The administration of historic preservation ordinances: Legal and practical implications for planning

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THE ADMINISTRATION OF HISTORIC PRESERVATION ORDINANCES:
LEGAL AND PRACTICAL IMPLICATIONS FOR PLANNING

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INTRODUCTION

Municipal planning departments are increasingly involved in the field of historic preservation as more communities create preservation ordinances to protect historic resources. In the United States, the number of historic preservation commissions has nearly doubled in the past decade and this trend is likely to continue. Estimates of the current number of preservation commissions in the United States range between 1,200 and 1,500, according to the National Trust’s Directory of American Preservation Commissions.

The degree to which historic preservation commissions and local planning agencies must coordinate activities varies among communities, depending upon local ordinances and the operational format followed by each jurisdiction. Common areas of overlap include proposed demolition of structures, building permit procedures, and comprehensive planning. The review of proposed alterations to structures located within historic districts is a planning function in communities with a historic preservation ordinance, but without a preservation commission.

Commission members and planners can ensure the integrity of the historic preservation review and associated permit processes by adhering to established administrative practices detailed in the section of this paper titled Procedural Due Process. These individuals must be responsive to the needs and goals of the community, familiar with recent developments in federal and state case law, and mindful of the constitutional requirements of procedural due process.
Beyond what is legally required, measures can be taken to make the administration of ordinances easier and more successful, fostering community support and awareness of the planning process in general and the historic preservation process in particular. The need for revising a preservation ordinance may become apparent during its implementation period. Tailoring the ordinance to the community's needs and goals will enhance its effectiveness for both property owners and historic preservation.

Additionally, the practical experience of those involved with the implementation and administration of preservation ordinances provides insight for others faced with this challenge. Also, the legal and practical implications of preservation planning can be applied by planners to the administration of other land-use ordinances.
STATEMENT OF PROBLEM

The distance between the creation of a carefully-drafted preservation ordinance and its proper implementation can be difficult to bridge in a manner that safeguards certain rights of property owners while realizing preservation goals. This paper explores how the objectives of a community historic preservation plan can be realized in a manner that is both deferential to the needs of property owners and legally defensible to court challenges grounded in allegations of procedural or substantive due process defects.

Local government officials must be mindful of the law of takings in the drafting and administration of all land use ordinances. This paper discusses regulatory takings and explores recent legal developments in this area of the law. It also focuses on the legal and practical aspects of administering the design review portion of a historic preservation ordinance, an integral part of most historic preservation programs. The author focuses on this aspect of preservation by drawing on observations gained through personal professional experience.

The preservation ordinance of Bozeman, Montana is referenced frequently for illustrative purposes, the author having been directly involved in its administration as a city planner, from its implementation in March of 1990 to September of 1991.

Generally, issues of substantive due process are raised concerning promulgation of a land-use ordinance and the content and issues of procedural due process
are raised concerning the administration of such ordinances. However, lawmakers
must be cognizant of both procedural and substantive due process requirements
in both the drafting and administration of land-use ordinances.
EXPLANATIONS

Many states have enacted preservation laws that enable local governments to adopt historic preservation ordinances. In other states, including Montana, enabling laws for zoning provide the legal justification for the promulgation of local historic preservation ordinances. The power of state and local governments to regulate land-use has its origins in the police power, which is the broad power to enforce legislation created to protect the health, safety, and welfare of the public.

In the landmark case *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the United States Supreme Court established the right of municipalities to divide land within their jurisdiction into districts for which uses are prescribed (zoning). The authority of local governments to regulate land-use for aesthetic goals was established as a legitimate exercise of police power in *Berman v. Parker*, 348 U.S. 26, (1954). The constitutional power to regulate the use of private property in the interest of historic preservation was firmly established in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

Traditional “Euclidean” zoning (named for *Euclid v. Ambler Realty*) is often ineffective at protecting resources such as historic architecture because it is concerned with the spatial, rather than qualitative, aspects of appropriate land-use in a community. To address this shortfall, cities often establish special zoning overlay districts, which impose particular land-use restrictions upon areas with unique characteristics such as wetlands, aquifer zones of influence, or historic
districts. To protect these unique characteristics, local governments may require developers or owners of these protected lands to secure special permits, comply with certain restrictions, and be subject to the review of quasi-judicial boards or commissions before proceeding with changes or development to their real property. The protection afforded by overlay districts supplements the underlying traditional zoning requirements.

The additional restrictions imposed by historic overlay districts are often administered by bodies of review such as architectural review boards, design review boards, or preservation commissions. Property owners in a historic overlay district typically must obtain a certificate of appropriateness (COA) before they can proceed with alterations to, or the demolition of, historic structures and property. Limitations on rights of property owners are commonly the origin of numerous legal challenges to preservation ordinances.

When a local government prevents a property owner from reasonable use of property, a court of law may find that the owner has a valid takings claim. Takings of property do not require the appropriation or physical occupation of property by government. They generally involve some reduction in use or value that impedes the owner's utilization of the property unreasonably.

Another challenge to land-use regulation ordinances is related to alleged deficiencies in the area of due process. The doctrine of due process is divided into two main areas of law; substantive due process and procedural due process. Substantive due process is concerned with whether or not a law is rationally-related to legitimate governmental goals or interests such as the protection of public health, safety, and welfare. The objectives of such laws must be achieved in a specified manner.
that is neither arbitrary nor capricious. Procedural due process requires the fair application of laws by decision-makers and administrators in a consistent and conscientious fashion. This paper applies the requirements of procedural due process to the administration of a historic preservation ordinance. It also addresses some practical implications of administering a community historic preservation program.
JUSTIFICATIONS

The November 15, 1990 issue of *Preservation Law Update* contains an article titled, "How Much Do We Really Know About Preservation Commissions?" Prominent legal commentator Robert E. Stipe is quoted from his 1980 article in the *North Carolina Central Law Journal*:

> It would not be amiss to suppose that perhaps ninety percent of all the decisions of all historic commissions in North Carolina (and elsewhere) would instantly be overturned by a court of appeal for procedural defects alone.¹

In the decade since that article, countless preservation commissions across the nation have undoubtedly been disbanded after brief life spans because of the loss of sufficient public support in the communities where they were formed. Often, this regrettable situation could have been prevented by the observance of simple legal and administrative principles.

Preservation commissions have often been seen by communities as too restrictive of private property rights. Architectural review boards or commissions often recommend denying building permits to property owners whose proposed alterations to, or demolition of historic properties are found to be unacceptable. Unpleasant experiences between permit applicants and a new commission may eventually undermine support for the protection of the historic resources of a community.

community well into the future. The need for more study in this area is illustrated by these passages from the Preservation Law Update:

There is remarkably little in print dealing with the work of individual preservation commissions.

Professor Stipe's bombshell suggestion is that, "a capable first-year law student could take apart almost any preservation commission in the country."

It's time to put some time and energy into the close analysis of how leading commissions do their jobs, to discover how the work of less capable commissions might be improved.

It is from this starting point that the administration of historic preservation ordinances is examined. Historic preservation provides the context for the analysis. By using this approach, it is hoped that:

1) Community planners and preservation board members will gain legal and practical knowledge necessary to ensure the proper and effective administration of preservation and other land use ordinances;

2) By adherence to fundamental legal principles and uniform application of established administrative practices, planners and board members can construct a legally defensible record in the event of a legal suit and thereby avoid costly legal judgments against the communities they serve;

3) By anticipating the needs of applicants, planners can facilitate the review process in ways that build understanding and support for a community preservation program;

4) Property owners will be able to enjoy the use of their property in a manner consistent with the historic preservation goals of their community;

5) Through contact with planning offices, owners of historic properties will become aware of the architectural and historical expertise available to them, usually at no cost; and

6) That awareness and appreciation of the history of any given community will be promoted through the planning process.

2 Ibid.
PROPERTY RIGHTS

Courts have routinely upheld ordinances which, in effect, take property rights from landowners without compensation under the recognized police power of the states. Regulations grounded in the police power impose duties or limits on personal activities, including the use of property, without compensation. In contrast, the formal exercise of eminent domain allows governments to appropriate private property for public use, usually in exchange for fair compensation.

In Board of Regents v. Roth, 408 U.S. 564, (1972), the U.S. Supreme Court declared that property rights are not created by the Constitution. They are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law. In 1922, the Court decided in Pennsylvania Coal v. Mahon, 260 U.S. 393, that if land-use regulation goes "too far" in restricting property use, a taking of property may be effected.

The Fifth Amendment to the Constitution states in part, "...nor shall private property be taken for public use, without just compensation." The precepts of the Fifth Amendment are extended to the actions of state and local governments by the Fourteenth Amendment to the Constitution.

The Fourth Amendment protects individuals from unreasonable searches and seizures of their "houses, papers, and effects." In Katz v. United States, 389 U.S. 347 (1967), the U.S. Supreme Court indicated that Fourth Amendment property rights are generally considered by many to be interrelated with a right to "life, liberty, and the pursuit of happiness," or a right to privacy.
Property and Personhood

Preservation planning often involves reviewing proposed changes to architectural elements of an applicant’s house. The relationship between property and personhood is based on the notion that to achieve proper self-development, an individual needs some degree of control over resources in his or her external environment. The necessary assurances of control take the form of property rights. The concept of personhood invokes the “binding up” of people with objects such as heirlooms, automobiles, or a house.

One method of measuring the degree of strength of such a relationship is the amount of pain one would suffer should an irreplaceable object be lost or irreparably damaged. When government regulation ventures into the domain of real property the associated concept of personhood should be taken into account. Design review can accomplish preservation goals in a manner that is deferential to the personal needs of the property owner.

Residential versus Commercial Property

A distinction can be made between residential and commercial property concerning the prospect of facing governmental regulation as a property owner. Most commercial development proposals are presented by professionals for review by local planning departments. In contrast, a homeowner applicant represents himself, and is more often concerned with improvement of lifestyle than a developer, who tends to be investment oriented. Although home improve-

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ment ordinarily increases the value of a property and can provide an eventual return on investment, homeowner applicants are more typically motivated by personal needs. These needs include the creation of more living space, the desire for more privacy, and the personal gratification derived from historic restoration. General home repairs lack the magnitude to qualify as "alterations" and do not fall within the purview of most preservation ordinances.

This is not to infer that economic considerations are not a motivating factor behind residential alterations and additions. Many homeowner applicants submit plans for the accommodation of a home occupation or the construction of a rental unit as an income supplement. Nevertheless, the homeowner applicant is a unique situation requiring a deferential approach by preservation commissions. The home is sacrosanct in American culture, and consequently regulation is less acceptable to homeowner-applicants than it is to commercial developers.

The need for a sensitive approach to residential applications is particularly important in the administration of a new historic preservation ordinance. Unfortunately, it is during its infancy that a newly-formed design review board is most likely to lack the skill and experience to successfully negotiate with sometimes recalcitrant homeowner-applicants. If the implementation of design review is seen as an excessive imposition upon the perceived property rights of homeowners, support crucial to the success of the preservation program may be lost. Opponents may influence elected officials to eliminate the commission and perhaps the entire program. The administrative measures outlined in the Procedural Due Process section of this paper can effectively prevent such a regrettable outcome.
THE PERMITTING PROCESS

Upon this backdrop of constitutional law and with a mandate to preserve our heritage, state and local governments venture forth into the area of preservation law. Guided by documents such as the Secretary of the Interior's Guidelines for Historic Preservation and by publications such as Preservation Forum, National Alliance, Preservation Law Updates, etc., local governments working with state historic preservation offices draft preservation ordinances, which are then implemented and administered by local preservation commissions or design review boards. Such boards must be constantly aware of the requirements of due process to protect their government from legal challenges and ensure the viability of a preservation program.

A fundamental component of many preservation ordinances is the certificate of appropriateness (COA) application process, which sets forth guidelines and criteria for review of proposed alterations to structures located within historic overlay districts. The restrictions and special conditions of approval required for projects located in overlay districts are supplemental to the zoning and other regulations governing the use of property underlying overlay districts. Typically, a COA must be issued to an overlay district property owner before a demolition, moving, or building permit can be obtained. Other projects that do not normally require building permits, such as the construction of small outbuildings, fences, and signs may require certificates of appropriateness within a historic overlay district.
A majority of COA applications propose alterations to structures located in historic overlay residential districts. Seventy-one percent of all applications in 1990 and 60 percent of applications in 1991 received by the city planning office of Bozeman, Montana, (population 25,000) were for alterations proposed to residences located within city conservation and preservation districts. It should be noted that, pursuant to the Bozeman Zoning Code, the DRB reviews new development architecture, landscaping, and alterations to structures in the preservation overlay districts. Almost all residential applications were prepared and presented by the property owners (see Appendix A).

When a community completes a historic architectural inventory, drafts a preservation ordinance, and designates certain areas within its jurisdiction as historic overlay districts, implementation of the ordinance can begin. Preservation commission, architectural review board, or design review board are some names given to the body responsible for regulating changes to structures located in historic districts.

The Bozeman Zoning Ordinance refers to its historic overlay review board as the Design Review Board (DRB). The Bozeman DRB reviews proposals for development in several other types of overlay districts. DRB members may represent a variety of backgrounds. The ordinance calls for professionals from architecture, history, planning, or design. The Bozeman ordinance requires that one person with a degree from an accredited school of architecture be present at any DRB meeting at which official action on proposals takes place. Laypersons on DRBs are likely to include amateur preservationists and other civic-minded
community members with an interest in local history or architecture. DRB members are appointed and serve their terms on a voluntary basis.

It is unlikely that a member of a commission or DRB will have the level of legal expertise required to guide the board in a manner consistent with traditional notions of procedural due process. Commissions that do include a member of the legal profession are fortunate to have immediate access to a source of legal knowledge.

Most review bodies do not enjoy the benefits of instant access to a lawyer and this is where a good working relationship with a city attorney can be valuable. A sympathetic city attorney can provide sound advice to a local preservation commission or DRB. In addition to providing the counsel necessary for the proper drafting of a local preservation ordinance, a city attorney can provide advice when important legal issues arise that could incur liability upon a municipality. Periodic meetings to address problem areas in the administration of the ordinance may result in a better ordinance, tailored to the specific needs of a community.
DUE PROCESS OF LAW

The doctrine of due process is divided into two main areas of law; substantive due process and procedural due process. Substantive due process is concerned with whether or not a law is rationally-related to legitimate governmental goals or interests such as the protection of public health, safety, and welfare. The objectives of such laws must be achieved in a specified manner that is neither arbitrary or capricious. Procedural due process requires the fair application of laws by decision-makers and administrators in a consistent and conscientious fashion. Law-makers must ensure that the principles of substantive and procedural due process are observed in the drafting of land-use ordinances.

The absence of land-use law precedent and the complexities of the takings question prompted the much quoted dissent of Justice Brennan in San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621, 636, (1981):

Such liability might also encourage municipalities to err on the constitutional side of police power regulations and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the constitution then why not a planner? 450 U.S. 621 (1981).

Substantive Due Process

Substantive due process requires that a regulation which restricts property rights is reasonable. The legislation must be within the jurisdiction of the legislative body, rationally-related to the achievement of a legitimate public interest, and applied in a manner consistent with the purpose of the legislation itself. Challenges
to legislation that allege violations of substantive due process are derived from the Fifth and Fourteenth Amendments, which state in part that the government should not deprive individuals of “life, liberty, or property without due process of law.”

Courts tend to be deferential to the interests of a legislature when a law is challenged for violations of substantive due process. Consequently, the burden is incumbent upon a plaintiff to prove a constitutional transgression. This is because an ordinance is likely to affect individuals in different ways.

A zoning ordinance will not fail substantive due process scrutiny merely because it denies a landowner of the most profitable use of his property. A determination will hinge upon whether there is any reasonable use to which the property can be devoted, irrespective of profit expectation. When the challenged ordinance is applied, the gain to public welfare must be significant when compared to the hardship imposed upon a group of similarly situated property owners. An ordinance will fail scrutiny if it can be shown that a substantial decrease in value, bearing no substantive relation to the public welfare, results from administration of that ordinance.

Procedural Due Process

Decisions of municipalities that affect the status of a particular parcel of land are deemed to be quasi-judicial rather than legislative by most states. The distinction between quasi-judicial and legislative bodies has important implications for the administration of historic preservation ordinances because a higher standard will be applied to decisions that, by their effect, regulate use of real property. Courts tend to hold decisions of quasi-judicial bodies regulating property
use to a higher standard of procedural due process than those of legislative bodies promulgating public policy. Such is the case where the right of an individual to enjoy property is decided on a case-by-case basis, as in an application for a land-use variance or COA.

A preservation ordinance may specify another review body, such as a board of adjustment or city commission, as the forum for appeals of the decisions of a DRB. It may also refer to the decisions of the DRB as recommendations. Nevertheless, on appeal a district court will review the procedure and deliberations of the body of first review or, in this case, the DRB, in its search for alleged defects in procedural due process. Most DRBs are made up of laypersons and professionals with no legal training. By venturing into aesthetic and architectural regulation, DRBs adjudicate the property rights of individuals. Members of DRBs and preservation commissions with authority to make binding decisions must know and apply the fundamental principles of procedural due process in their review process.

The constitutional requirement of fair procedures has nine general aspects:

1) Public Notice
2) Opportunity to be Heard
3) The Right of Cross-examination
4) Disclosure
5) Findings of Fact
6) Conflicts of Interest and the Appearance of Conflict or Impropriety
7) Prompt Decisions
8) Records of Proceedings
9) Ground Rules for Fair Hearings

Smith, Marlin R. *Due Process: The Elements of Fair Play*. 
These aspects of procedural due process are interrelated, as the following discussion illustrates.

1) Public Notice

In the landmark case *Mullane v. Central Hanover Bank and Trust Co.*, the U.S. Supreme Court addressed the issue of adequate public notice. Notice must be "...reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objectives.... The notice must be of such nature as reasonably to convey the required information...and it must afford a reasonable time for those interested to make their appearance."\(^5\)

Procedural due process requires that there must be notice of an action, it must adequately apprise interested persons of the intended action, and it must be given within time periods prescribed by law and within sufficient time to allow interested individuals to make appropriate preparation. Public notice requirements vary between local ordinances and may require more than the state in which their jurisdictions are located.

Applications for Certificates of Appropriateness (COAs) in Bozeman, Montana, require that the subject property be posted conspicuously for not less than ten days. Posting the subject property is the responsibility of the planner assigned to work with the particular application. After a complete submittal is received, the planner prepares the notice from a stored computer format, inserting the relevant data concerning the applicant's name and address, the legal and

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common description of the subject property, the property owner's name and address, a brief but complete description of the proposed alteration, and the time and place of the public hearings where the application will be reviewed. A statement directs written comments to the planning office by address. A brief phrase stating that the file with proposed alterations is available for review at the planning office is advisable.

Public notice postings offer wide exposure to passersby and are both informative and educational. Many first-time applicants explain that they became aware of the permit process by reading postings on neighborhood properties. Brightly colored signs and notices are effective at bringing attention to notices. In Bozeman, notices are inserted into plastic covers and stapled securely to wooden signs with the open end downward to prevent the elements from damaging the notice.

Placement of notice is an important decision. To assure that notices reasonably apprise all interested parties, signs should be readable from the sidewalk or public right-of-way. Placement unreadable without trespassing discourages the purpose of public notice by making it inaccessible. A posting located in the boulevard strip between the sidewalk and street lets motorists know that a project exists from the presence of the planning office sign, although motorists rarely stop to read the posting. Signs posted in front yards afford the opportunity to be read by pedestrians and still be seen from the road.

Placement of the sign effects the level of public exposure achieved by the notice. If a notice faces the street, it offers a brief moment of visibility to passing motorists; if it faces an oncoming traffic lane, it is more visible and recognizable. Two-sided postings offer visibility to two-way traffic and pedestrians.
When a submittal is amended, the posting should reflect this by indicating proposed changes and amended times of meetings, where applicable. The language of the ordinance should be examined to determine whether the entire required posting period should begin again. In the case of a major project of widespread public concern, an amended posting can be prepared on brightly colored paper. This will serve to apprise individuals of significant changes to the application. Failure to keep the public abreast of application changes could result in a breach of procedural due process.

Means of physical posting of property vary from place to place. City shops can construct signs to accommodate the needs of a planning office. In Bozeman, a 14-inch by 20-inch plywood (3/4-inch thick) panel is screwed to a 3/8-inch steel rod. This combination coupled with plastic slipcovers offers a model suitable for harsh weather and seasonally frozen ground. Other municipalities staple weather-resistant, pre-printed notices to telephone poles in the vicinity of the project. This method may be effective where there is an abundance of poles, but often results in inadequate notice if poles are scarce.

It is preferable to post projects located on corner lots on both street frontages. In the case of cul-de-sac development more than one posting is preferable. One notice at the closest well-traveled intersection and another at the site is better at inviting public interest than a remote posting, secluded from traveled ways.

It was mentioned earlier that posting property offers an opportunity for educational as well as informative exposure to a preservation program. With this in mind, a town may consider developing a special sign format with architectural details integrated into the sign. A unique sign style would easily distin-
guish COA projects from other planning and zoning postings and increase awareness of a preservation program.

In Bozeman, posting of subject properties occurs shortly after the submittal of a complete application. The posting provides adequate space for a brief description of the project in addition to information about public meetings. Notice requirements for the Neighborhood Conservation and Historic Preservation Overlay Districts, or Chapter 18.42 of the Bozeman Zoning Code, are found at Chapter 18.51, Design Review Board (DRB) and Development Review Committee (DRC), (Section 18.51.020 General Procedures, Notice and Timing, c. Public Notice; see Appendix A).

2) Opportunity to be Heard

All persons with interest in a pending land-use decision of a regulatory body must be given an opportunity to express their views and supply evidence in support of those views. Closely associated with the opportunity to be heard is the requirement that a public hearing be held as a forum for such views before any land-use decision is made. There must be adequate prior notice of public hearings to provide all interested parties a full opportunity to be heard. A hearing of a quasi-judicial body at which no meaningful opportunity to be heard exists is tantamount to no hearing at all, and decisions made in such conditions will not withstand procedural due process scrutiny.6 This tenet applies to any quasi-judicial body possessing regulatory authority, such as preservation commissions and design review boards.

Meetings should be set for times and places that ensure the attendance of interested parties. Decisions made at hearings conducted under conditions that inhibit the attendance, such as under-sized halls or meeting places, or at hours of the day when those interested cannot attend, will not withstand procedural due process challenges. Meetings of great local significance that are held preceding or following national holidays such as the Fourth of July, Labor Day, or Christmas foster low attendance and should be avoided.

Periods for public comment must be identified on the meeting agenda. Public notice of the meeting should indicate that public testimony will be taken at the meeting. It should also indicate where written comments can be submitted to be read at the meeting and added to the official proceedings. The notice should also designate a place where the public can pick up copies of the meeting agenda, which should be made available well before the meeting date.

If the volume of public comment exceeds the time designated by the agenda, decisions should be deferred until another meeting can be held and all comments taken. It is unfair to allow project representatives to ramble on indefinitely, usurping public comment time. Use of such filibustering tactics tends to make board members impatient and indifferent to public comment when it is finally presented. Failure to facilitate a meaningful opportunity to be heard will ultimately undermine support for community programs and the bodies that administer them.

3) The Right of Cross-examination

When a hearing is regarded as adjudicative or quasi-judicial, all parties must be given the opportunity to question opponents and their witnesses. The

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7 Smith, Marlin R. "Due Process: The Elements of Fair Play."
importance of the right to cross-examination was emphasized by the Supreme Court of Connecticut in *Wadell v. Board of Zoning Appeals*.

...a zoning board often deals with important property interests; and a denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value when its lack of credibility or the necessity for accepting it only with qualifications can be shown by cross-examination.8

At the beginning of each agenda item, a member of a preservation commission should explain to those present what the hearing procedure will be. This explanation should include any applicable time limits and the order of testimony from those present wishing to make a statement. A time should be designated to read written comments submitted by absentee parties. If there is opposition to a proposal, the applicant or his representative should have the opportunity to cross-examine the opposing witness concerning the authenticity of any allegations. In this way, commission members can be made aware of any qualifications or mitigating factors that would affect the gravity accorded such statements before a decision is made.

A regulatory body may make the mistake of scheduling a comment period following, rather than preceding, the decision. Such after-the-fact or illusory acknowledgement of due process undermines the credibility of decisions and exposes them to subsequent legal challenges. Hearings for the granting of COAs are rarely adversarial in nature. Nevertheless, DRB members must be aware that in order to establish a complete record and assure procedural fairness, the opportunity for cross-examination must be announced.

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4) Disclosure

There must be an opportunity for the public to see, hear, and know all of the statements and evidence considered by the body making the local decision. Private, or ex parte communications with decision-makers destroy the credibility of the hearing process and deprive it of an appearance of fairness.

In any community there exists a level of informal interaction and familiarity among those involved in governmental decision-making. Contact between board members and citizens active in development and preservation in settings outside of the formal arena is common. Board members should refrain from any informal discussion regarding a particular project that is currently under consideration or that may be in the future. Applicants who question board members about a particular land-use issue should be referred to a planning office for information. Ex parte discussions between board members and applicants should be avoided until a formal hearing is held.

One fundamental element of the right to full disclosure is the opportunity for public review and response to staff reports used by the administrative body in reaching a decision. Such reports must be available to all interested parties far enough in advance of hearings to allow ample time for the preparation of a response. The Bozeman planning staff report for a COA application is available four to seven days in advance of the relevant DRB meeting (see Appendix A).

Under the Bozeman Code, an architectural review is prepared by an independent contractor for each COA application. The contractors are usually architecture graduates from the state university or local architects. A state license is not required of the review contractors, who receive a nominal fee for each re-
view. The review is usually available one week in advance of the meeting. A two-week application process allows one week for staff report preparation and one week for public review. The public notice posted on the subject property indicates that the proposal and independent architectural review are available for public review at the planning office. This measure is recommended both as a courtesy and as an assurance of full disclosure of the pertinent information.

The planner arranges the architectural review immediately after receiving a complete submittal from an applicant to ensure ample time for public review. The architectural review is assigned to one member of a pool of reviewers on a rotating basis. Architecture students from the state university or local architects with an interest in architectural history serve as reviewers. The initial discussion between the planner and reviewer is limited to a brief explanation of the project that includes the address and district of the subject property. The reviewer is given the review form, one copy of the submittal, and the desired time of completion. The reviewer submits a bill for the 20 dollar fee to the planning office with the completed review and is paid by the City with a check.

Planning offices should have staff reports ready well in advance of DRB meetings. Otherwise, interested parties are deprived of access to information used by decision-makers. This may constitute a denial of procedural due process. If scheduling difficulties arise, the planning director should reschedule the application review to allow ample time for public review. Delays in review may cause an applicant to sue for loss of opportunity or costs of delay. Such a situation may indicate the presence of a larger problem such as under-staffing. To satisfy the requirements of full disclosure, interested parties must not only have
access to these reports, but must also have ample time to respond to the assertions made in them.9

5) Findings of Fact

The reasons underlying a particular decision by a preservation commission or design review board must be supported by adequate findings of fact to meet procedural due process requirements. This is an important aspect of the establishment of a complete and legally defensible record of proceedings. It is also very important that applicants are fully apprised, upon introduction to the application process, of what criteria will be employed by the board in evaluating a submittal.

The Bozeman Zoning Code lists the criteria for review of Certificates of Appropriateness in Chapter 18.42, Neighborhood Conservation and Historic Preservation Districts, Section 18.42.060 Standards For Certificates of Appropriateness, A., B. and C., (see Appendix A):

A. In considering an application for a Certificate, the Design Review Board shall be guided by the "Secretary of Interior's Standards for Historic Preservation Projects".

B. Architectural appearance design guidelines used to consider the appropriateness and compatibility of proposed alterations with original design features of subject structures or properties and with neighboring structures and properties shall focus upon the following:

1. Height
2. Proportions of doors and windows
3. Relationship of building masses and spaces
4. Roof shape
5. Scale

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9 Smith, Marlin R. Due Process: The Elements of Fair Play.
6. Directional expression, with regard to the dominant horizontal or vertical expression of surrounding structures.

7. Architectural details

C. Contemporary design of new structures and additions to existing structures shall be encouraged when such new construction or additions do not destroy significant historical, cultural, or architectural structures or their components and when such design is compatible with the foregoing elements of the structure and surrounding structures.

Design board professional members will usually recognize an element of a proposal that is inappropriate to the existing structure or neighboring structures. It is important to express such recognition in terms of the criteria set forth in the language of the preservation ordinance. During the review process, board members must avoid discussing the merits of a particular project in subjective terms. A decision that is not directly-related to the criteria set forth in the ordinance is confusing to applicants and legally indefensible upon subsequent appeal. Furthermore, reports of alleged arbitrary decision-making will eventually undermine the support of a community for a preservation ordinance.

To foster an atmosphere of consistency and objectivity the planner should conduct the review. Each board member should be polled individually on each of the criteria. This can be facilitated by polling each member successively on each criteria, one member at a time, or by polling each member on all of the criteria one member at a time. A clarification of a statement of opinion can be requested so that the record indicates to which of the established criteria the member is referring.

Members should be encouraged to frame opinions in an objective manner so that the record will correspond with the ordinance’s criteria. At the conclusion of the review, the decision should be summarized in language that goes
beyond merely repeating the wording of the statute. It should specify which aspects of the proposal are in conflict with the criteria. There must be a clear statement of what the decision-making body believed to be the relevant and significant facts on which it based its decision.

In evaluating an application for a COA, a board may wish to provide an additional degree of objectivity and justification for decisions by adopting a scale of “degrees of change” for alterations proposed to existing structures. One such scale attempts to describe how existing features of a building would be affected by a proposed change. This scale utilizes ten degrees of change which can be used to monitor changes to historic structures and determine over long periods of time a point at which a building will lose its original character:10

To what degree is the existing special architectural or historic interest of the property adversely affected by this proposal?

1. Very slight change
2. Minor change
3. Simple alterations which do not directly affect elements of interest
4. Alterations having marginal impact on elements of interest
5. Alterations having noticeable impact on elements of interest
6. Elements of interest generally intact, with occasional losses
7. Substantial or complete loss of some elements of interest, but over 50 percent remaining generally intact
8. Major alterations involving substantial change to over 50 percent of elements of interest
9. Loss of majority of elements of interest
10. Complete loss with the exception of a vestigial feature

Another such scale inquires, "To what degree do the proposals involve restoration or conjectural reinstatement of missing or mutilated features?" There are four possible answers: (1) not at all; (2) to a small degree; (3) to a moderate degree; and (4) to a high degree.11

6) Conflicts of Interest and the Appearance of Conflict or Improperly

The decisions of quasi-judicial administrative bodies can significantly affect individual property rights as well as community interests. With the potential for sudden change in property values, public confidence in the integrity of the zoning process is vital.12

Inevitably, even the most conscientious public official will face a potential conflict of interest at some time in his or her career. Increasingly, state courts are prohibiting even the appearance of unfairness to ensure an impartial setting for the zoning process. Such an approach will serve to uphold the integrity of a decision-making body into the future. It is possible for a single unsubstantiated allegation of impropriety to leave a lasting air of suspicion and mistrust over a local government's ability to function objectively and impartially. Decision-makers must be cognizant of both real and perceived conflicts of interest in their everyday contact with citizens of the community.

Personal interests that threaten impartiality in zoning decisions fall into one of three categories: 1) An interest directly or indirectly affected by a zoning decision; 2) partiality stemming from associational ties, family relationships, friendship, employment, or previous business dealings; or, 3) prejudgment, which is usually revealed in pre-hearing statements.13

11 Ibid.
13 Ibid.
Associational or membership ties may create the appearance of conflicts of interest. It is not unusual for planning board members to have ties to the local real estate or construction industry. A member of a local preservation commission or design review board may be involved in restoration or have indirect ties with those who are. The conservative approach by courts to this unfolding area of procedural due process law is evidenced by a trend to find a conflict of interest based not on whether a decision-maker was in fact influenced by a relationship, but on whether such a relationship would appear to a disinterested observer to have compromised the decision maker's impartiality.

Another common area of conflicts of interest originates through business dealings. A current or previous relationship between an applicant and a board member could cause a court to invalidate a zoning decision. However, because business dealings between citizens in smaller communities are not uncommon, some degree of association is usually tolerated by courts.

What exactly constitutes a conflict of interest defies definition and depends upon the factual circumstances of each case. Charges of conflicts of interest will therefore usually not be withdrawn until the alleged conflict is voluntarily terminated or a hearing exonerates the accused. To preserve an atmosphere of impartiality board members should be cautious to avoid the appearance of conflicts and to follow established rules of procedure in all board decisions.
7) Prompt Decisions

It is imperative that a preservation commission observe the procedural requirements of the ordinance under which it operates. Section 18.51.020 of the Bozeman Interim Zone Code provides that:

...by day 14 from the date of the DRC and/or DRB meeting following formal submission, and at its regularly scheduled meeting, the DRC and/or DRB shall take action upon the applicant's proposal. Action may be to approve, approve with conditions or deny.14

It is not uncommon for a design review board to request a re-submittal from an applicant to address concerns or deficiencies related to the original submittal. If the delay in disposition of the submittal is due to an incomplete application, the applicant would be barred from an action against the city for failure to render a prompt decision. However, if a DRB ordered more information than the ordinance requires, causing the process to exceed 14 days, the applicant would have an actionable cause because the city is bound by the language of its ordinance. Unless the ordinance specifically addresses such a situation by tolling the time period between two submittals for the same project, an applicant could be deprived of the procedural guarantee of a prompt decision. Upon receipt of a complete submittal, the review board should decide to approve, approve with conditions, or deny. A timely decision satisfies the prompt decision re-

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14 Section 18.51.020 General Procedures, Notice and Timing, E. DRC and/or DRB Action of Chapter 18.51 Design Review Board (DRB) and Development Review Committee (DRC) of the Bozeman Interim Zone Code.
quirement and allows the applicant an opportunity to proceed within the required time limit.

In *Salvatore v. City of Schenectady*, 530 N.Y.S. 2d 863 (1988), the city was found to have deprived the applicants of a prompt decision by disapproving an application in September 1986 and recommending that the applicants re-submit an amended application. After an appeal and its withdrawal, the applicants re-submitted in January of 1987. In February of 1987 the board granted another hearing and approved with conditions. The court found that because the ordinance provided no basis for dispensing with the time deadline of 45 days for the commission decision, the historic district commission was barred from imposing the conditions of approval. The foregoing case underscores the importance of rendering a prompt decision where property rights are adjudicated.

8) Records of Proceedings

In the event of a legal challenge to the decision of a quasi-judicial administrative body such as a preservation commission, the reviewing court must have available all statements of witnesses and board members, and all materials considered in the decision to decide an appeal. It is recommended that a preservation commission maintain “two sets of files; one set to contain minutes from the commission’s meetings and a second group to contain copies of applications to the commission for certificates of appropriateness and demolition permits.”

Minutes should be backed up by stenographic notes and tape recordings. The transcribed minutes should reveal what decisions were made and indicate

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which members voted for or against each application. The minutes should indicate which members abstained from votes and why. Who was present and the names and statements of all witnesses are also important facts.

The record should contain details of the board’s deliberations, including reasons cited for decisions and references to the applicable criteria of the ordinance. Copies of the minutes should be available to the members as well as to interested parties for review as soon as possible following the hearing. Planning staff members should use the official minutes in drafting correspondence or making recommendations to other decision-making bodies to ensure accuracy and fairness.

Complete files can be used for future studies to determine the effectiveness of a preservation program over time and how certain issues were addressed in the past. In the event of legal challenge to a commission’s decision, the city attorney will need a complete and accurate record of the proceedings to adequately defend the city.

9) Some Ground Rules for Fair Hearings

Every decision-making body must have a set of rules of procedure for the orderly and efficient conduct of hearings. These rules must be readily available for anyone requesting them. Applicants should know the procedures of the board as well as the criteria upon which their application will be evaluated. At the beginning of the hearing the applicant should be informed of board procedures and any other information to be taken into account by the reviewing body in reaching its decision. As mentioned earlier, the availability of the staff report and other reviews should be made known to the applicant in advance of the meeting, during the initial application process, and on the posted public notice.
If the decision of the reviewing body is based on any information that was unavailable to interested parties beforehand or on criteria which was unknown to the applicant, the applicant has been deprived of procedural due process and is entitled to either a new hearing or another form of judicial relief. A planning office should have an information brochure summarizing the rules of procedure and any other information that the public is entitled to know about a particular review process.
POLICE POWER AND LAW OF TAKINGS:
SUPREME COURT BACKGROUND

In the nineteenth century, the U.S. Supreme Court viewed the takings clause of the Fifth Amendment to the U.S. Constitution as a limitation only on formal and inverse condemnations, and not as a check on the police power of government. Supreme Court Justice Oliver Wendell Holmes believed that the question of whether an exercise of police power was permissible depended upon the particular facts of a case. This inclination of the Supreme Court, as well as other federal and state courts, to decide a case depending upon the particular facts and how the challenged law had been applied, was grounded in the doctrine of separation of powers between the branches of government. The Court scrutinized the application of the challenged law instead of striking it down as unconstitutional. In other words, if a case had merit on procedural grounds, the Court would find it unnecessary to address the substantive aspect of the challenged law.

In the early 1900s the U.S. Supreme Court extended the reach of the takings clause of the Fifth Amendment to include cases of regulatory overreaching in the exercise of police power by state and local government. In Pennsylvania Coal, a coal-mining regulation was deemed to be too restrictive in the absence of compensation. The takings clause provided the rationale for the invalidation of that law. The Court employed a balancing test, wherein the substantiality of the governmental interest was weighed against the impact on the regulated individual.
The U.S. Supreme Court has afforded deferential treatment to the home in its application of the Fourth Amendment by prohibiting unreasonable searches and seizures. However, the Court has been clear in its qualification that the amendment protects people, and not places, in barring warrantless searches. Distinctions between the home and all other places have not left the use of property, including houses, unfettered by regulatory bodies.

An offended party may seek governmental compensation by an action in inverse condemnation if a regulation reaches far enough to constitute a taking. Inverse condemnation is defined as "a cause of action against a governmental defendant to recover value of property which has been taken, in fact, by the governmental defendant even though the taking agency has not attempted to formally exercise its power of eminent domain." In other words, a governmental action is alleged to have diminished substantially the property owner's enjoyment of his property for its originally intended use.

Although landowners have come to expect some physical restrictions imposed by zoning and nuisance law, they tend to be less tolerant of governmental encroachments upon discretionary property rights. Generally, the Supreme Court has regarded development expectations as legitimate only if they are consistent with the public interest. The rights of property owners are always subject to the restraint that the use of property not harm the interests of society. In colonial times, it was recognized by both Federalists and Republicans that although some protection of private property was necessary for true human independence, use of property must not be harmful to public welfare. Consequently, when the

use of property is in direct conflict with the public interest, the former must yield to the latter.

The language of the constitutional takings clause indicates that "just compensation" is the remedy available to landowners who can demonstrate a taking of their property by a governmental entity. Until recently, courts granted declaratory and injunctive relief only. Constitutional law scholars waited patiently for the Supreme Court to venture into the realm of compensable takings.

Finally, after five decades of virtual silence, the Court addressed the issue in a pair of companion cases. The prospect of local government liability became reality in Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), where the Court held a negotiated land-use decision unconstitutional and decided that the coastal commission should pay damages for a taking of private property. The commission had made the issuance of a building permit contingent on the condition that the landowner provide public access through his property to the beachfront. The Court majority concluded that "the condition imposed failed to further the interest the state had advanced as a justification for imposing it."18

Herein lies the foundation of the "nexus" test the Court developed to support its decision. The taking in Nollan was unconstitutional because it violated the Fifth Amendment which states, in part, that "private property shall not be taken for public use without just compensation." In Nollan, Justice Scalia ventured beyond traditional bounds of judicial restraint when he hypothesized that the state could absolutely prohibit the proposed development if by doing so the prohibition would "substantially advance a legitimate state interest." However,

he conditioned his speculation by adding that such prohibition would be allowed only if it did not "interfere so drastically with the appellants use of their property as to constitute a taking."\textsuperscript{19}

In \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, 107 S. Ct. 2378 (1987), the Supreme Court held that when the application of a land-use regulation precludes all reasonable use of property for a period of time, the landowner is entitled to compensatory monetary damages for the value of the property for the time between the imposition of the unconstitutional ordinance and the court's decision under a "temporary taking" theory. Concerned with the chilling effects that the granting of monetary damages for a temporary taking would have upon the ability of local governments to regulate land use, and prompted by a lack of guidance by the courts, Justice Stevens, writing for the minority, felt that the damage remedy was inappropriate, because, among other reasons:

The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted.... It is no answer to say that, if a policeman must know the constitution, then why not a planner?\textsuperscript{20}

Also fearful of the chilling effect monetary damages would have on local government, the California Supreme Court, in \textit{Agins v. Tiburon}, warned:

This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures that are less stringent, more traditional, and fiscally safe.\textsuperscript{21}


Thus, the most recent Supreme Court decisions add no new significance to the rule that a state may prohibit development if it meets due process requirements, and as long as such prohibition does not constitute a taking. The language of the Fifth Amendment's takings clause does not offer any more insight as to how far is too far in governmental regulation than the circuitous reasoning of judicial precedent. It is clear that the clause does not prohibit takings; rather it prohibits takings without just compensation. What exactly constitutes a taking or just compensation will most likely remain an enigma, having as much to do with the needs of society and trends of the time, as with the facts of a particular case.

On the leading edge of permissible regulatory controls are laws that govern alterations to historic structures. Preservation of historic resources has routinely been held to "fall within the permissible scope of the police power."\(^{22}\)

The regulation of aesthetics was firmly established in \textit{Berman v. Parker}, 348 U.S. 26, (1954), based upon the view of the U.S. Supreme Court that:

\begin{quote}
The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.\(^{23}\)
\end{quote}

In Montana the use of the police power to preserve aesthetic values was established in \textit{State v. Bernhard}, 173 Mont. 464, 568 P.2d 136 (1977). Although the regulation of historic resources and community aesthetics are areas of permissible regulation in the administration of preservation ordinances, they remain

\(^{22}\) \textit{Maher v. City of New Orleans}, F.2d 1051, 1061 (1975).

controversial issues to many property owners who feel that private property rights are abridged by such regulations.

The doctrine of judicial restraint has left a void of guidance for historic preservation law. Overworked judges decide the issues before them in the narrowest manner necessary to reach resolution, rarely addressing the larger issue of social policy with respect to preservation. This lack of precedent is partly due to judicial doctrine such as the "ripeness" principle which holds that a party alleging a takings claim must exhaust all administrative remedies before being granted a day in court.

Further compounding the lack of guidance legislators receive from federal courts is the fact that state courts have more latitude than federal courts to find a taking. State constitutions may be more, but never less protective of private property rights than the U.S. Constitution. The possibility of a state court finding that a property owner has suffered a taking as defined by a state constitution, even though the property owner may not have a valid claim under the federal constitution, has far-reaching implications for the uncharted waters of preservation law. The basic fact that a state constitution may expand or extend property rights beyond federal constitutional thresholds has received almost no discussion among historic preservation attorneys.
PRACTICAL IMPLICATIONS OF THE APPLICATION PROCESS

As mentioned in the Introduction, the practical experience of the author gained during his tenure as a historic preservation planner is discussed to provide the reader with insight and suggestions for those anticipating involvement in the administration of preservation ordinances. This section provides this background of first-hand knowledge.

During introduction to the application process, applicants should be encouraged to consider all future restoration and alteration plans. In this way, future as well as immediate plans can be reviewed by the board in one comprehensive process, rather than incrementally. Professionals on the board can be more helpful to applicants when decisions and suggestions are made in the context of a total plan. Comprehensive submittals allow the board more time to review other projects, since loss of some time is unavoidable in multiple reviews of the same site.

Advice of independent architectural reviewers is more beneficial to applicants when long-range plans are known for an entire structure or property. If an architect or designer is retained on the project, the applicant can save design and representation costs by submitting a complete plan as opposed to multiple submittals. A comprehensive submittal also eliminates the need for repeat application fees.

Many applicants are under the impression that review is available only for the portion of a project that they are able to construct in the present or up-
coming building season. It is important that applicants be fully informed of any applicable time constraints or allowances for commencement or completion of approved projects during the application process. It is incumbent upon applicants to be aware of any variances or deviations from the zoning code or preservation ordinance required by their proposal. Failure to plan accordingly can result in loss of time for the board, the planning office, the applicant, and the contractor.

In Bozeman, the city planner assigned the project should be able to determine from the submittal site plan and elevation drawings whether a deviation will be required. Deviation is the term used in the Bozeman Zoning Code to refer to a variance from the code for projects located within an overlay district such as a Historic or Conservation District (see Appendix A). A requested deviation must first be approved by the board before approval for the project is granted. The building official will not issue a building permit unless the project is approved by the DRB. All projects requiring a building permit are independently reviewed by the city building official for compliance with the Uniform Building Code which has safety as its primary purpose.

If an applicant fails to begin an approved project before a time limit imposed by a zoning code lapses, another application may be required. It may be better to require that an approved project be completed within a time period that begins with commencement of the project. If the zoning code or circumstances surrounding the project have changed, the project may require additional review by the DRB. The rationale underlying a code's time restraints on building permits should be reconsidered in the context of alterations to residences in historic
districts. If a code does impose a building commencement time limit on building permits, the board should make the applicant aware of available extensions of such limits following project approval.
HISTORIC MARKER PROGRAMS

State historic preservation programs often have signing programs to identify particular properties listed with the National Register of Historic Places or to designate neighborhood historic districts. An arrangement specifying percentages of contribution by state, locality, and property owner encourages program participation. A local government may decide that it is wise to pay the remainder of the sign cost above the state’s contribution in recognition of the value of its tourist industry, civic pride, value, or inability of the property owner to pay the marker contribution cost.

Such well-spent tax dollars will not only enhance public recognition of certain places and structures, but will encourage further participation in the historic marker program by other property owners and neighborhoods. A neighborhood preservation board member is a likely advocate of a neighborhood historic marker designating a district, the work of a prominent architect, or the property of a community member important to the history of growth and development in the area.

In Montana, National Register signs are researched and written by the Montana Historical Society’s Preservation Office and paid for from state bed tax funds. Organizations or individuals owning property listed on the Register pay a total of only $25 to cover shipping and handling of the historic signs.

An article in the June 13, 1993 Helena, Montana Independent Record quoted the state historic preservation officer as saying that a recent increase in National
Register of Historic Places markers demonstrates the potential for combining community pride with heritage tourism.24

In Spokane, Washington, historic neighborhoods develop their own district signs that inform visitors of entry to the particular district and provide brief text noting important historical events, former noteworthy residents, and places important to the history of the locality. This sign program has contributed to a renewed sense of civic pride in this city’s history and architecture.

Charitable organizations may organize a fund-raising effort to accumulate the financial resources necessary to finance the purchase of historic markers. They may operate on an ad hoc basis to provide recognition of a particular property, or they may choose to adopt such a program to bring support and recognition to their cause as well as foster community pride. As a historic marker program gains momentum in a community it provides the foundation for either guided or self-guided tours of the architecture and history of a place.

CONCLUSIONS

After 18 months of functioning, the Bozeman design review process had matured in several ways:

- There was dramatic improvement in the quality and completeness of submittals. This is due to better application forms and checklists, increased awareness and support of the program in the community, and improved staff reports and supporting materials.

- The review went from a single review session for each proposal to two per proposal, then back to one review as the process became more organized (This was needed anyway to avoid conflict with procedural language in the ordinance regarding time limit for decisions).

- The proposed Final Draft of the Zoning Code of Bozeman contains changes proposed for the Overlay District Regulations (see Appendix A). The significant changes are: that there is no longer a distinction between Neighborhood Conservation and Historic Preservation Districts; the proposal is for all-encompassing districts. This could precipitate equal protection arguments from former Neighborhood Conservation District property-owner COA applicants who would now be held to the same standards as National Preservation District property-owners. The two types of areas have been inventoried and offi-
cially designated as having widely varying degrees of architectural significance.25

• The 12-month "cooling off" period has been eliminated from Section 18.42.050, which was formerly the "Delay of Proposed Alterations" section. This change protects the City from legal action for denial of a prompt decision, a procedural due process requirement. Demolition is an appropriate matter for the imposition of a statutory delay.

The proliferation of preservation commissions over the past decade has made possible the preservation of countless structures of historical and architectural significance that may have otherwise been lost. Participating on these boards and commissions, usually on a voluntary basis, are laypersons and professionals from a variety of backgrounds. They face both the challenge of administering a local preservation program and the challenge of doing so in a procedurally correct and fair manner.

In communities where the planning function is coordinated or integrated with a historic preservation program, planners can take measures to ensure that a municipality has a fair and equitable review process. By being aware of recent developments in the area of due process law, planners can develop preservation programs that are both responsive to property rights and procedurally fair. What is required and helpful in the administration of preservation ordinances holds true for other statutes as well.

25 See article on suit of June 1993 alleging the Neighborhood Conservation District is unconstitutional.
Beyond what is legally required, measures can be taken to make the administration of ordinances easier and more successful. A majority of applications for permits to alter historic structures are for residential properties. The house has had a sacrosanct place in American culture since colonial days. Review of proposed residential changes mandates a conservative and deferential approach by review bodies empowered to grant or deny permits for proposed alterations. If a local government is to remain free from successful legal challenges, board members must observe all aspects of due process during the administrative process. If a local preservation program is to be successful and broaden community support for preservation, administration must be both fair and realistic. There must be flexibility by both boards and applicants in the approach to the review process. A balance must be tactfully struck which is both preservation-minded and sensitive to property rights.

Recommendations

In a 1988 issue of the *Preservation Law Update*, 26 14 percent of local preservation commissions responding to a questionnaire reported having been involved in a lawsuit in the past two years. When asked if they needed more information about decided court cases involving local preservation commissions, 75 percent of those responding answered yes. It was found in this study that litigating commissions relied on help from the following sources in order of highest frequency: local city or county attorneys; state historic preservation organizations; the Na-

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tional Trust for Historic Preservation; The National Alliance of Preservation Commissions; and the state law school.

A recent survey involved the study of design review processes, and specifically how they relate to the issue of new construction in nine communities examined in the same way ten years earlier. Even though the design review process remained a controversial planning tool throughout the decade, boundaries of original historic districts were enlarged and additional districts designated in all nine communities, indicating a growing base of community support. This contributed to more confident, secure commissions. There were more materials—such as surveys, plans, and guidelines—used and an increased awareness of preservation issues. Staff support had increased and the majority of boards and commissions participated in training programs. The study concluded that the greatest problems in the districts were not design-related, but use-related; an issue over which the commissions had little or no control. As the districts changed in character, so did the expectations and interpretations of people toward them.27

This study underscores the importance of educating the public and administrators. This includes the use of printed material to inform the public of preservation planning. The City of Bozeman Historic Preservation Office distributes brochures on properties listed on the National Register of Historic Places, maps of National Historic Districts, histories of the city’s people and places, and a preservation newsletter. Similar materials should be prepared to explain the design review process as well.

The Preservation League of New York State produces a leaflet asking and answering the following questions:\textsuperscript{28}

\begin{enumerate}
\item What is a historic district or landmark ordinance?
\item I thought a man's home was his castle. How can a board tell him what to do with his property?
\item Are there any positive benefits in it for me?
\item Are these ordinances legal?
\item But suppose the board is just being arbitrary?
\item What else do these commissions do?
\item Can the owner still use the property as he likes?
\end{enumerate}

By providing potential applicants with informative materials, understanding and support of design review can be broadened.

Education should not begin and end with the general public. Preservation board members should be required to read a selection of reference materials as part of membership orientation. They should also be required to attend historic preservation seminars to learn of recent developments and new approaches to preservation planning. Boards should develop a handbook that includes a statement of policy and the procedures employed in the administration of the program. Communities should be encouraged to share knowledge and exper-

\textsuperscript{28} Stripe, Robert L., Technical Series No. 8, \textit{Local Preservation Legislation: Questions and Answers}, Published by the Preservation League of New York State.
tise through a preservation assistance clearinghouse with the support of the state historic preservation office.

DRB’s should have a periodic review, open to the public, at which questions may be posed by the public and issues discussed among the board members. The general policy and goals of a program should be addressed to re-focus on the broad issues to determine if the board is deviating from its stated mission or goals.

A list of current DRB members and a profile of their backgrounds would be of interest to applicants. In addition to an introduction at the beginning of a review meeting, name plaques should identify the board members where they are seated. New members should attend seminars in preservation planning for an impartial perspective of the subject. This will help them think more independently and bring new ideas to the board. Otherwise a new member can be unduly influenced by incumbent members’ views or procedural oversights.

Boards can have a tendency to expand their roles to exceed the purview of the ordinance. For this reason, a carefully drafted ordinance must include a broad policy statement including goals and parameters of the program.

Finally, participation on a review board and application before a board should generally be a pleasant and collaborative experience. Loss of morale by a board member should signal the need for a change. Applicants should leave proceedings with a plan that feasible and acceptable to them. By observing notions of common sense and fair procedures, administration of, and involvement with, a preservation ordinance can be an immensely satisfying experience.
EPILOGUE

The period of research for this paper concluded in April of 1993. The author would like to inform the reader of subsequent developments regarding legal suits filed against the City of Bozeman for alleged violations of due process. The following developments relative to this paper have occurred in the period of time from then through March of 1995:

• As of May, 1993, the Bozeman City Commission was discussing ways to cut the DRB’s workload by up to two-thirds by eliminating review of small residential construction projects and commercial sign permits. Suggestions were made that the two DRB’s be combined to review projects together as one board (this would also avoid equal protection challenges grounded in the fact that treatment or procedures varied between the two DRBs). Commissioners expressed concern that “very definite conflict(s) of interest exist when board members represent clients.”

• As of June 9, 1993, a developer who had a project approved by the DRB was suing the City of Bozeman because the city commission, at the urging of planning staff, had imposed five conditions of approval following unanimous approval by the DRB without the conditions. Among

other assertions, the plaintiff alleges that the city commission violated his right to due process by not approving the DRB's recommendations. The suit illustrates the importance of coordinated procedures and the need for clarification of the provisions of the ordinance. As of December, 1993, this developer reapplied hoping that the addition of new members to the commission would result in a more favorable outcome for his project. The suit was eventually settled out of court.

- The Mitchells of 122 South Church Ave., Bozeman had their application for a gambrel roof on a remodeled garage turned down. As of May 3, 1994 the Mitchells were preparing for a lawsuit against the City over the roof decision. On March 29, 1995, the District Court judge ruled that City officials failed to follow the City's statutory procedures for adequate public notice. The judge dismissed the other counts and sent the case back to the City Commission for another hearing. If the application is denied again, the Mitchells intend to resume the lawsuit.

APPENDICES
APPENDIX A*

Bozeman Zoning Code

1. Chapter 18.42 Neighborhood Conservation and Historic Preservation Overlay Districts, Interim Code 7/02/90

2. Chapter 18.51 DRB - DRC

3. Summary of Changes Contained In The 5/31/91 Final Draft Zoning Ordinance, Overlay District Regulations (Chapters 18.42 through 18.44), Neighborhood Conservation Overlay District

Application for Certificate of Appropriateness

1. Application for COA by Jeff Aldworth for alterations to 709 S. Sixth Avenue, Cooper Park National Historic Preservation District, which required deviations from the Bozeman Interim Zoning Code

*Items listed below are included as enclosures at end of paper.
Certificate of Appropriateness

Application Process

The following is a chronology of the process of an application for a Certificate of Appropriateness (COA) under the Bozeman Interim Zone Code, Chapter 18.42 (1991) Neighborhood Conservation and Historic Preservation Overlay Districts:

1) The applicant makes initial contact with the Planning Office to obtain an application for a COA. The Building Department will direct anyone seeking a building permit for a property located within an overlay district to the Planning Office.

2) A planner confirms the location of the property within the conservation district, a historic district, or as a property listed on the National Register of Historic Places. The applicant is provided with the application for a COA and the planner briefly explains the submittal requirements. The application has a checklist to assure completeness (see Appendix A, 18.42.050).

3) The applicant returns the completed application with the required $40.00 review fee and the supporting materials including the site plan, elevations, explanations, scheduling photographs, history, neighborhood comments, and any other documentation relevant to the application. The person taking the submittal records the name of the applicant and the time of submittal on a "Projects Received" sheet posted in the office. The deadline for completed
applications is any Tuesday at 5:00 p.m. The Planning Office has 48 hours to check the submittal for completeness. If the application is complete, the process is initiated and the next step is taken. If the application is not complete, the applicant is informed of the deficiency. If the deadline has not lapsed, the applicant may amend and re-submit.

4) After it is determined that the application is complete, the $40.00 review fee is tendered to the city cashier and a receipt is held for the applicant. The planner then checks the legal description of the property, arranges for the preparation of the public notice, and posts the property. The project is assigned a zoning file number and a file is created with an attached scheduling sheet and a time log to record the time spent on each activity for administrative purposes. The average time for the complete process is three hours per case.

5) The planner contacts a member of the architectural review pool and arranges to have a review conducted. He may spend a few minutes with the reviewer to briefly explain the particular project and its location status. The reviewer is given one copy of the submittal and an architectural review form. The planner has completed the first two pages of the review form which include zoning information such as whether the proposal will require deviations under the code.

6) The planner provides the historic preservation officer with a copy of the submittal and requests any comments that would be of concern to the Design Review Board (DRB) during the review process.
7) The application is placed on the agenda for the DRB meeting two weeks after the next deadline. A copy of the agenda is mailed to the applicant and any other parties requesting one on the Thursday before the hearing date.

8) The applicant is informed by the planner of any problems anticipated related to relevant zoning issues or the comments of the historic preservation officer and the architectural reviewer. This enables the applicant to amend or supplement the application in time for the distribution by mail of the submittals to the DRB members.

9) The planner prepares a staff report that lists any of the deviations requested by the applicant in addition to general information such as location in zoning district, address of project, date received, and comments of staff, the public, the preservation officer, and the architectural reviewer. A copy of the staff report is mailed to the applicant with the agenda. Any public comment is recorded by the planner and reference is made to it in the staff report. Copies of public comment received are included in the file and brought to the hearing for review.

10) The hearing is conducted and the rules regarding procedural due process are observed as closely as possible. The minutes are recorded by tape recorder and by a stenographer. The DRB observes its rules as required by the ordinance and approves, denies, or conditionally approves the application.
11) The applicant returns to the Building Department for a building permit with any additional information requested by the building official.

12) If a deviation from the code was recommended by the DRB, the planner prepares a memorandum for the City Commission’s approval. Deviations are usually placed on the consent item agenda for approval without presentation or discussion. If a member of the commission wishes, the item is removed from the consent agenda and the planner will present the case.

13) The applicant is mailed a COA or a letter of denial. The planner closes out the file including any relevant comments or data entries in the charts.
APPENDIX B

Questionnaire Response

Former Bozeman Design Review Board member, Ben Tintinger, AIA

1) Would you please briefly describe your professional background and your past relationship with Bozeman's historical preservation program preceding your tenure on the design review board?

- Bachelor of Architecture, Montana State University, School of Architecture, 1989.
- Contract with the city of Bozeman to review projects in the historic districts on project by project basis 1990-91.
- McLaughlin Architecture, Fall 1989-Fall 1993.
- Associate, McLaughlin Architecture, June 1991.
- Licensed Architect, September, 1993
- Projects at McLaughlin Architecture include:
  - Historic restorations
  - Additions to historic buildings
  - New construction within historic districts.

2) When were you appointed to the Bozeman Design Review Board and how long did you serve on the board?
Answer:

I was appointed to the Design Review Board in June 1991. I served two years until June 1993.

3) A 1993 article appearing in the Bozeman Daily Chronicle titled; “Disgruntled review board member dumped,” said that following a disagreement with the mayor you were not reappointed for a second term. Do you feel that the disagreement was the reason for your not being rehired?

4) The article said that you disagreed with some in local government on what the role of the board should be. You were quoted as saying in a letter that you believed that “the city should not be in the business of designing buildings.” What prompted you to say this and what do you believe is the proper role of the board? Did other members of the board take a position regarding this matter?

Answer to 3 and 4:

In June of 1993, my two-year term on the DRB came up for reappointment. I composed a letter of reapplication. In the letter I explained what I felt were my strengths as a design review board member during the last two years. I also explained what I felt were problems in the review process. It is my opinion that the Bozeman City Planning Office and the DRB mem-
bers are reviewing projects based on known pieces of architecture, such as double-hung windows and pitched roofs, rather than scale, proportion, and overall architecture. The whole process has become a subjective view of likes and dislikes rather than an acknowledgment of good design.

It was this view of the review process that caused the uproar. I really feel that my views were merely misunderstood by the city commissioners rather than a philosophical disagreement. I believe that the commissioners' limited knowledge of architecture results in an inability to distinguish between appropriate scale, proportion, and theme and their individual knowledge of pieces of architecture.

When I stated that the city should not be in the business of designing buildings, I meant literally that. The city should be reviewing projects with respect to appropriateness, not trying to force that appropriateness on a project by designing it. I see this over and over. Personal experience from the applicants perspective along with the stories of others tell of a flawed process. Somehow, seemingly innocent comments such as "I think it would be better if you did this..." become conditions for approval.

Other board members are architects and are similarly frustrated when their own projects are reviewed. After the articles came out, I received numerous phone calls from other board members and the public that supported my position. But, I would still have to say that even though some of the members supported me they still did not understand what I was getting
at in terms of review. Those who had an architectural background were/are more apt to view a project in terms of its whole rather than in its pieces.

5) The same article from the Bozeman Daily Chronicle said that one commissioner declared that the city did not want people "who will hamper the work of the board." In your opinion, was he saying that all board members should have the same philosophy of the board's role? If not, what did he mean?

Answer:
I talked to that particular commissioner by phone later and learned that he had abstained from voting on my reappointment to the board. The reason he abstained, he said, was because he did not have enough time to read my letter and understand its meaning before the vote. I would have to say he was very diplomatic in discussing what I was advocating and the city's requirement for design regulation.

The commissioner's comments were taken out of context by the paper. I feel that he was not referring to people of differing philosophies, but to people who could not work in a group setting, such as a review board. The DRB must be composed of people who can work together to arrive at a decision. These people may not necessarily agree but they must be open minded enough to listen to each other and arrive at some solution. In his statement, I don't think he was referring directly to me because he is the
only commissioner who has sat in on DRB meetings. I feel that he thought that I was an asset. If any commissioner understands the problems of the review process, it would be that commissioner. My instincts tell me that other commissioners feel, literally, that board members should totally agree with the city’s design sensibilities.

6) The article stated that the mayor commented that “the city had every right to review construction plans.” In your opinion, at what point in the review proceeds does the city’s review infringe upon the private rights of applicants, if it does at all?

Answer:

The city does have the right to review construction plans, especially in establishing that plans meet building and zoning codes. The problems is that, architecturally, they are reviewing on the subjective sensibilities of the city commission, planning staff and DRB. The line of appropriate review is crossed when the city starts designing the buildings. Once double-hung windows are required in a given project, that line has been crossed.

The city has to realize that there is a continuing history of Bozeman, not a one-point-in-time history. The city is caught up in nostalgia. It is that nostalgia that dictates the pieces they feel are appropriate or inappropriate. Simply because a building was built in 1900 doesn’t mean that the addition on that building can’t reflect 1994. The Secretary of Interior Stan-
7) The same article made reference to a pending lawsuit in which the planning staff recommended denial of an applicant's design. The board disagreed with the staff recommendation and approved the design. The city commission overruled the board, siding with the planning staff. Do you believe that the planning staff has a role in project review beyond ensuring compliance with the zoning code? If so, why?

Answer:
No, I don't feel that the planning staff should have a role in the review of projects architecturally, or beyond the zone code. The DRB was formed to provide this subjective review. The DRB is made up of a cross-section of the community concerned with design including architects, landscapers, builders and lay people. The review process progresses from the planning staff, to the design review board and to the city commission. The DRB considers the planning staff recommendations and may or may not pass those recommendations on to the city commission.

It is completely out of line for one member of the planning staff to subvert that recommendation by going to the city commission and the city manager individually and lobbying his opinion. This particular project the article referred to is a perfect example of a review in which the planning staff's recommendations were based on pieces rather than them de-
sign as a whole. That project came before the DRB with recommendations from the city planning staff. Those recommendations, for the most part, were considered but not made conditions by the DRB. As such, the project was approved by the DRB as presented by the applicant. There were built-in deviations to the project, but those were also deviations that could not be helped due to tight site restraints.

It was after this approval that one member of the planning staff subverted that decision and lobbied the city commission. On February 11, The Bozeman Chronicle detailed the suit. It stated the suit has been settled out of court. The applicant has received approval for about 80 percent of the building details he petitioned the board for.

8) Do you feel that it is more appropriate for the city to review commercial construction proposals than alteration proposals for residences in historic districts?

Answer:
Yes. The city should scrutinize commercial site reviews more closely than residential site reviews. However, that review must be more objective than subjective. In other words, the zone code must spell out what height lamp post is allowable, what landscaping must be provided, and what size of building is acceptable. Yet, once again, the city should avoid actually designing the building and view the project on its whole. I think the
Wal-Mart is a good example of a commercial project that was successful in setting a design standard in terms of parking, landscaping, and sense of entry. Although, the gable shapes required by the designing DRB were not necessary. Again, this was a subjective requirement.

9) In 1991, the city expanded the jurisdiction of the board to the city’s “conservation” districts with respect to review, from an advisory capacity to a binding status even when applicants do not request a deviation from the zoning code. In your opinion, was this an appropriate expansion of the board’s authority? In other words, had there been problems with the original ordinance policy of offering non-binding advice to applicants residing in conservation districts?

Answer:
I think it is appropriate to expand the authority to include conservation districts as well as all neighborhoods because in my opinion the review process has more to do with scale, proportion and neighborhood appropriateness rather than merely historic significance. The review process should apply to any neighborhood, not just our historic neighborhoods. Besides, common thought is that only the historic neighborhoods are going to be historic, but 50 years down the road the conservation districts as well as current structures will become historic in their own right.

10) A May 6, 1993 article in the Chronicle titled; “City considers streamlining building reviews” states that the board’s workload may necessitate lim-
iting the purview to only new construction. The article claims that this arrangement would spare homeowners the inconvenience of undergoing review for minor home construction projects such as adding a porch or new room. Do you feel that it would be appropriate for the city planning staff to conduct the review of historical district property alteration applications?

Answer:
Ideally, it would be great if the city planning staff could cut down on the work load of the DRB and the city commission by reviewing minor additions or alterations such as fences and porches as long as they could approve these projects in an objective manner. The problem with this idea is that some members of the current planning staff would be happier working in a design office rather than in a public service position. They continue to apply their subjective architectural pieces to the applicant's structures.

11) Many communities use a preservation commission to review alterations to historical properties and a separate design review board to review new commercial construction outside historic districts. Considering the problems in volume of new development requiring review in Bozeman, do you think that the above model has merit, and if so, why?
Answer:

I do not feel that a separate design review board and preservation review board would be necessarily appropriate. Historical review boards become too idealistic in their review. Reviewing projects based on known architectural pieces rather than neighborhood appropriateness always seems to be the default. As stated before, historic neighborhoods have a continuing history, not a one point in time history. The house built several years ago on the corner of 6th and Koch on Cooper Park is a good example of the continuing history of that neighborhood. While some people may not feel that this home is historically correct in terms of their known library of pieces of architecture, it is certainly is appropriate in terms of scale and proportion. I feel that a historically-minded review board may not have approved this project.

12) While you were serving on the board, did the city have two design review boards active at the same time, alternating weeks for review? Did this arrangement cause any problems with consistency of review or present problems of equity to applicants, in your opinion?

Answer:

While I was serving, the city did have two review boards serving at once that alternated duties every Tuesday. An applicant would visit one review board and receive recommendations for resubmittal. The resubmittal before the second board would end with disagreements with the first review
board's recommendations, or be denied for other items. The city has since formed one 7-8 member review board that meets every other week. The change has solved many problems in consistency and equity.

13) To the best of your knowledge, do members of the Bozeman Design Review Board attend seminars in historic preservation or have qualifications for this work beyond their professional credentials? Is there any training of new members with respect to procedure? Should there be?

Answer:
Currently, there is no training required for DRB members with respect to procedure or historical review other than being given a copy of the zone code. Although, historic projects/buildings that are listed on the national historic register make up a very small portion of the projects reviewed (one every year). These projects fall under tighter scrutiny by the State Historic Preservation Office if federal or state money for renovation and additions is involved.

Individual projects within an historical district that are not listed on the historic register do not require specific historical training. I feel that these projects can be reviewed by design professionals without a background in historic architecture if those projects are reviewed for appropriate scale and proportion. It is paramount to keep in mind that history is continuing and not one point in time. In fact, a strong historical background could
be a disadvantage and discredit to the architecture because of strongly preconceived notions of historical appropriateness.

14) A November 21, 1993 article in the Bozeman daily Chronicle titled; "Gable or a gambrel? City moves on garage roof styles." In your opinion, must the roof design of a garage in an historic district reflect the roof style of the house? Since this structure is not on the National Register of Historic Places, or located in an historic district, is it proper for the city to deny the design submitted by the applicant, and in the process, the requested "deviations" from the zone code?

Answer:

The gable vs. gambrel roof style controversy is an example of the city's overstepping tendencies with regard to the review process. The design of the gambrel roof is appropriate in terms of scale for the neighborhood. It is unfortunate that the city had to revert to its known architectural library to prescribe a piece/roof that is common in the area even though the gambrel roof was no less appropriate than the gable roof.

15) Given that the city has a right to review design by virtue of its police power authority and legal precedent, in your opinion, is there a strong enough nexus between the roof design and the deviation requests to tie them together in denying the setback deviation requests because of the proposed roof style?
Answer:
I do not believe the city should be designing projects. It seems that the city is strong arming the applicant because deviations are required. Such tactics has caused a backlash of angry public sentiment and seems to leave the city wide open for challenge.

16) Do you feel that all roofs of the buildings on a given property must be of the same style, given that the gambrel style is present in the neighborhood of the applicant, although not on the subject property?

Answer:
The problem is that the gambrel roof is not present in the neighborhood. The argument is not whether it should match the existing roof of the house but rather, does a gambrel roof exist in the neighborhood. In this particular project the neighborhood should be considered in context of all of South Bozeman not just the homes in its immediate vicinity. In that case, gambrel roofs are prevalent and appropriate.

17) Does this proposal have greater implications for other projects proposed for historical properties in Bozeman? Please explain.
Answer:

This project probably does not have greater implications for other projects because the DRB and the city planning staff have lacked consistency and equity in their decisions.

18) This professional paper recommends that a resident of each historic district participate in the review process with respect to alterations to residential structures. The member would serve as a voting member whenever a proposal in his or her district comes under review. Do you feel that this arrangement would present any problems to the review process? Would it have any advantages?

Answer:

I don't think having a neighborhood member would make significant changes to the structure of the review process as it currently exists. The current members already represent a good cross-section of the historic districts in Bozeman. I also think that a lack of architectural training or education in overall design could lead to those people slipping into the same old pattern of applying architectural pieces.

19) Please comment on your position regarding the proper role of a design review board with respect to historic districts. What are the proper parameters for review?
Answer:

I think that the review process ought to take place at the neighborhood level. This process, ideally, would be more of a collaborative thought process than a subjective review. As an example, when somebody wanted to plan an addition or alteration to their property, they would get together with their neighbors in a workshop setting to design an acceptable solution. This solution would then continue to the city planning office where it would have more backing or more acceptance by nature of its collaborative inception, as defined by the neighborhood. I think a neighborhood is the most appropriate setting for deciding what is acceptable.

If big developers were required to work with the neighborhoods to arrive at solutions, then new development within existing neighborhoods would result in more acceptable projects. The danger of neighborhood design workshops is the addition of one more level of bureaucracy and one more level of design subjectiveness. But at least the neighborhood would feel that they were involved in the decision making.
APPENDIX C

Comments of the Historic Preservation Officer

Catherine Goetz, Historic Preservation Officer of Bozeman in 1991, provided the following passage to illustrate the procedure that she employs when the planner requests her statement regarding an application for a COA:

A COA application is submitted by the city planner to the Historic Preservation Officer for comment.

The Historic Preservation Officer reviews the application with its attending narrative, photographs of the structure's elevations, and drawings of proposed alterations. The officer determines the "landmark" status of the existing structure by researching its architects, builder, building dates, subsequent alterations, and other pertinent data relevant to design and history. Commonly, much of this data is included in the National Register of Historic Places Inventory.

An assessment of the proposed alteration is made taking into consideration massing, size, scale, and architectural features as outlined by the Secretary of the Interior's Standards for Rehabilitation. The assessment is also based on the structure's original or intended use and subsequent previous uses, whether or not the structure is associated with significant historical periods of development in the community or with significant historical figures, and whether or not the proposed alteration will destroy or detract from the "work of a master" architect.
The HPO typically makes an on-site visitation and speaks with the property owners or the designer of the proposed alteration. The HPO then writes a memo to the city planner recommending approval or denial of the COA based on the consideration of the above factors. If relevant, the HPO suggests changes or recommends alternatives to the proposed alteration of the historic structure.
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APPENDIX A
CHAPTER 18.51

DESIGN REVIEW BOARD (DRB) AND DEVELOPMENT REVIEW COMMITTEE (DRC)

18.51.010 PURPOSE OF DESIGN REVIEW BOARD AND DEVELOPMENT REVIEW COMMITTEE

A. Purpose

The purpose of the Design Review Board and the Development Review Committee shall be to coordinate, expedite and assure fair, equitable administration of this ordinance. The objective, to be implemented through their procedures and deliberations, shall be to encourage development quality that will enhance both the natural and built environments.

B. Development Review Committee Procedures Established

To implement this purpose, certain procedures shall be adopted to include, but not be limited to, a regularly scheduled weekly meeting attended by representatives of each of the City or County departments charged with developmental review, each representative of which shall have decision making capability and authority. Tape recorded and written meeting reviews setting forth decisions, commitments, and directives shall be made. These records shall be preserved as part of the official proceedings for each developmental proposal. The City Manager shall be responsible for assuring these procedures are implemented. The functional aspects of the DRC shall be the responsibility of the Planning Director. Lastly, the DRC shall prepare and adopt procedural rules that will assure the accomplishment of the stated purpose and promote the efficiency and effectiveness of the developmental review process.

1. The Committee shall at a minimum be composed of the following personnel: Director of Public Service or designee, Fire Marshall or designee, the Superintendent of Streets/Garbage or designee, the Superintendent of Water/Sewer or designee, the City-County Planning Director or designee, and the Building Official or designee. When necessary, other members of the Committee may include: the Police Chief or designee, the Superintendent of Parks/Cemetery or designee, the Recreation Superintendent or designee, the City Manager or designee, with other individuals to be included as necessary at the City-County Planning Director’s request.

When applicable, County personnel may be included on the Committee, including the County Subdivision Review Officer or designee, the County Sanitarian or designee, the County Road Superintendent or designee, with other individuals to be included as necessary at the County Commission’s request.

Interim Code 7/02/90
C. Design Review Board Procedures Established

To implement this purpose, certain procedures shall be adopted to include, but not be limited to, a regularly scheduled weekly meeting attended by members of the Board. Tape recorded and written meeting reviews setting forth decisions, commitments, and directives shall be made. These records shall be preserved as part of the official proceedings for each developmental proposal. Lastly, the DRB shall prepare and adopt procedural rules that will assure the accomplishment of the stated purpose and promote the efficiency and effectiveness of the design review process.

1. The Board shall consist of four (4) professional and three (3) non-professional members as follows: Professional members - degreed in their respective disciplines or the equivalent thereof - Two architects, one architectural historian, and one landscape architect or landscape designer; Non-professional members -- One Planning Board member (to be recommended by the Planning Board), and two individuals with a demonstrated interest in and knowledge of urban design and/or historic preservation.

A quorum of the DRB shall be three members, of which two must be professional members, and one of the professional members must be a degreed architect.

18.51.020 GENERAL PROCEDURES, NOTICE AND TIMING

A. Informal Advice and Direction

A person or organization considering any construction, building or site alteration, rezoning or other developmental activity may approach the DRC and/or DRB for informal advice and direction. Such discussion shall be treated as advisory by both parties and shall record only the fact that contact had been made. No application or appointment is required and no further action is necessary.

B. Formal Application

An application for DRC and/or DRB consideration of a project proposal must be submitted utilizing a form available from the Planning Director. Material to be submitted with the application shall include the elements set forth within the requirements for the type of proposal to be considered, i.e., Site Plan, Conditional Use Permit, Planned Unit Development, et. It is recommended that the applicant discuss the application informally with the DRC, DRB, or Planning Director prior to formal submission to help expedite the process. Depending upon the size of the proposed project, its location and type, the applicant may be directed to one or more agencies of the City for processing.
C. **Public Notice**

When the applicant's proposal is fully and properly prepared for consideration, the Planning Director will cause the following actions within three (3) calendar days:

1. Property owners within two hundred (200) feet of the subject property shall be sent a written notice indicating the location and general intent of the proposal and scheduled public meetings and appeal process and hearing(s), specifying the date, number, time and place for said hearings. It shall specify the name and address of the applicant, the name and address of the owner of record of the property, a legal description of the property affected, the street address or its location by approximate distances from the nearest major street or road intersections so the property can be readily identified, and a brief statement of the nature of the hearings. Notice may also be provided to property owners in any additional area that may be substantially impacted by the proposal as determined by the Planning Director.

2. One or more notices containing the same information as stated in 1. above shall be placed in conspicuous locations on the subject property.

3. The applicant's proposal, along with the plans and a copy of related information shall be made available at the Planning Office for public review.

4. When required by ordinance or statute, certain projects may require advertisement in a newspaper of general circulation.

D. **Public Comment**

The period for public comment shall be ten (10) days. Comments, if any, shall be in writing and shall be directed to the Planning Director and shall be available for inspection by the general public. The applicant may respond to the comments as he/she may feel appropriate.

E. **DRC and/or DRB Action**

By day 14 from the date of the DRC and/or DRB meeting following formal submission, and at its regularly scheduled meeting, the DRC and/or DRB shall take action upon the applicant's proposal. Action may be to approve, approve with conditions or deny.

F. **Plan Appeals Procedure**

The applicant or certain other parties may appeal a decision of the DRC and/or DRB. The criteria for appeals is set forth in Chapter 18.58, Plan Appeals Procedure.
CHAPTER 18.42

NEIGHBORHOOD CONSERVATION AND HISTORIC PRESERVATION
OVERLAY DISTRICTS

18.42.010 INTENT AND PURPOSE

All new construction, alterations to existing structures, movement of structures into or out of the Conservation or Preservation Districts, or destruction of structures by any means or process will be subject to review by the Design Review Board. This chapter defines and sets forth standards by which to apply the two related, but different zoning 'overlay' districts.

The intent and purpose of these districts, "Conservation" and "Preservation", is to stimulate the restoration and rehabilitation of structures, and all other elements contributing to the character and fabric of established residential neighborhoods and commercial or industrial areas. New construction will be invited and encouraged provided primary emphasis is given to the preservation of existing buildings and further provided the design of such new space enhances and contributes to the aesthetic character and function of the property and the surrounding neighborhood or area. Contemporary design will be encouraged, provided it is in keeping with the above stated criteria, as an acknowledged fact of the continuing developmental pattern of a dynamic, changing community. The neighboring community shall be provided notice and opportunity to comment upon the proposed property improvements and further, shall have the right to appeal the decisions of the Design Review Board, the agency responsible for enforcing the provisions of this chapter.

In view of the fact that most of the area included within the boundaries of the overlay districts was developed and built out prior to the adoption of zoning and contemporary subdivision regulations, its construction, development pattern and range of uses is highly diverse and frequently not in compliance with conventional regulatory requirements. This chapter recognizes that this diversity is a major contributing element of the historic character of these neighborhoods or areas. The provisions of this chapter shall be applied in a manner that will encourage the protection and enhancement of the many diverse features for future generations.

The two overlay districts, Conservation and Preservation, are distinguishable from each other primarily by the extent of alterations or by the age of the structures therein. The Conservation District boundary is largely coterminous with the area surveyed in the effort that led to eight districts and forty additional Landmark structures listed in the National Register of Historic Places. The Preservation District includes the eight designated districts and forty Landmarks.

Interim code 7/02/90
This chapter sets forth the means of protecting and enhancing the Conservation and Preservation Districts. The procedures and standards designed to accomplish this objective are parallel but differ in application. The primary distinction between the two districts is the number and quality of significant historic resources. Greater protection is provided to Preservation Districts. Preservation activity within the Conservation District is encouraged to protect this older area and enhance its architectural significance and historic value to the community. As individual buildings or districts within the Conservation District become eligible for listing in the National Register, either through restoration or rehabilitation activity or by virtue of age, the Preservation Commission, with property owner concurrence, shall take actions to nominate them to the National Register, thereby upgrading their local designation status.

The definitive purpose of the Neighborhood Conservation and Historic Preservation Overlay Districts is to protect and enhance neighborhoods or areas of significant land planning or architectural character, historic landmarks or other built or natural features for the educational, cultural, economic benefit or enjoyment of Bozeman citizens. It will be the policy and responsibility of the administrative agencies of this chapter too:

A. Protect, preserve, enhance and regulate structures, archaeological sites and areas that are reminders of past eras, events or persons important in local, state or national history; or which provide significant examples of land planning or architectural styles or are landmarks in the history of land planning and architecture; or a which are unique or irreplaceable assets to the City and its neighborhoods; or which provide examples of physical surroundings in which past generations lived; or which represent and express the unique characteristics of small agricultural based, western city developmental patterns;

B. Enhance property values through the stabilization of neighborhoods and areas of the City, increase economic and financial benefits to the City and its inhabitants, and promote tourist trade and interests;

C. Develop and maintain the appropriate environment for buildings, structures, sites and areas that reflect varied planning and architectural styles and distinguished phases of Bozeman's history and prehistory.

D. Stimulate an enhancement of human life by developing educational and cultural dimensions, provide for spiritual as well as physical needs by fostering the knowledge of Bozeman's heritage, and cultivate civic pride in the accomplishments of the past; and

Interim code 7/02/90
E. Seek to maintain and enhance the many private and public elements that are unique to the fabric, theme, and character of each neighborhood and area, including but not limited to: lighting, pathways, street trees, natural areas and other features that may, from time to time, be identified by the citizens and property owners of neighborhoods, areas, and subsections thereof.

F. Empower the Design Review Board in its administration and enforcement role in the City’s neighborhood conservation and historic preservation efforts as further defined by its bylaws, policies and procedures.

18.42.020 DEFINITIONS

Unless specifically defined below, words and phrases in this chapter shall be interpreted so as to give them the same meaning as set forth in the principal definitions section of the zoning ordinance, or if not so defined, shall have the same meaning as they have in common usage and so as to give this chapter its most reasonable application.

A. Alteration - Any act or process, except repair as defined herein, that changes one or more of the architectural features of a structure, including, but not limited to, the erection, construction, reconstruction, relocation of or addition to a structure. Additionally, any act or process that changes the interior architectural features of that portion of a public or private property commonly frequented by the general public. Changes upon interior elements of private residences shall be exempted from this requirement provided there is no visible element of such change from the buildings exterior.

B. Architectural Appearance - The architectural character and general composition of a structure, including but not limited to, the kind and texture of the building's materials and the type, design and character of all windows, doors, light fixtures, signs and appurtenant exterior elements; and, interior architectural detail including, but not limited to, floors, fixtures, hardware, ornamentation and other elements that contribute to the building's architectural or historical significance.

C. Area - A specific geographic division of the City of Bozeman.

D. Certificate - A Certificate of Appropriateness issued by the Design Review Board indicating its approval of plans to alter a structure.

E. Conservation District - An area designated as a "Conservation Overlay District" on the City Zoning Map pursuant to the procedures set forth herein.

Interim code 7/02/90
F. **Construction** - The act of adding to an existing structure or erecting a new principal or accessory structure.

G. **Demolition** - Any act or process that destroys, in part or whole, a structure or archaeological site.

H. **Landmark** - A site, structure or object designated as a "Landmark" pursuant to the procedures prescribed herein, that is worthy of preservation, restoration or rehabilitation because of its historic land planning or architectural significance. Officially recognized through listing in the National Register.

I. **National Register** - National Register of Historic Places. A list, maintained by the U.S. Department of Interior, of sites, properties, objects and districts having local, state or national historical, architectural or cultural significance.


K. **Preservation District** - An area containing one or more "Landmarks" and designated as a "Historic Preservation Overlay District" on the City Zoning Map and pursuant to the procedures prescribed herein. Also a historic district listed in the National Register.

L. **Relocation** - Any movement of a structure on the same site or to another site.

M. **Repair** - Any change not otherwise construed as an alteration, as herein defined, that constitutes replacing broken, worn or damaged materials with like, not necessarily identical, materials and is insignificant to the size and condition of the structure or property. Repainting and reroofing shall be considered repair and are exempt from the provisions of this chapter.

**18.42.030 DESIGN REVIEW BOARD POWERS AND DUTIES WITHIN CONSERVATION AND PRESERVATION DISTRICTS**

The Design Review Board shall have the following powers and duties within Conservation and Preservation Districts:

A. To hold public hearings and review applications for property alterations affecting proposed or designated Landmarks or structures within Conservation and Preservation Districts and issue or deny Certificates for such actions. Applicants will be required to submit documentation specified herein to make decisions;
B. To develop and apply specific requirements and general design guidelines for the alteration of structures or property within the Conservation or Preservation Districts;

C. To review all development proposals, applications for zoning amendments, or applications for moving, demolition or any other kind of permit that may affect proposed or designated Landmarks, Conservation or Preservation Districts. The Director of Planning and the Building Official shall refer all such matters to the Design Review Board for appropriate action;

D. To call upon City staff or persons having technical expertise for advice;

E. To testify before all boards, commissions and agencies on any matter affecting architecturally significant sites, structures, objects, areas, neighborhoods and districts;

F. To review any tax abatement or other incentive programs adopted by the City Commission that are designed to stimulate preservation and rehabilitation of structures and properties.

18.42.040 DISTRICT DESIGNATION OR RECISION

A site, structure, object, area or district may be designated or rescinded as a Landmark, Conservation or Preservation District by the City Commission or Preservation Commission if the property owner concurs subject to the provisions of Chapter 2.80 HISTORIC PRESERVATION ADVISORY COMMISSION and Chapter 18.55 TEXT AMENDMENT AND REZONING CHANGES.

18.42.050 CERTIFICATE OF APPROPRIATENESS

A Certificate of Appropriateness shall be required before any and all alteration(s) other than repair as defined herein, is undertaken upon any structure in the Conservation or Preservation Districts. Application for a Certificate will be mandatory within both the Conservation and Preservation Districts. Within the Conservation District, compliance with the Design Review Board's decisions will be voluntary; within the Preservation Districts, compliance will be mandatory subject to appeal to the City Commission. Application procedures are as follows:

A. No building, demolition, or moving permit shall be issued within a Conservation or Preservation District until a Certificate of Appropriateness has been issued by the Design Review Board.

B. Application and review procedures for proposals located within Conservation and Preservation Districts are set forth in Chapter 18.51 DESIGN REVIEW BOARD AND DEVELOPMENT REVIEW COMMITTEE. Additionally, in order to accommodate limited,
"weekend" type projects, a Certificate may be applied for and issued within 24 hours without posting the property, if the Administrative Officer and an architect on the DRB approve and sign the application.

C. A denial of a certificate shall be accompanied by a written statement of reasons for the denial.

D. Aggrieved persons, as defined in Chapter 18.58 of this ordinance, may appeal the decision of the Design Review Board pursuant to the provisions of said Chapter. In such event, the issuance of a Certificate shall be stayed until the appeal process has been satisfied.

18.42.060 STANDARDS FOR CERTIFICATES OF APPROPRIATENESS

A. In considering an application for a Certificate, the Design Review Board shall be guided by the "Secretary of Interior's Standards for Historic Preservation Projects".

B. Architectural appearance design guidelines used to consider the appropriateness and compatibility of proposed alterations with original design features of subject structures or properties and with neighboring structures and properties shall focus upon the following:
1. Height
2. Proportions of Doors and Windows
3. Relationship of Building Masses and Spaces
4. Roof Shape
5. Scale
6. Directional Expression, with regard to the dominant horizontal or vertical expression of surrounding structures.
7. Architectural Details

C. Contemporary design of new structures and additions to existing structures shall be encouraged when such new construction or additions do not destroy significant historical, cultural or architectural structures or their components and when such design is compatible with the foregoing elements of the structure and surrounding structures.

18.42.070 SUBMISSION REQUIREMENTS FOR CERTIFICATES

Certain information shall be provided to the Design Review Board to review prior to granting or denying a Certificate of Appropriateness. All materials to be submitted shall be prepared on 8 1/2" x 11" paper and packaged or bound to fit a standard, letter size file. Applications that involve more voluminous architectural plans and specifications shall be accompanied by simplified sketches, details and supporting documentation, on letter size paper, which synthesize the detailed design documents.

Interim code 7/02/90
The extent of documentation to be submitted on any project shall be dictated by the scope of the planned alteration and the information reasonably necessary for the Design Review Board to make its determination. At a minimum, the following items shall be included in the submission:

A. Completed application on form provided by the City-County Planning Office.

B. One current picture of each elevation of each structure planned to be altered and such additional pictures of the specific elements of the structure or property to be altered that will clearly express the nature and extent of change planned. Except when otherwise recommended, no more than eight (8) pictures should be submitted and all pictures shall be mounted on letter size sheets and clearly annotated with the property address, elevation direction (N,S,E,W) and relevant information.

C. Site sketch, oriented with north at the top of the page, approximately to scale; showing site boundaries, street and alley frontages with names, and location of all structures with distances to the nearest foot between buildings and from buildings to property lines.

D. Historical information, including available data such as pictures, plans, authenticated verbal records and similar research documentation that may be relevant to the planned alteration.

E. Plans, sketches, pictures, specifications and other data that will clearly express the applicant's proposed alterations.

F. A schedule of planned actions that will lead to the completed alterations.

G. Such other information as may be suggested by the City-County Planning Office.

H. It is further suggested that the applicant seek comments from the neighborhood or area.

18.42.080 DEVIATIONS FROM UNDERLYING ZONING REQUIREMENTS

Because the development of historic Bozeman preceded zoning and construction regulations, many historic buildings do not conform to contemporary zoning standards. Obtaining the necessary zoning variances often discourages restoration and rehabilitation activity that would contribute to the overall historic character of the community. In order to encourage such activity, deviations from underlying zoning requirements may be granted as an incentive for adherence to Design Review Board recommendations. Such deviations from underlying zoning may be granted by the City Commission after considering the recommendations of the Design Review Board.

Interim code 7/02/90
The criteria for granting deviations from the underlying zoning requirements are:

1. Modifications shall be consistent with the intent and purpose of this ordinance and/or any adopted Master Plan.

2. Modifications will have minimal adverse effect on abutting properties or the permitted uses thereof.

3. Conditions stated in the approval shall protect the public health, safety, and general welfare, and may include:
   a. A time period within which alterations will be completed;
   b. Landscaping and maintenance thereof;
   c. Surfacing and marking of off-street parking and loading areas;
   d. Any other conditions in conformity with the intent and purpose set forth in this chapter.

18.42.090 DELAY OF PROPOSED ALTERATION

Should the City Commission, upon recommendation of the Design Review Board, conclude that the proposed alteration of a Landmark or a structure in a Preservation District would have a significant effect detrimental to the importance of the Landmark, archaeological site or Preservation District, it shall notify the Building Official of an official postponement of action. Said postponement shall bar the issuance of a permit for a period not to exceed twelve (12) months. Reasons for postponement for a specified time within the twelve month period shall be forwarded with the official notice. At any time during the postponement, an application satisfying the City Commission’s concerns may be submitted to the Design Review Board for reconsideration. Subsequent action and final decision shall rest with the City Commission.

If, at the expiration date of the postponement, no resolution or compromise agreement is reached and no action has been taken by the City or State toward condemnation of the property in question, a permit authorizing the alteration as originally applied for, shall be issued by the Building Official without need for a Certificate or any other action by the Design Review Board or City Commission.

18.42.100 APPEALS

All decisions of the Design Review Board may be appealed to the City Commission pursuant to the provisions of Chapter 18.58, Plan Appeals Procedure.

Interim code 7/02/90
ORDINANCE NO. 1341

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF BOZEMAN, MONTANA, PROVIDING THAT THE BOZEMAN MUNICIPAL CODE, AS AMENDED BY ORDINANCE NO. 1332 AND NOT CURRENTLY CODIFIED IN THE BOZEMAN MUNICIPAL CODE, BE AMENDED BY REVISIONING SECTIONS 18.04.010; 18.08.020; 18.08.040; 18.10.030.B.; 18.28.020; 18.32.020.A.; 18.42.050; 18.43.050; 18.43.060; 18.50.020.C.6.b.; 18.50.030.D.; 18.50.035.A.; 18.50.035.l.; 18.50.035.Q.; 18.50.100.B.; 18.50.100.D.3.d.; 18.50.100.E.; 18.50.110.B.; 18.50.120.K.; 18.50.120.N.; 18.51.010.A.; 18.51.010.C.; 18.52.020.A.; 18.52.020.D.; 18.52.050.A.; 18.52.070.C.; 18.65.030; 18.65.050 and 18.65.100 OF SAID CODE, PROVIDING FOR REVISION TO THE FOLLOWING: DEFINITIONS OF DESIGN REVIEW BOARD, DEVIATION, AND OFFICES; COMPLIANCE WITH ZONING REGULATIONS REQUIRED; YARDS AND LOTS — REDUCTION PROHIBITED; LOT AREA AND WIDTH -- A-S DISTRICT; PERMITTED USES TO ALLOW OUTDOOR ACTIVITIES IN THE B-1 ZONE; PERMITTED USES IN THE B-3 ZONE TO INCLUDE LABORATORIES EXCEPT ON THE GROUND FLOOR; CERTIFICATE OF APPROPRIATENESS IN NEIGHBORHOOD CONSERVATION DISTRICTS; CERTIFICATE OF APPROPRIATENESS IN ENTRYWAY CORRIDOR OVERLAY DISTRICTS; WEEKEND PROJECTS IN THE ENTRYWAY CORRIDORS; DESIGN CRITERIA AND DEVELOPMENT STANDARDS FOR CERTIFICATES OF APPROPRIATENESS; ARCHITECTURAL GUIDELINES; WATER AND SANITARY SEWER SYSTEM REQUIREMENTS; CLARE AND LIGHTING; NOISE; REQUIREMENTS FOR BICYCLE LANES; VARIOUS REQUIREMENTS PERTAINING TO LANDSCAPING; PROPERTY FRONTAGE AND DRIVE ACCESS STANDARDS; PARKING IN REQUIRED FRONT OR SIDE YARDS; PROVISIONS FOR TERMINATION OF NON-CONFORMING USE; PURPOSE STATEMENT FOR DESIGN REVIEW BOARD AND DEVELOPMENT REVIEW COMMITTEE; SKETCH PLAN SUBMITTAL REQUIREMENTS; SITE PLAN SUBMITTAL REQUIREMENTS; SITE PLAN INFORMATION; BUILDING DESIGN INFORMATION; SUBMITTAL REQUIREMENTS FOR CERTIFICATES OF APPROPRIATENESS; RE-USE, CHANGE IN USE, OR FURTHER DEVELOPMENT OF SITES DEVELOPED PRIOR TO THE ADOPTION OF THIS ORDINANCE; DELETE TITLE OF PLANNED UNIT DEVELOPMENT CHAPTER; DEFINITION OF INCIDENTAL SIGN; TABLE OF PERMITTED SIGN CHARACTERISTICS OF ZONING DISTRICT; AND SIGNS EXEMPT FROM REGULATION; AND REPEALING SECTIONS 18.42.090, and 18.54.010, AND ALL OTHER ORDINANCES AND PARTS THEREOF IN CONFLICT WITH THIS ORDINANCE.

PREAMBLE

The purpose of this code is to promote public health, safety and general welfare for the City of Bozeman and its extraterritorial zoning jurisdictional area by dividing the city and its surrounding area into districts restricting and regulating the location, erection, construction, reconstruction, alteration and use of buildings, structures and land for trade, industry, residences and other purposes; to provide for adequate transportation, water, sewerage, schools, parks and other public requirements; to regulate the intensity of the use of lot areas, and to regulate and determine the area of open spaces surrounding such buildings and structures; to establish building lines and location of buildings designed for specified industrial, business, residential and other uses within such districts; to fix standards to which buildings or structures shall conform there; to prohibit uses, buildings or structures incompatible with the character of such districts, respectively; to prevent additions to and alterations or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder; to limit congestion in the public streets by providing for off-street parking and loading and unloading of vehicles; providing for the gradual elimination of non-conforming uses of land, buildings and structures; to lessen congestion in the streets: to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land and undue concentration of people; to preserve historic buildings and
structures; to conserve established neighborhoods; to regulate signs; to provide methods for seeking deviations and variances to this ordinance; and to provide penalties for the violation of this ordinance.

WHEREAS, the City Commission of the City of Bozeman did, on the 3rd day of September 1991, after due and legal proceedings, adopt Ordinance No. 1332, redrafting the zone code for the City of Bozeman; and

WHEREAS, the City Commission has solicited public input concerning amendments which are determined necessary to "fine tune" said code; and

WHEREAS, copies of the entire unrevised sections of the zone code as specified in the title above are attached as Exhibit "A"; and

WHEREAS, the City has followed all due and legal proceedings to implement said amendments.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF BOZEMAN, MONTANA:

Section 1

That Section 18.04.010 of the Bozeman Municipal Code, Definition of Terms, be amended so that the definitions of "Design Review Board", "Deviation", and "Offices" of said section shall read as follows:

"Design Review Board: That Board appointed by the City Commission, charged with the review of certain plans and proposals as specified in this ordinance.

The Board shall consist of six (6) professional and two (2) non-professional members as follows: Professional members degreeed in their respective disciplines or the substantial equivalent thereof -- four architects, one architectural historian, and one landscape architect or landscape designer; Non-professional members -- an individual with a demonstrated interest in and knowledge of urban design and/or historic preservation. No member of the Design Review Board shall serve concurrently as a member of the Bozeman City-County Planning Board. The presence of three (3) professional members at a Design Review Board meeting shall constitute a quorum.

A quorum of the DRB shall be three members, of which two must be professional members, and one of the professional members must be an architect.

"Deviation: A modification or variation of the provisions of physical standards of this Ordinance as applied to a specific piece of property located within the Neighborhood Conservation Overlay District or Entryway Corridor
Overlay District. No deviation regarding use of property may be permitted. A deviation may be permitted only by the City Commission."

"Offices: Structures, or portions of structures, in which commercial activities take place but where goods are not produced, sold, or repaired. These include: general and professional offices; governmental offices; insurance offices; real estate offices; taxi-cab offices but not taxi stands; travel agency or transportation ticket offices; telephone exchange; utility offices; radio broadcasting and similar uses."

All other parts and definitions of Section 18.04.010 not specifically amended above shall remain in full force and effect.

Section 2

That Section 18.08.020 of the Bozeman Municipal Code be amended so that such section shall read as follows:

"18.08.020 COMPLIANCE WITH ZONING REGULATIONS REQUIRED

No building, structure or land shall hereafter be used or occupied, and no building, structure or part thereof shall hereafter be erected, constructed, reconstructed, moved or structurally altered, and no development shall commence unless it is in conformity with all of the regulations herein specified for the district in which it is located."

Section 3

That Section 18.08.040 of the Bozeman Municipal Code be amended so that such section shall read as follows:

"18.08.040 YARDS AND LOTS — REDUCTION PROHIBITED

No yard or lot existing at the time of adoption of the ordinance codified in this title shall be reduced in dimension or area below the minimum requirements of this ordinance except as set forth herein. Yards or lots created after the effective date of said ordinance shall meet at least the minimum requirements established by this Ordinance."

Section 4

That subsection B of Section 18.10.030 the Bozeman Municipal Code be amended so that Section 18.10.030.B. shall read as follows:

"B. Cluster Development Option

This option is intended to encourage land reassemblage and cluster development, or other planned development meeting the intent of the Rural Residential land use classification of the 1990 Bozeman Area Master Plan Update."
Sporting and athletic goods store
Tailor shop, less than 5 employees
Theatre, excluding drive-in theatre
Toy store
Travel agency
Upholstery shops, excluding on-site upholstering services of cars, boats, trucks and other heavy equipment
Variety store
Wallpaper store
Watch repair shop
Wholesale establishments that use samples, but do not stock on premises

All other parts of Section 18.32.020 not specifically amended above shall remain in full force and effect.

Section 7

That Section 18.42.050 of the Bozeman Municipal Code be amended so that this Section 18.42.050 shall read as follows:

"18.42.050 CERTIFICATE OF APPROPRIATENESS

A Certificate of Appropriateness, received from either the Design Review Board, Planning Board, or the City Commission, shall be required before any and all alterations(s) other than repair as defined herein, are undertaken upon any structure in the Conservation District. For alterations not requiring City Commission or Planning Board approval, compliance with the Design Review Board's decisions will be mandatory subject to appeal to the City Commission as set forth in Chapter 18.58 of this Ordinance. Application procedures are as follows:"

A. No building, demolition, sign, conditional use, or moving permit shall be issued within an Entryway Corridor until a Certificate of Appropriateness has been issued by the Design Review Board or the appropriate review authority, and until final action on the proposal has been taken.

B. Application and review procedures for proposals located within Entryway Corridors are set forth in Chapter 18.51 DESIGN REVIEW BOARD AND DEVELOPMENT REVIEW COMMITTEE.

Additionally, in order to accommodate limited, "weekend" type projects, a Certificate may be applied for and issued without posting the property, if the Administrative Officer and an architect on the DRB approve and sign the application. "Weekend" type projects may include such
alterations as fencing, sidewalk and driveway construction, or removal of dilapidated, unsafe structures.

C. A denial of a certificate shall be accompanied by a written statement of reasons for the denial.

D. Aggrieved persons, as defined in Chapter 18.58 of this ordinance, may appeal the decision of the Design Review Board pursuant to the provisions of said Chapter. In such event, the issuance of a Certificate shall be stayed until the appeal process has been satisfied."

Section 8

That Section 18.42.090 of the Bozeman Municipal Code is hereby repealed and declared null and void and of no effect. See Exhibit "A" attached hereto for text of Section 18.42.090.

Section 9

CODIFICATION INSTRUCTION

That Section 18.42.090 of the Bozeman Municipal Code be reserved for future use.

Section 10

That Section 18.43.050 of the Bozeman Municipal Code be amended so such section shall read as follows:

"18.43.050 CERTIFICATE OF APPROPRIATENESS

A Certificate of Appropriateness, received from either the Design Review Board, Planning Board, or the City Commission, shall be required before any and all alterations(s) other than repair as defined in Chapter 18.42, are undertaken upon any structure in the Entryway Corridor. For alterations not requiring City Commission or Planning Board approval, compliance with the Design Review Board's decisions will be mandatory subject to appeal to the City Commission as set forth in Chapter 18.58 of this Ordinance. Application procedures are as follows:

A. No building, demolition, sign, conditional use, or moving permit shall be issued within an Entryway Corridor until a Certificate of Appropriateness has been issued by the Design Review Board or the appropriate review authority, and until final action on the proposal has been taken.

B. Application and review procedures for proposals located within Entryway Corridors are set forth in Chapter 18.51 DESIGN REVIEW BOARD AND DEVELOPMENT REVIEW COMMITTEE.

Additionally, in order to accommodate limited, "weekend" type projects, a Certificate may be applied for and issued without posting the property,
if the Administrative Officer and an architect on the DRB approve and
sign the application. "Weekend" type projects may include such al-
terations as fencing, sidewalk and driveway construction, or removal of
dilapidated, unsafe structures.

C. A denial of a certificate shall be accompanied by a written statement of
reasons for the denial.

D. Aggrieved persons, as defined in Chapter 18.58 of this ordinance, may
appeal the decision of the Design Review Board pursuant to the pro-
visions of said Chapter. In such event, the issuance of a Certificate
shall be stayed until the appeal process has been satisfied."

Section 11
That the title of Section 18.43.060 of the Bozeman Municipal Code be
amended so that such title shall read as follows:

"18.43.060 DESIGN CRITERIA AND DEVELOPMENT STANDARDS FOR-
CERTIFICATES OF APPROPRIATENESS IN ENTRYWAY CORRIDORS"

All other parts of Section 18.43.060 not specifically amended above shall
remain in full force and effect.

Section 12
That the title of subsection C.6.b. of Section 18.50.020 of the Bozeman
Municipal Code be amended so that the title of Section 18.50.020.C.6.b. shall
read as follows:

"b. Architecture Architectural Guidelines"

All other parts of Section 18.50.020 not specifically amended above shall
remain in full force and effect.

Section 13
That subsection D of Section 18.50.030 of the Bozeman Municipal Code be
amended so that Section 18.50.030.D. shall read as follows:

"D. Water and Sanitary Sewer System Requirements

1. Whenever any building lots and/or building sites are created
within any zoning districts inside the City limits, inside the City
limits, except for those lying within A-S or R-S zoning districts,
and prior to the issuance of any building permits on said lots or
sites, central water distribution and central sanitary sewer col-
lection systems, public or private, shall be provided to the site,
developed and utilized. Each building site must utilize and be
connected to both the central water distribution and central sani-
tary sewer collection systems, public or private."

2. These improvements shall be designed, constructed and installed
value as determined by the last equalized assessment role of the County of Gallatin. However, in the event of damage by fire, wind, earthquake or other act of God to the extent described above, said structure or structures and the non-conforming use or uses housed therein may be re-established through a Conditional Use Permit procedure as set forth in Chapter 18.53 of this ordinance."

All other parts of Section 18.50.160 not specifically amended above shall remain in full force and effect.

Section 23

That subsection A and subsection C of Section 18.51.010 of the Bozeman Municipal Code be amended so that Section 18.51.010.A. and Section 18.51.010.C. shall read as follows:

"A. Purpose

The Design Review Board and the Development Review Committee are established to coordinate, expedite and assure fair, equitable implementation of this ordinance. The objective, to be implemented through their procedures and deliberations, shall be to encourage development quality that will enhance both the natural and built environments, with full consideration to present and future property values."

"C. Design Review Board Procedures Established

1. The Board shall consist of six (6) professional and one (1) two (2) non-professional members as follows: Professional members degreed in their respective disciplines or the substantial equivalent thereof -- four architects, one architectural historian, and one landscape architect or landscape designer; Non-professional members -- an-individual individuals with a demonstrated interest in and knowledge of urban design and/or historic preservation. No member of the Design Review Board shall serve concurrently as a member of the Bozeman City-County Planning Board. The presence of three (3) professional members at a Design Review Board meeting shall constitute a quorum.

A quorum of the DRB shall be three members, of which two must be professional members, and one of the professional members must be an architect."

All other parts of Section 18.51.010 not specifically amended above shall remain in full force and effect.
Section 24

That subsection A of Section 18.52.020 of the Bozeman Municipal Code be amended so that Section 18.52.020.A. shall read as follows:

"A. Sketch Plan Submittal Requirements

A. Certain independent development proposals (i.e. not in conjunction with other development) are required to submit only Sketch Plans, drawn to scale and in sufficient detail to demonstrate compliance with all zoning requirements. Sketch Plans shall be oriented with north at the top of the page and shall also show site boundaries, street and alley frontages with names, and location of all structures with distances to the nearest foot between buildings and from buildings to property lines.

Separate construction plans are necessary for building permits when the proposal requires such permits. Additional information is also necessary when the proposal requires the issuance of a Certificate of Appropriateness (see Section 18.52.050).

Examples of independent projects which qualify for Sketch Plan Review are: individual single-family, two-family, three-family, and four-family units, residential units, each on individual lots; mobile homes on individual lots; fences; signs in compliance with zoning requirements; special temporary uses; home occupations; and accessory structures associated with these uses. Other similar projects may be determined by the Planning Director to require only Sketch Plan Review. The Planning Director shall determine all submittal requirements."

All other parts of Section 18.52.020 not specifically amended above shall remain in full force and effect.

Section 25

That subsection D of Section 18.52.030 of the Bozeman Municipal Code be amended so that Section 18.52.030.D. shall read as follows:

"D. Site Plan Submittal Requirements

1. Applications for all Site Plan Approvals shall be submitted to the Planning Office on forms provided by the Planning Director. The Site Plan application shall be accompanied by the appropriate fee and development plans showing sufficient information for the City Commission, Planning Board, Design Review Board, or Development Review Committee to determine whether the proposed development will meet the development
requirements of the City. Unless otherwise specified, twenty (20) copies
of the application and required supplemental information addressing the
following shall be submitted:
a. General Information
   (1) name of project/development;
   (2) location of project/development by street address and legal
description;
   (3) location map, including area within one-half mile of site;
   (4) name and mailing address of developer and owner;
   (5) name and mailing address of engineer/architect, landscape
   architect and/or planner;
   (6) date of plan preparation and changes;
   (7) north point indicator;
   (8) suggested scale of 1" to 20', but not less than 1" to 100';
   (9) list of names and addresses of property owners within two
hundred (200) feet of site, using last declared County real
estate tax records;
   (10) stamped, unsealed envelopes addressed with names of
above property owners;
   (11) zoning classification within two hundred (200) feet;
   (12) listing of specific land uses being proposed; and
   (13) complete, signed application.
b. Site Plan Information
   The following information is required whenever the requested in-
formation pertains to: 1) zoning or other regulatory require-
ments; 2) existing conditions on-site; or 3) conditions on-site
which would result from the proposed development.
   (1) boundary line of property with dimensions;
   (2) location, identification and dimension of the following exist-
ing and proposed data, on site and to a distance of 100
feet outside Site Plan boundary unless otherwise stated:
   (a) topographic contours at a minimum interval of two
feet, or as determined by the Planning Director
   (b) adjacent streets and street rights-of-way to a dis-
tance of 150 feet, except for sites adjacent to major
arterial streets where the distances shall be 200
feet
(c) on-site streets and rights-of-way
(d) ingress and egress points
(e) traffic flow on-site
(f) traffic flow off-site
(g) utilities and utility rights-of-way or easements:
   (i) electric
   (ii) natural gas
   (iii) telephone, cable TV
   (iv) water
   (v) sewer (sanitary, treated effluent and storm)
(h) Parcel size in gross acres and square feet.
(i) buildings and structures
(j) Estimated total floor area and estimated ratio of floor area to lot size (Floor Area Ration, FAR), with a breakdown by land use.
(k) Proposed coverage of buildings and structures for parcel(s) and total site, including the following:
   (i) Percentage and square footage of building coverage.
   (ii) Percentage and square footage of driveway and parking.
   (iii) Percentage and square footage of open space and/or landscaped area.
(l) surface water holding ponds, streams and irrigation ditches, watercourses, water bodies, and wetlands.
(m) Floodplains as designated on the Federal Insurance Rate Maps.
(n) grading and drainage plan, including provisions for on-site retention/detention and water quality improvement facilities as required by the City engineering department, or in compliance with any adopted storm drainage ordinance.
(o) significant rock outcroppings, slopes of greater than 15%, or other significant topographic features
(p) detailed plan of all parking facilities: including circulation aisles, access drives, bicycle racks,
compact spaces, handicapped spaces and motorcycle parking

(q) sidewalks, walkways, driveways, loading areas and docks, bikeways, including typical details

(r) provision for handicapped accessibility, including but not limited to wheel chair ramps, parking spaces, hand rails, and curb cuts

(s) fences and walls, including typical details

(t) exterior signs

(u) exterior refuse collection areas, including typical details

(v) exterior lighting, including typical details

(w) landscaping (detailed plan showing plantings, equipment, and other appropriate information as required in Section 18.50.100)

(i) landscape legend, including botanical and common names of vegetation to be used

(ii) size of plantings at time of planting and at maturity

(iii) areas to be irrigated

(x) Unique natural features, significant wildlife areas, and vegetative cover, including existing trees and shrubs having a diameter greater than two and one-half (2 1/2) inches, by species.

(y) snow storage areas

(z) Location of municipal and extraterritorial boundaries within or near the development

(zz) Existing zoning.

(3) number of employee and non-employee parking spaces, existing and proposed, and total square footage of each.

(4) site statistics including site square footage, non-residential building square footage, percent of site coverage (building and parking), net dwelling unit density, percent park or open space.

(5) total number, type, and density per type of dwelling units, and total gross residential density and density per residential parcel.
(6) a reproducible copy of the Site Plan with appropriate signatures shall be submitted upon approval.

c. Building Design Information (On-Site)

(1) building heights and elevations of all exterior walls of the building(s) or structure(s).

(2) materials and color schemes to be used. (The effect of color in creating a design character that is appropriate for and compatible with the area will be considered.)

(3) height above mean sea level of the elevation of the lowest floor and location of lot outfall when the structure is proposed to be located in a floodway or floodplain area.

(4) floor plans depicting location and dimensions of all proposed uses and activities.

All other parts of Section 18.52.030 not specifically amended above shall remain in full force and effect.

Section 34

That subsection A of Section 18.52.050 of the Bozeman Municipal Code be amended so that Section 18.52.050.A. shall read as follows:

"18.52.050 CERTIFICATES OF APPROPRIATENESS: ADDITIONAL APPLICATION REQUIREMENTS, REVIEW PROCEDURES, AND REVIEW CRITERIA

A. Submittal Requirements for Certificates of Appropriateness

All development proposals requiring Certificates of Appropriateness (i.e. located in a Neighborhood Conservation or Entryway Corridor Overlay District) shall submit the following information in addition to any Sketch Plan, Site Plan, or Special Development submittal requirements for the proposal.

1. Neighborhood Conservation Overlay District

Certain information shall be provided to the Design Review Board to review prior to granting or denying a Certificate of Appropriateness. All materials to be submitted shall be prepared on a 8 1/2" X 11" paper and packaged or bound to fit a standard, letter size file. Applications that involve more voluminous architectural plans and specifications shall be accompanied by simplified sketches, details and supporting documentation, on letter size paper, which synthesize the detailed design documents. The extent of documentation to be submitted on any project shall be dictated by the scope of the planned alteration and the information reasonably
APPLICATION FOR PROJECT REVIEW
CITY OF BOZEMAN DESIGN REVIEW BOARD

City-County Planning Office
35 N. Bozeman Avenue
CITY OF BOZEMAN, MONTANA 59715

Tel: 586-3321 ext. 227

Date: 4/9/91

To The Planning Director:

The undersigned (Applicant) hereby makes application to the Design Review Board (DRB) for review of a development proposal within an Overlay District as described below.

Name of Applicant: Jeff Aldworth
Tel: 586-7774

Address of Applicant: Box 1560, Bozeman, Montana 59715

Address of Proposed Development: 709 S. 6th Ave.

Zoning: R-3a
Type of Review: Major Site Plan

Conditional Use Permit: Amended Site Plan: Sign(s):

Entryway District: not in an entryway

Describe the proposed development project:
Remodeling and putting on
an addition on my home & adding a detached garage
Exisitng home is 720 sq ft. 2nd floor will be 720 sq ft. addition will be 268 sq ft.
Garage will be 316 sq ft.

Date of DRB review meeting: ________________.

DRS Action: Approved

__ Denied __ Approved with following conditions:

__ Appealed to City Commission

Note: Application must include five copies of a completed site plan for the proposed development including, if applicable, a revised original site plan showing all changes proposed for an amended site plan and all specifications for any proposed sign(s) including size, method of attachment or support, locations, and materials to be used.

All application materials must be submitted to the City-County Planning Office by 5:00 P.M. on Tuesday to be eligible for review by the DRB at their weekly meeting the following Tuesday.

I (We) hereby certify that the above statements and the statements contained in any papers or plans submitted herewith are true to the best of my (our) knowledge.

Jeff Aldworth
Applicant

Jeff Aldworth
Property Owner
Scale: $\frac{\frac{2}{3}}{\text{in}} = 1\text{"}
Review Checklist for Certificates of Appropriateness - To be completed by Planning and Preservation Office Staff:

1. Will the project require processing through other zoning, building, licensing or permitting procedures? YES If so, what? DEMOLITION, BUILDING OCCUPANCY

Schedule and order? BUILDING DEPT. REVIEW CONCURRENT OR AFTER DES

2. Will this project require a deviation from underlying zoning requirements? NO If so, by which agencies?

Schedule and order?

3. Would it be helpful or advantageous to the Applicant seek any Code or Ordinance deviations? NO If so, what?

By what agency or department?

Schedule and order?

4. Will or could the Applicant be eligible for services, grants, tax abatements, or any other incentives? NO If so, what?

How start process?

5. Is the project within a Historic or Conservation Overlay District, or a Landmark outside the Overlay Districts?
7. Compatibility with Standards for "Certificates of Appropriateness", Section 18.42.070 of Zoning Ordinance.

A. Address Compatibility with "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings."

**Building Exterior:**

1. Masonry  
   - NA

2. Wood  
   - 2" x 4" Lap Siding

3. Architectural Metals  
   - NA

4. Roofs  
   - Asphalt Shingles Existing

5. Windows  
   - Triple Pane on House

6. Entrances and Porches

7. Storefronts

**Building Interior:**

1. Structural System

2. Interior Spaces, Features and Finishes

3. Mechanical Systems

**Building Site:**

**District/Neighborhood:** Copper Park District
8. Deviations from Underlying Zoning Requirements:

1. Will the modifications be consistent with the intent and purpose of this ordinance and/or any adopted Master Plan?  
   ______________________________________________________  
   ____________________________  YES ____________________________

2. Will the modifications have minimal adverse effect on abutting properties or the permitted uses thereof?  
   ______________________________________________________  
   ____________________________  YES ____________________________

3. Stated Conditions  
   a. Time  
      ______________________________________________________
   b. Landscaping  
      ______________________________________________________
   c. Surfacing, etc.  
      ______________________________________________________
   d. Other conditions  
      ______________________________________________________

9. Delay of Proposed Alteration, Pursuant to Section 18.42.100 of Zoning Ordinance.

1. If certificate denied and alteration action postponed, for what period?  
   ______________________________________________________  
   ______________________________________________________  
   ______________________________________________________  
   ______________________________________________________

2. Reasons for postponement:  
   ______________________________________________________
   ______________________________________________________
   ______________________________________________________
   ______________________________________________________

5
City considers streamlining building reviews

The commission discussed ways to cut the DRB's workload by up to two-thirds. The move would save most homeowners from having to undergo the review for minor home construction projects such as adding a porch or building a new room.

However major projects, such as the Wal-Mart store proposed for Bozeman, would still be subject to DRB review.

If the city revises the DRB, only the most complicated projects would undergo such review. The less detailed projects could be handled by city staff, Planning Director Andy Epple said.

Changing the DRB is also recommended by Wade Kumlien who announced in a letter that he's resigning later this month to devote more attention to a business interest. He suggests the two groups of DRB members that meet separately on projects should be changed so all board members meet together to review projects.

If this change is initiated, Epple said he wants to hire another planner because staff work will increase.

Mayor Tim Swanson said he thought people would see a move to reduce the DRB workload and put the burden on city planning staff as "major streamlining."

However, Commissioner Joe Frost said it's helpful for him to have both a DRB and a planning office review report.

City Manager Jim Wysocki said reducing the DRB workload should also mean it will spend less time reviewing commercial sign permits.

He said having the DRB spend so much time on signs is unnecessary.

Commissioner Al Stiff said revising the board could reduce a concern of his that exists when members of the board represent clients.

"It seems to me there's been a very definite conflict of interest," Stiff said.

Commissioners also expressed concern that people aren't testifying on construction projects until the project reaches the City Commission. Wysocki said there's a way to deal with "ambushing at the City Commission" by sending projects back to the Bozeman City-County Planning Board when new information is presented at the last minute.

However, that can also delay projects, which is what opponents sometimes want, he added.

The commission may be able to reduce the last-minute testimony against projects if it didn't "fine tune" projects as much as it does.

"I think you've brought some of that on yourself," Wysocki said of the last-minute testimony.
By AL KNAUHER
Chronicle Staff Writer

The weathereed outhouse, a familiar fixture in the back yard of 216 N. Plum Ave., is out front. On the sidewalk to be exact.

Bozemans passion for historic preservation has left contractor Everett Egbert looking for someone to take the dilapidated outhouse off his hands or he says he'll demolish it.

Egbert, who is building a duplex on the property, says he figures city planner Kevin Wall wasn't serious when recommending the outhouse be retained on the property as "a sculptural element." "My position is it's a joke," Egbert said.

But Wall said today he was serious when recommending that Egbert could keep it as art on the site. However, the recommendation wasn't a condition on which construction approval hinged. Had Egbert wanted to keep it, he would have had to restore it and nail the door shut.

"You don't see those things anymore," Wall said. "It's just a remnant ... of the neighborhood." If indeed art is in the eye of the beholder, members of Egbert's construction crew say they don't see the aesthetic value in preserving this vestige of Bozemans past. After all, there's no sign hanging above its door to indicate what prominent persons may have availed themselves of its services.

"I just can't imagine wanting to save it," said Dan Gates, project foreman. Vines and moss grow from beneath the shingles and the bottom of the walls have rolled.

Even if Egbert's crew fails to appreciate this architectural art, outhouses have earned a place in history. Author Bob Ross wrote a series of poetry books that use photographs of these solitary statements to early sanitation. "Muddled Meanderings in an Outhouse" is the first book in the series that sold about 500,000 volumes.

Gates calls the outhouse sitting on the sidewalk a "pretty neat little setup." The outhouse was wired with electricity and had running water and was connected to the city sewer system.

Despite such improvements, it didn't rate even a mention in Derek Stratans historic report on the property. Stratans, the city historic preservation officer, states the former wood-frame home that was located there was built prior to 1927.
Developer sues city over new zoning code

By AL KNAUBER
Chronicle Staff Writer

A developer is suing the City of Bozeman over its controversial new zoning code.

The suit, filed by Scott Johnson, involves only one section of the voluminous regulations approved by the city in late 1991 following several years of revision.

Johnson's legal battle began after the commission refused to let him include arched windows in his plans to remodel a building at 101 E. Mendenhall St. The commission, when approving the project in March, imposed five conditions restricting his plans.

Johnson's plans were first reviewed by the Design Review Board before the commission approved them. The DRB, which includes architects among its volunteer members, reviews construction within the city then makes recommendations to the commission.

The 26-page suit alleges the DRB unanimously approved the project without additional conditions, but city planner Kevin Wall objected and sought to have the five conditions imposed. Wall declined to comment today on the suit.

The suit alleges the DRB and not city planning staff have the authority to recommend conditions for construction.

Bozeman attorney Barry O'Connell, representing the city in the suit, disputes the allegation. He claims in court documents the commission, not the DRB, has the final say.

O'Connell also insists the commission has "... the right to consider and give weight to the opinions of city staff although such opinions may be different than the opinions held by members of the DRB."

"If the ordinance is upheld, we'll continue business as usual," said City Attorney Paul Luwe. If the city

(Continued on Zoning, page 8)

Zoning/ from page 1

loses, the court ruling will have to be examined to decide what changes to the zone code are needed.

Bozeman Attorney Joe Sabol, who represents Johnson, said today he didn't know if there would be a negotiated settlement or if the matter would be settled before a judge.

The city "may be hard-pressed to back up" and reconsider its decision on Johnson's plans, Sabol added.

Johnson's suit asks the District Court to reverse the commission's decision and order it to approve the project without the five conditions.

It also seeks rulings to declare:

■ The neighborhood conservation overlay district is unconstitutional. The district operates under regulations guiding new construction and remodeling of existing buildings.

■ The DRB and not the plan-

ning staff is responsible for administering the district.

■ Johnson's right to due process was violated by the city.

■ The commission doesn't have authority to impose additional conditions on projects. Rulings are also sought that the commission exceeded its authority and lacks jurisdiction.

■ Johnson's civil rights were violated and for the city should pay damages proven at trial.
Gable or a gambrel? City moves on garage roof styles

Jennifer and William Mitchell want to remodel their garage with a barn-like roof, left. The Design Review Board wants a peaked roof typical of most homes. The City Commission will have to decide the backyard battle over garage roof styles.

Jennifer and William Mitchell, who live at 122 S. Church Ave., want to remodel their garage and place a pitched roof on it. They also need city approval for their existing garage to be within the side- and rear-yard setbacks — areas normally reserved for landscaping.

Their plan to use a gambrel-style roof, similar to what would be seen on a barn, didn’t find favor with the city.

The Design Review Board, which oversees residential and commercial construction projects, is willing to recommend the garage be allowed to remain in the setback, but rejected the proposed roof style. Instead, the DRB is recommending a gable-style roof which is a typical of most homes.

The commission delayed its decision last week after receiving a three-page memo from senior city planner Dave Skelton. The memo explains why the staff won’t agree with the Mitchells’ roof style.

The DRB based its decision on the Secretary of Interior’s Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, the memo states. Nor does the request for a barn-style roof address the standards in the zoning ordinance.

However, the Mitchells wrote the commission to say neither their neighborhood nor their house is listed on the National Register of Historic Places.

Therefore, this garage has no historical significance and should not be judged by the (National Register) standard in terms of design,” their letter states.

They defend the choice of roof, saying it relates to the valley’s agricultural heritage. Former carriage houses elsewhere in the city use this style of roof, they wrote the commission.

There is no neighborhood with a single style of carriage house, she explained to the commission, adding “Diversity is what makes our neighborhood interesting.”

But Skelton’s memo says it’s not the valley’s heritage that’s at issue, but the historic integrity of the neighborhood.

Derek Strahn, city historic preservation officer, agrees the DRB roof choice is more in keeping with the character of the property’s main residence. He calls the barn-style roof “unnecessarily tall and awkward.”

Even though the home isn’t listed on the National Register, Strahn states it could be someday and this is the reason the choice of roof style should be judged by these standards.

City sues Karst Stage over bus fleet growth

The suit is asking the court to require the bus service to seek a conditional use permit which involves exten...
City denies barn-like garage roof

By AL KNAUBER
Chronicle Staff Writer

Jennifer and William Mitchell say they may place a blue, plastic tarp on top of their leaky garage roof until they decide what they're going to do. They had wanted to replace the existing flat roof with a gambrel, barn-style roof. However, Bozeman's City Commission voted Monday to require a peaked, gable roof.

A gable roof was recommended by the city's Design Review Board, which oversees residential and commercial construction. The garage roof design became an issue because the Mitchells needed city approval for the existing garage to remain within the side- and rear-yard setbacks — areas normally reserved for landscaping. In return for city approval, they were told what style of roof to build.

"It's a little late to build a roof," Jennifer Mitchell said, standing ankle-deep in snow. "We have to analyze the next step. It won't go away. It's not the end of it for us. We're not people who lay down and die."

Mayor Tim Swanson and commissioners Joe Frost and Beverly Knapp voted to uphold the DRB recommendation while commissioners Al Stiff and John Vincent dissented.

The DRB based its decision on the secretary of Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, Swanson said. These are the rules the city uses in judging construction projects.

Frost said the Mitchells' application for the renovation states they wanted a design that is historically sensitive and that's what the DRB has done using the federal guidelines.

Stiff said his parents owned the home 35 years ago and, "I don't have a problem with the design."

Vincent said the proposed barn-style roof was consistent with other garage roofs in the city.

According to letters the Mitchells wrote the commission, they wanted a barn-style roof to demonstrate Jennifer Mitchell's design talents. She owns the business Heritage Restoration, which helps people with historic renovation projects.

City Planning Director Andy Epple disagrees the barn-style roof should be allowed to impress her future clients.

"It's not necessarily in the best interests of the neighborhood," Epple said, adding, preserving the architectural character of the neighborhood will protect residents' property values.

"Neighborhoods have established patterns and character that give them charm," Epple said. "The character and pattern of that neighborhood is dominated by gable roofs."

He said it's typically inappropriate to introduce a new roof design into such a neighborhood. Jennifer Mitchell disagrees and said the roof architecture is already part of the neighborhood.

"It's not necessarily in the best interests of the neighborhood will protect residents' property values."

"Neighborhoods have established patterns and character that give them charm," Epple said. "The character and pattern of that neighborhood is dominated by gable roofs."

He said it's typically inappropriate to introduce a new roof design into such a neighborhood. Jennifer Mitchell disagrees and said the roof architecture is already part of the neighborhood.

City Planning Director Andy Epple disagrees, saying "That was never even considered in any aspect of review of this project."

"We're handling too many projects and have too much going on to play those kinds of games."
we are going to ut-of-state influ-
d out-of-state determine the fu-
our community state...

d the present generation in
and is going to go through
my generation went through.
ike to stress again that we have
in this state that I have not, in
rs, seen in the seven states in
worked. Whatever they can
t better. We have the ability to
h technical, clean industry to
example. Computers have vir-
every part of this country ac-
uding Bozeman, Montana.
e noble thought is that we do
estroy the quality of life here.
mountains, the hunting, the
skiing, and in short the Great
ese things are worth fighting
out to stagnate in the thinking
not changing is as good as
the farm. We have to make
creating opportunities for
lat we have or will educate or
someone from someplace else is going to.
I share these thoughts with all of you in
this community.

Jim Hanshaw
2200 W. Dickerson No. 3
Bozeman

Challenge the city
Is the City berserk?
From the accounts published in the
Sunday (Nov. 22) Chronicle, it is clear to
me that both the City Design Review
Board, in requiring Mr. and Mrs. Mitchell
to adopt its preferred roof design for their
garage, and the City Commission in exact-
ing “affordable housing” from Tom
Riddle’s proposed apartment complex,
have both acted in an arbitrary and capri-
cious manner and probably in excess of
any authority granted to either entity.
They ought to be challenged.

Ben Berg, Jr., retired city attorney
1407 W. Koch St.
Bozeman

Toilet paper OK?
We are going shopping this afternoon
and I wonder if it is necessary to call Dave
Skelton and the Design Review Board for
approval on color of toilet paper. Will it
make a difference if the paper is for the up-
stairs or down stairs bathroom?

Gordon and Marti Elder
2611 Westridge
Bozeman
Toilet paper advice

Attention Gordon and Marti Elder: I am not a member or the Design Review Board, but I’m practicing to become a member and represent the citizens of Bozeman and their collective needs.

Remember, I can only advise. It is my recommendation that all of your toilet paper be earth-toned in color and quilted for that proper “Western-Flair.” It will make no difference if your toilet paper is used upstairs or downstairs, as your upstairs already exists. We can do nothing about that discouraging fact. It is imperative, however, that your toilet paper roll in the historically correct over-the-top manner rather than unrolling from the back near the wall. This later example is totally unacceptable to the overall aesthetic quality of our fair city.

If I really was on the Design Review Board I’d recommend to the City Commission to inspect Mr. Ben Berg, Jr.’s toilet paper immediately! Renegades like Berg will only hinder our ultimate creation of Xanadu. Challenge us! Poppycock! We’re above that! Yours, etc. with an eye on everything,

Benjamin M. Scallan
137 Mullen Trail
Bozeman
The case for diversity

City stepped over the line when it nixed garage roof design

In J.D. Salinger’s “Raise High the Roof Beam, Carpenters,” a character describes how as a child he wished all the houses in his neighborhood were alike. They would be exactly alike from lattice to lawn. That way, he said, people would go to different houses every night since they wouldn’t recognize their own homes.

In the story it’s a wishful fantasy for the youngster, a homogenization of a neighborhood so that residents would experience new families and new friends every day. But to most of us it likely sounds more like a nightmare, kind of like wandering a Levittown ‘burb.

It also sounds like what the city’s Design Review Board — Bozeman’s “taste police” — and City Commission are doing when they rule on how people spending their own money to enhance their property are told what they can or cannot build.

The city believes it can call the shots for construction, interfere with property owners who want to improve their property and generally decide what neighborhoods look like.

In the latest instance, the city ruled out a gambrel-style roof in favor of a gable-style roof... for a garage!

For anyone who hasn’t followed this backyard battle between the city and a couple who want to remodel their flat-roofed garage, here’s the controversy. The couple — Jennifer and William Mitchell — planned on improving their garage by constructing a barn-like roof. Jennifer, who owns a historic building restoration business, presumably knows something about maintaining the integrity of her property and the neighborhood. She wanted something that resembled the rooflines of some of the city’s historic carriage houses.

But the city nixed her notion. The DRB and city planner said the garage needed a pitched roof just like all the other garage roofs in the neighborhood.

The city was not citing safety standards. The Mitchells were not planning anything that obstructed electrical wires, fire hydrants or the alleyway. Their plan didn’t block a neighbor’s view or present a grotesque sky-high eyesore.

There wasn’t a hint of neighborhood opposition to their plan.

The city, referring to federal guidelines (now there’s a comforting thought), said the pitched-roof style simply fit better, was closer to the historic character of the other garages and would meet the standards for the National Register of Historic Places.

Never mind that the garage isn’t on the register, some day it could be, the city said. The city was trying to look ahead, vigilant about the historic character of the other garages and would meet the standards for the National Register of Historic Places.

Right.

What the city — the same people who approved the soup can statue — is really doing is throwing its bureaucratic weight around. This is a case of micromanaging by the city.

The Mitchells plainly should have had the right, as owners of the property, to improve it as they want as long as it doesn’t radically interfere with the safety or property values of their neighbors.

The city has no case, unless, like the kid in Salinger’s story, they want everyone’s house garage and lawn decorations to look alike.

Then no one will find their way home.

Pack it in, Packwood

The distasteful and dispariting case of Bob Packwood now threatens to drag on well into the new year. The man who was once the most powerful Republican in the Senate has been denied that representation.

The case has now been further delayed.
If you don’t like the ordinance, change it

In its attempt to make a “case for diversity,” (“Our opinion,” Nov. 27) the Chronicle editor failed to recognize a number of important facts. One of these is that the city staff, Design Review Board and the City Commission are obligated to observe the Bozeman Zone Code, a document comprised of various ordinances, a set of local laws born of the democratic process — years of public hearings and exacting revisions. The specific ordinance in question in the Mitchell garage case is the Conservation Overlay District Ordinance.

The purpose of this part of the Zone Code is “to stimulate the restoration and rehabilitation of structures, and all other elements contributing to the character and fabric of established residential neighborhoods...”

This ordinance calls for the Design Review Board, et al., to “be guided by” the Secretary of the Interior’s Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. The Guidelines recommend “Designing ... adjacent new construction which is compatible with the historic character of the site and which preserves the historic relationship between a building or buildings.” Further, the guidelines clearly state that roof shape is an important architectural element for consideration and recommends against “creating a false historical appearance because the replaced feature (Mitchell’s garage roof) is based on insufficient historical, pictorial, and physical documentation.”

It is a fact that the Mitchell garage and the Mitchell neighborhood stand within the Conservation Overlay District and are therefore subject to this review. It is a fact that gambrel roofs do not appear in the Mitchell neighborhood ...

should be given their due.

If the property owner and the editor do not want the city staff, Design Review Board, and the City Commission to observe the law and the agreed upon standards and guidelines used to support the law, then they should take legal steps to change or delete the ordinance. However, if the property owner and the editor appreciate safeguards codified to protect their own neighborhoods from random acts of cuteness, ostentation, gratuitous profit, etc., then they should allow that this ordinance works well a large percentage of the time, a good record given the limitations of mere mortals to interpret and enforce it.

Catherine Goetz
120 W. Cleveland
Bozeman

Letters

It is a fact that the Mitchell garage and the Mitchell neighborhood stand within the Conservation Overlay District and are therefore subject to this review. It is a fact that gambrel roofs do not appear in the Mitchell neighborhood ...

Demagoguery

First Max Baucus decided to switch from gun rights advocate to anti-gun advocate. Then we read his excuses. Then we were treated to the “right on Max” letters from retired politicians trying to giv him political cover, and the “Anyone who owns a gun is a terrorist” crowd. Something has been lost in the rhetoric.

If one can do a 180 on such a controversial issue as gun control, how many more 180’s should we expect? I don’t believe in a politician’s anguish; unless they’re talking lost votes on election day. His explanation doesn’t cut it when you read the fine print of the bills supported. The anti-gun crowd vehemently objected to provisions added to the Brady bill mandating records checks within 5 years (the wait does not require one), and a written reason within 20 days if you were denied purchase. In Maryland, 85 percent of the denials which are appealed, are found to have been mistakes on the part of the record checkers.

On so called assault weapons, guns are banned on appearance rather than function. The weapons that would be banned, and there more than 19 kinds, are typically less powerful, have less range, and are less accurate than more conventional looking guns. The bill could affect up to 4 million privately owned firearms. Consider that one of the guns listed, the Steyr AUG, has never been used in the commission of a crime in this country. In the military I watched a demonstration where a revolver was used to hit multiple targets more quickly than the vaunted Uzi. If Max were interested in banning the most powerful weapons, he’d be banning your hunting iron. Maybe next year; one gun bill at a time.

The senate bill Max Baucus supported is a copy of California’s failed gun laws with an added ban on gun magazines that California rejected. Their attorney general, who is a gun control advocate, felt the magazine provision was unenforceable. They are already being sued by both sides of the issue for their attempt to enforce what they’ve got. So Max supported a law proven to be a failure and a law rejected by gun control advocates as unworkable. I’d call it a profile in demagoguery.

Matt Egloff
P.O. BOX 485
Bozeman

Bring Goodman back

Every newspaper needs at least one editorial writer who writes with common sense, humor and compassion, who is observant and articulate and who can cut through the hypocrisy that pervades the halls of power, be it business, government or religion.

Ellen Goodman is just such a writer. Please bring her back. You and your readers need her.

Katie Cady
2211 Arrowleaf Hills Dr.
Bozeman
City codes too restrictive?

Critics say ‘taste police’ have gone too far; supporters say it’s necessary

With its extensive landscaping, pitched roof and interesting entrance and windows, Pierry’s factory is more attractive than its more industrial-looking neighbors, Gibson Guitar, Dana Design and United Parcel Service, which used more metal and cement-block construction.

When Doug McClelland wanted to build a two-car garage behind his home in the South Sixth Avenue neighborhood, he hired an architect to study it to fit in with the historic neighborhood, where planning rules are strict. The project took three years longer than he expected and boosted the cost by 10 to 20 percent, he said.

A lot of neighbors have been fixing up homes in the historic district. Rising property values have made it a good investment, said McClelland, a business law professor who has been working as a fishing director for the local tour company Off the Beaten Path. He supports the city’s new planning rules. One of the biggest complaints he hears from tourists is how bad a first impression they get from North Seventh Avenue’s commercial strip.

“I feel the city has to stand up for certain requirements of attractiveness and good taste or Bozeman’s going to be an ugly community,” McClelland said.

For nearly four years, Bozeman has been living with new planning and zoning rules, and debating their wisdom. Supporters say the rules preserve the quality of life, charming old neighborhoods and a “green” look that attracts people. Strong rules are needed because the city is undergoing the biggest building boom in its history, they argue.

But critics like Tom Burnett, owner of Marathon Seat Cover and chairman of the Coalition for Responsive Government, say strict regulations are turning Bozeman into “a elitist city, adding too much to the cost of construction that ordinary people can’t afford to build homes or open businesses.”

They complain that “taste police” at City Hall are dictating such minutiae as whether new windows will be wood or metal, and the exterior colors allowed on new stores and factories.

Critics have taken to mocking the city’s codes in letters to the editor, suggesting people need the city’s permission before deciding what color toilet paper to buy, or whether it should be hung to roll from the front or back.

(More on Taste & Code, page 10)

Official says current zoning more flexible than old days

Proposed changes should speed up minor projects

Darren Williams fixed up his home this fall. He says he’ll never do it again.

Williams, a construction engineering student, wanted to pull out one corner of his home to expand a bathroom. Getting the city to approve his plans took weeks longer than he expected and boosted the cost by 10 to 20 percent, he said.

Because his home at 309 W. Harrison St. is in the Bon Ton historic district, the city made him put in wooden windows instead of the vinyl-and-metal type he thought would be better. City design experts didn’t want the addition to blend in perfectly because it would give a “false historical impression,” he said, and so asked him to offset the new siding. They settled for a wooden strip that marks the break between old and new.

The city also wouldn’t let him replace his cedar shake roof with a cheaper, metal roof.

(More on Changes, page 9)
The city's supporters reject the notion that new rules smack of Big Brother, but concede some bugs need to be worked out. Revisions have been in the works since last summer that would make it easier and faster to win approval of minor projects, Epple said. Recommendations will be ready early next year, after the new City Commission takes office in January.

Code supporters like outgoing Mayor Tim Swanson point out that, despite complaints the new rules are too onerous, this has been the biggest year in Bozeman history for construction. In the first 11 months of this year, the city issued building permits for nearly $41.5 million worth of commercial and residential projects, both new construction and remodeling. That's 27 percent higher than the same period for the next closest year, 1991.

Just what effect the new planning rules have on construction is open to debate. During this fall's election, Commissioner Joe Frost argued more people are fixing up their homes in historic neighborhoods because of the new codes. The rules assure homeowners their property values won't be threatened by an invasion of modern apartments which often hurt the character of the neighborhood. Under the old zoning rules, such buildings could be built without any say by neighbors.

Others give credit for the building boom to historically low interest rates that have helped all construction and let homeowners like Mc- Clelland refinance their mortgages, freeing money for improvements. Still, Epple argues Bozeman is busier than other parts of the state that, like Bozeman, have been "discovered" in recent years by urban refugees.

The bottom line, planning supporters say, is that the public supports the new codes. Last month, by far the most votes were cast for candidates who strongly supported planning — as has happened in the previous three city elections.

Critics of the city's new codes contend, however, that the top vote-getter this November was

Deal clears way for exporting U.S. apples to China

WASHINGTON (AP) — U.S. and Chinese representatives signed an agreement Saturday to allow the export of apples grown in the state of Washington to China, the Agriculture Department announced.

"For the first time, China is allowing American apples in commercial quantities into this country," Agriculture Secretary Mike Espy said in a statement.

The deal was signed by U.S. and Chinese agriculture officials in Portland, Ore., said Mary Dixon, a USDA spokeswoman. The first sale is expected in March, USDA said.

The industry estimates that more than 400,000 boxes of apples would be shipped to China in the initial sale, Dixon said. A box contains three-quarters of a bushel of apples.

USDA did not have any immediate estimates of the quantity of Washington state apples that would be sold in China, she said.

But Espy said that the outlook for apple exports is "exceedingly bright" because of the large markets for American-grown apples in Japan, Taiwan and Hong Kong. Apples are already very popular in China.

Espy said the Clinton administration envisions the agreement "as the first in a series of steps that would open China up to imports of a wide variety of U.S. fruits and vegetables — from all parts of the country."
co producer. "Looking back, I needed that to focus on myself and resolve own issues," she says. "We're really not taught anything about parenting. The message is, 'OK, I had parents, now you be a parent.' So age and experience make a difference."

Though these new-fashioned roles are becoming more commonplace, misunderstandings occur with some regularity — the clerk who thinks older parents are buying clothes for their children, the passer-by who comments on their well-behaved "grandchildren."

After her alienating play group experience, Joanne Grossman med a play group for older others that soon grew so big it split into smaller groups. Eventually, she began keeping a list of old-motherhood issues across the nation and talking in touch with each other.

"There are thousands of these "ents out there in the middle of America, and so many of them feel isolated," Grossman says. "They've different issues — worries about age and not keeping up with their kids — and they need to know that they're not alone." Burt says the mothers in her group are preoccupied with estions about middle age.

"We're talking about facing menopause with a child," she says.

"It's been kind of a sour spot in my mouth," Williams said, "Let me put it this way — I won't do any more because of what you have to go through."

Yet Andy Epple, Bozeman's planning director, said Williams' project (which was picked at random out of the city's files) is an example of why the city's new, design-oriented planning rules are a big improvement over the old rules.

Under the traditional, more rigid zoning regulations, Williams would have found it much harder to get permission to expand the bathroom because it was too close to the lot line and encroached onto the mandatory yard setbacks. Williams would have to have proven a "hardship."

Under the new, more flexible rules, the city is willing to let people build in setbacks. In exchange, the owner has to do something to enhance the appearance or historic character of the building. In Williams' case, the city didn't think vinyl windows and a metal roof would fit in with the historic neighborhood or would help neighbors' property values.

Williams' bathroom is also an example of the kind of project that may become easier under changes the planning office will recommend next year. To speed up minor projects, homeowners like Williams who want to build close to a lot line, for example — in exchange for more landscaping or a more attractive building design. The give and take works well with most builders, Epple said.

"It affords far more flexibility than traditional zoning ever has, but that flexibility comes at a cost, in terms of some increased bureaucracy and some subjective review criteria," Epple said. "And there will be differences of opinion on how to interpret criteria. But in the end the process is spurring a tremendous amount of redevelopment and new investment."

Tom Burnett, chairman of a coalition of mainly business owners who view the new rules as arrogant and sometimes "insane," argues that the flexibility and subjectivity in the code mean it is wide open to abuse. Business owners can never be sure what will be allowed because "it's anybody's guess what goes." And they can't afford to openly criticize the city, he said, because they have to get along to get their projects OK.

Epple says some 653 zoning applications and 123 planning applications have been filed under new process since 1990. And he points to a list of nearly 20 major projects, that have recently won easy approval from the city.

The list ranges from the Global Inn's new facade to the new Evergreen Industrial Park, just south of Interstate 90. Both Evergreen and the new ILX Lightwave building on East Frontage Road are examples where builders "chose to work with the code rather than against it," Epple said. He's also proud of the new Blackwood Building, across from City Hall, the new USDA building on West Main Street, and the planned expansion of Gibson Guitar.

Burnett said he has his own list of horror stories. He lists projects that have taken too long or been dropped — costing this area millions of dollars — because of what the owners see as ridiculous requirements.

For example, David Ng, owner of Hines Motor Supply, said when he wanted to remodel his business behind the Baxter Hotel, the Planning Board tried to tell him to shave feet off the front of the building — including a structural wall — to put in grass. The city backed down from what Ng saw as a "fairly arbitrary and very expensive" idea, but approval still took three months.

Some of those who've had frustrating experiences with the city have been the biggest contributors to Burnett's Coalition for Responsible Government. In the last election, it received $1,000 from William Martel, owner of Martel Construction; $250 from Ralph Ferraro, owner of the Rocking R Bar; and $1,000 from Don Cape Sr., owner of Ponderosa Homes in Belgrade.

So far the critics have failed to make much of a dent in the new zone code, even though legal challenges are mounting. One lawsuit by a helicopter company, which wasn't allowed to expand after neighbors objected, has been dropped, Epple said. Another was filed this summer by businessman Scott Johnson who objected when the city wouldn't allow him to install arched windows in an office building on Mendenhall Street. The city objected that arched windows didn't fit the historic downtown area.

Last week, Johnson and his attorney, Joe Sabol, submitted new drawings for the building.

Still time for
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Real solutions.
Real estate the way it should be.

Real people.
Real solutions.
Real estate the way it should be.
opposed to Yeltsin made rules discouraging foreign investors from becoming involved in Russian enterprises. The result is a huge number of businesses starving for investment while Western money stays home.

Three things need to happen before investors in Montana and elsewhere should feel comfortable putting money in Russian interests, he said. The Russians need to guarantee the businesses won't suddenly be re-nationalized, they need a court system that will enforce international contracts fairly, and foreign investors need to be allowed more voice in deciding how their investments are spent. Those things are close to occurring, but the political situation in Moscow must calm down first.

McFaul compared the situation to the Weimar Republic in 1920s Germany, when the Germans had lost World War I, given up much of their territory and installed a democratic government nobody believe in. Hitler was able to use the political confusion and sense of wounded national pride to take power — with promises to bring back the glory of the good old days.

Zhirinovsky is making similar promises, including hints he would like to recapture the currently independent states surrounding Russia where about 30 million Russian citizens live. On a recent visit with German Neo-Nazis, he reportedly offered to help Germans regain lands lost in World War II.

"His strategy from now to 1996 is to campaign for president," McFaul said. "They (Yeltsin's supporters) really need to rethink Yeltsin's campaign. Zhirinovsky has started campaigning today. They should start today."

A businessman suing the city over the design of his building is betting that with new faces on the City Commission, he'll be allowed to build his way.

Scott Johnson, owner of the computer firm ISC Distributors, this month plunked down $330 to apply a second time for city approval of his remodeling project.

Johnson wants to fix up a small office building at 101 E. Mendenhall St., between the Kenyon Noble hardware store and the Rocky Mountain Roasting Co. He said he wants to make the building more attractive and replace the front parking area with landscaping, improvements typically sought under the controversial new city zone code.

The dispute centers largely on whether Johnson can have slight arched shapes in the wall just above the windows. City planner Kevin Wall argued earlier this year that would "degrade" the building, because it's not in keeping with the historic look of that building or its neighbors, which is required by the secretary of the Interior's standards for rehabilitating "living historic areas."

Johnson argues that far from degrading the building, he's planning to spend $300,000 to fix it up, and that there are plenty of neighboring buildings in the historic downtown area, including the Bon Ton Bakery, that have arched shapes and arched windows. He said it's "ridiculous" that the subjective tastes of one planner now have become law.

Johnson said Tuesday he's reapplying for approval, not because there's been any settlement reached in his lawsuit, but because Don Stueck was elected to the commission in November. Stueck, a builder, has said he supports planning in general but that the city's zoning rules go too far.

"He has always said the city should have a common-sense approach, not a god-like approach," Johnson said.

When Johnson's remodeling plans came before the commissioners in March, they voted 3-1 to approve the project — but on conditions he change the appearance of the windows, doors and roof to fit the planning staff's recommendations.

Johnson said he expects support this time from the lone dissenter in the first vote, Commissioner John Vincent, and from Commissioner Al Stiff, who was absent during the March meeting, as well as Stueck.

A new vote might settle the issue faster than waiting for it to be decided in court, he said. Johnson sued in April, challenging the constitutionality of the neighborhood conservation overlay district, a key part of the city's new zone code.

Barry O'Connell, an attorney representing the city in the suit, said there has been no settlement and he has advised city officials not to discuss the matter. In papers filed in the court case, the city denied all Johnson's charges and challenges to the new zone code. No trial date has been set.

When the commission voted on the project the first time, it sided with the planning staff over the Design Review Board, a group of experts, which had unanimously approved Johnson's plan.

DRB board member Nick Davis wrote the commissioners, saying Johnson's building was one of the least historically significant they'd reviewed in a year, that the owner had been more than cooperative and had made significant changes sought by the DRB and staff.
coming under attack again 5/3/94

‘Thorn’ sharpens her assault on regs

By AL KNAUBER
Chronicle Staff Writer

A critic of proposed changes to Bozeman’s zoning laws says the public would have fewer opportunities to comment on development within the city.

“My biggest complaint is that the public’s been cut out more and more,” said Jennifer Smith Mitchell. “There shouldn’t be anything to hide.”

Mitchell is a self-proclaimed thorn in the city’s side, speaking at local service clubs to complain of Bozeman’s regulations. She’s also suing the city in a battle over the garage.

The proposed regulatory changes, contained in a document nearly a half-inch thick, are sought by the City Commission and the Bozeman City-County Planning Board. The Planning Board will hold a hearing on the changes at 7 p.m. tonight in the basement of City Hall.

One change would give city planning staffers authority to approve construction projects that don’t require deviations from zoning regulations.

The commission and Planning Board agree they want to streamline the approval process for such projects because of people’s complaints.

But the public won’t be notified of such proposals under the proposed revisions, Mitchell said. City Planning Director Andy Epple agreed.

“I don’t think the (Planning) board or commission will view it as cutting out the public,” Epple said.

Mitchell is also critical of a revision allowing housing projects with fewer than 12 units, requiring no deviations, to also be reviewed without public notice.

Under this change, the Dell Place neighborhood would never have known about developer Clair Daines’ plans for duplexes had fewer than 12 units been proposed, Mitchell said. “If the neighborhood doesn’t know about it, they can’t get upset about it,” Mitchell said. “Maybe that is the purpose of all these codes.”

Epple disagrees. People rarely comment on minor construction projects such as a room addition, new garage or even a new home when no deviations are sought, he said.

Among other proposed changes are:

■ The public would no longer be allowed to comment on issues at Design Review Board meetings. Meetings of the advisory board, which reviews the design of construction projects, would still be open to the public.

■ Planning staff would receive authority to approve the least complex construction projects.

■ Proposed color schemes could be denied if determined to be a nuisance. Epple calls this a safety net to prevent neighboring property values from being hurt by someone who wants to paint a home an unusual color.”

“I think most people would agree what color schemes constitute a nuisance,” Epple said.

The current regulations require builders to submit for city review a list of materials and colors that will be appropriate for and compatible with the area. Epple said the change means the code would be less restrictive.

A homeowner wanting to repaint a home wouldn’t have to obtain city approval for the proposed color, Epple said.
Disgruntled review board member dumped

By AL KNAUBER
Chronicle Staff Writer

A member of the city's Design Review Board, who disagreed with Mayor Tim Swanson over the board's role, won't be reappointed for a second term.

Ben Tintinger, an architect on the DRB for the past two years, wasn't reappointed to the board by the City Commission during its weekly meeting Monday.

The board reviews construction plans and advises developers and the commission.

Tintinger wrote a letter to the City Commission earlier this month saying the city is not in the business of designing buildings.

"A design must be reviewed as a whole and not based on whether one person dislikes arched windows or the color green," he wrote.

Swanson disagreed, and said the city has every right to comment on construction design. He voted during the meeting not to reappoint Tintinger.

Commissioners Beverly Knapp and Joe Frost said they agreed with Swanson, but abstained in the vote. Only Commissioner John Vincent voted to support Tintinger's reappointment. Commissioner Al Stiff, who is recovering from heart surgery, was absent. It takes a majority of the five commissioners to make an appointment.

Tintinger said today he isn't as concerned about not being on the board as he is about the reasons for not being reappointed.

"They just can't be in that business," Tintinger said of the city's involvement in construction design. "Reviewing it is one thing, designing it for (developers) is another."

During a recess in the meeting, Frost said the city doesn't want people who will hamper the work.

The city is in a legal battle with the owner of a building on East Mendenhall Street who objects to the city's involvement in his renovation (More on Dumped, page 12)

Selective Service System's days could be numbered

WASHINGTON (AP) — Ten college students crammed into a dormitory room, opened their beers, tuned on the television and waited tensely to learn whether their lives would be interrupted by military service and, perhaps, death.

That was the scene more than two decades ago in a room at the University of South Carolina, and at countless campuses across the country the day the first draft lottery numbers were drawn.

At the time it was hard to imagine without the Selective Service System's days could be numbered 1973, and in 1975 registration requirements ended. But registration was reinstated in 1980 and the system now has computerized data on some 14 million men aged 18 to 25.

The Selective Service System was born in controversy during World War II, traumatized teen-age music lovers by drafting Elvis in the 1950s and went on to become the target of anti-war outrage in the 1960s and 1970s.

"Greetings," the dreaded letter would begin, or "Greeting," if an errant computer was on the job. And thus would another young
**Attack on Iraqi Intelligence offices**

The U.S. missile attack accomplished "the near complete destruction" of offices used by Iraq's intelligence leaders according to the Pentagon.

The Iraqi Intelligence service headquarters compound in Baghdad was hit by 16 of 23 Tomahawk cruise missiles. Four of those hit landing in the compound, but did not hit their intended target and three, landed in two different residential areas between 100 and 500 yards outside the compound.

**Tomahawk cruise missile**

- **Range:** About 700 miles
- **Power system:** Turbo-fan engine
- **Cost:** About $1.3 million each
- **Warhead:** Conventional 1,000 pound. Also can be armed with nuclear warhead
- **Speed:** About 550 mph

**Dumped from page 1**

The 26-page suit alleges the board, and not the city planning staff, has the authority to recommend conditions for construction.

In court papers, the city disagrees and claims it can receive recommendations from the planning staff.

The planning staff's opposition to Johnson's plans prompted a highly critical letter from Nicholas Davis, another DRB member.

Davis wrote, "Not only is this procedurally out of place, it is also bureaucratically reprehensible."

**Commission selects several to serve on advisory boards**

By Chronicle Staff

Several volunteers were selected for advisory boards Monday by the City Commission including:

- **Ellen Kreighbaum**, Design Review Board. Kreighbaum is a Montana State University professor of health and human development.
- **Monte Cooper**, Community Development Block Grant Loan Review Committee. Cooper is a real estate agent.
- **Donald W. Belflower**, Community Development Block Grant Loan Review Committee. Belflower moved here about a month ago from Charlottesville, Va.
- **Linda T. Belflower**, Bozeman representative to the City-County Health Board. She is employed as a computer programmer and analyst with MSU and has lived in Bozeman for about a month.
- **Catherine Goetz**, Historic Preservation Advisory Committee. Goetz is a self-employed historian and former city historic preservation officer.
- **Beth Mentzer**, Historic Preservation Advisory Committee. Mentzer is an adjunct instructor in history and English at MSU.
- **Dora Anderson**, Historic Preservation Advisory Committee. Anderson is a technician and research aide at MSU.
- **James G. Webster**, Historic Preservation Advisory Committee. Webster moved here in July from Massachusetts.
ent said watermelon cheese. star a helmet the last
says an illegal drug. leave AIDS could be
nee another 12 percent by vaccination.
she cigarettes, while seven percent of the
smoked, and 31 per-
suggests that people who eat plenty of fruits, vegetables and fiber and relatively little fat have a reduced cancer risk.

Getting adults to change their eating habits is difficult. The California Department of Health Services conducted a public education campaign to encourage people to eat at least five servings of fruits and vegetables daily.

Susan B. Forster, the department's chief, told the conference that while the program was going on from 1989 to 1993, consumption remained unchanged at just under four servings a day.

Eliot's bill had already passed the House, but it was stalled last week in the Senate Taxation Committee before the panel approved Holden's bill.

"It was a political decision, and I don't like that," said Sen. Larry Baer, R-Bigfork, who opposed the bill. "It goes against my principals to take away credit from one person and give it to another for political reasons."

Baer also said the bill did not of-
ymall owners to file for an income tax credit, which in the end would only to amount to $90 at the most.

Senate Majority Leader John Harp, a Kalispell Republican, said the defeat of SB425 was a significant blow to his party's plans for tax relief. But he said the Senate could still consider Elliot's bill, the only statewide residential tax bill still alive after Tuesday's transmis-
tal deadline.

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**Judge: City acted unfairly in roof case**

**By AL KNAUBER**

**Chronicle Staff Writer**

Bozeman attorney Jennifer Bordy needed only one day in District Court to convince Judge Larry Moran her clients weren't treated fairly by the city.

Moran agreed Bozeman officials didn't follow city requirements for public notice when deciding in November 1993 what style of roof was appropriate for Bill and Jennifer Mitchell's one-car garage at their South Church Avenue home.

"I think it's a crying shame that a citizen has to go through this to get due process," Bordy said today.

Jennifer Mitchell said several attempts were made to resolve the dispute without going to court.

The Mitchell's have already applied for another hearing before the City Commission, which denied permission for them to build a gambrel, or barn-style roof. The city would only approve a peaked, or gable roof.

The Mitchells sued in December 1993 and waited until Monday for their day in court.

The lawsuit accused the city of acting illegally because it didn't mail written notices of a pending city hearing to property owners within 200 feet of the Mitchells' home as required by city codes.

The suit also said the city failed to post a notice on the Mitchells' property to advertise the date of the public hearing to decide what roof style would be allowed.

Jennifer Mitchell describes having to sue the city as "astounding."

"I'm just sorry that the taxpayers had to pay for this," Mitchell said of the city's legal costs. The city hired attorney Bob Planalp to defend it in court.

Planalp may have to return to court next month if the Mitchells ask the city to pay their legal bills, which have yet to be to-
taled.

If the City Commission again

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(More on Roof, page 8)
Media coverage of the Republican revolution — and Gingrich personally — has been intense, at times overshadowing that of President Clinton. But for the networks to grant the speaker's request would be extraordinary even in the current atmosphere.

The White House had no response to Gingrich's request, even though customarily, only presidents have been accorded prime-time live coverage for speeches.

tor directions against the Mitchells, the lawsuit will probably be resumed, Boryd said.

City Attorney Paul Luwe declined to comment on Moran's ruling, which cut short the trial that was anticipated to last most of this week.

Moran didn't rule on other claims in the lawsuit that challenged Bozeman's ability to regulate construction on private property.

Luwe said he didn't want to prejudice the City Commission by commenting before commissioners have a chance to decide what style of roof is appropriate.

The city has yet to set a date for the City Commission to reconsider Mitchells' roof, Luwe added.

The commission has changed significantly since the 1993 vote. Only Commissioner Joe Frost remains of the three who voted against the Mitchells. Mayor Tim Swanson and Commissioner Beverly Knapp didn't run for a second term. Commissioner Al Stiff and now Mayor John Vincent, who voted for the barn-style roof, are still on the commission.

Harassment/ from page 1

Montana then because some of the buffalo have brucellosis, which can cause cattle to abort. Cattle ranchers fear the buffalo could infect their herds and could end Montana's current brucellosis-free status. The Legislature has repealed buffalo hunting, allowing only state and federal officials to shoot buffalo in Montana.

One reason buffalo hunts have ended, Lilburn said, was because he and 10 other buffalo advocates protested the March 13 hunt and gained national publicity. The public outcry against that hunt and others helped persuade state lawmakers to stop them, he said.

"It's my mind," Lilburn replied.

Lilburn said he went to the Hebgen Lake area to protest what he called a slaughter because he felt the buffalo were on public land using traditional migration routes.

"I was there to try to be an advocate for the bison, who can not speak," Lilburn said. "I wanted to tell the hunters, state agencies and people of this country it (the hunt) was wrong," Lilburn said.

He said he walked between Sleemmer's gun and a buffalo twice in spite of Department of Fish, Wildlife and Parks warden David Etzwiler's warning that he could be arrested. Lilburn said at one point he told Sleemmer "Don't shoot."

They be retried in District Court. Olson said the law was vague and violated Lilburn's right to free speech by punishing him for talking to hunters. Gallatin County appealed Olson's decision to the Montana Supreme Court, which upheld the law. Lilburn appealed the state Supreme Court's ruling on the law's constitutionality to the U.S. Supreme Court, which declined to hear the case.

"... The protest and the five years of judicial proceedings have really helped keep the issue alive and the state's bison control program under a lot of scrutiny," Lilburn said. He said he wasn't sur-