you have included archeology as one of the professional disciplines that is desirable for membership on the LPC, however you have not included archeological properties as a property type that may be designated by the city. I recommend that you revise Section 3.24.060 to include archeological properties.
- **Surveys.** In Section 3.24.070, I would include under powers and duties, the authority to carry out historical resources surveys. This is a major component in the CLG program and should be reflected in the ordinance.
- **Annual Report.** Berkeley's annual CLG report covers the period October 1-September 30 of each year. Under Section 3.24.090, you may want to change the LPC's reporting date to City Council to coincide with the CLG annual report.
- **Landmarks and Structures of Merit.** If the same consideration, review, and protection is given to structures of merit as to landmarks, why have a two-tier system of historical designation?
- **Integrity.** Under Section 3.24.110, I would apply integrity to all property types, not just those of architectural merit. This would bring the city's procedures in line with the National Register and California Register. National Register Bulletin #15, referenced in the ordinance, makes clear that the test of integrity does not apply to all historic properties in the same way. For example, a property significant for its architectural design would require a different kind of integrity than a property significant for its association with a historical event.
- **Waiting Period for Resubmission.** If your intent in Section 3.23.180 is to impose a two year moratorium on initiating a landmark application" unless

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substantial new information is revealed, then you should just say so. And, I would define "substantial new information," and who makes that decision.

- **Incentives.** It would be appropriate under the duties and powers of the LPC to include providing information about and encouraging the use of historic preservation incentives, including those outlined in your general plan.

If you have questions, please do not hesitate to contact me at (916) 653-9116 or at lwood@ohp.park.ca.gov.

Sincerely,



Lucinda Woodward, Supervisor
Local Government and Information Management Unit