

Landmark Preservation in Denver: You Need a Lawyer!

By Alexandra H. Katich

Historic preservation laws exist at the federal, state and local levels, and present a multitude of issues at each. From challenges under the Takings Clause of the United States Constitution,¹ to battles over the merits of a property's historic significance, to policy debates regarding the balance between upholding the past and modernizing for the future, historic preservation has become a salient topic across the nation.

Although commonalities exist among the more than 2,300 historic preservation ordinances that have been enacted by municipalities across the United States, such laws vary from jurisdiction to jurisdiction.² Denver's landmark ordinance, Chapter 30 of the Denver Revised Municipal Code (the "DRMC" or the "Code"), features elements similar to those in other cities in Colorado and elsewhere.³

Under the DRMC, applications for landmark designation may be initiated by the property owner; the manager of community planning and development; a Denver City Council member; or three or more individuals without legal interest in the property who own property or have a place of business in the City and County of Denver.⁴ In order to establish that it merits preservation, the applicant must show that the subject property (1) Maintains its historic and physical integrity; (2) Meets one designation criterion in two or more of the following categories: History,⁵ Architecture⁶

¹ NATIONAL TRUST FOR HISTORIC PRESERVATION, "Takings Clause," PRESERVATIONNATION.ORG, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/constitutional-issues/takings-clause.html#.VuBRXvk4GUK>.

² NATIONAL TRUST FOR HISTORIC PRESERVATION, "Local Preservation Laws," PRESERVATIONNATION.ORG, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/?referrer=https://www.google.com/#.Vt5BXJMrKgQ>.

³ See NATIONAL TRUST FOR HISTORIC PRESERVATION, "Local Preservation Laws," PRESERVATIONNATION.ORG, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/?referrer=https://www.google.com/#.Vt5BXJMrKgQ>; see also Boulder Municipal Code (BMC), Title 9, Chapter 11; New York City Administrative Code (NYCAC), Title 25, Chapter 3; Seattle Municipal Code (SMC), Chapter 25.12.

⁴ DRMC Sec. 30-4(1).

⁵ "To have historical significance, the structure or district shall be thirty (30) or more years old or have extraordinary importance to the historical development of Denver, and shall: a. Have direct association with the historical development of the city, state, or nation; b. Be the site of a significant historic event; or c. Have direct and substantial association with a person or group of persons who had influence on society." DRMC Sec. 30-3(1).

⁶ "To have architectural significance, the structure or district shall have design quality and integrity, and shall: a. Embody distinguishing characteristics of an architectural style or type; b. Be a significant example of the work of a recognized architect or master builder; c. Contain elements of architectural design, engineering, materials, craftsmanship, or artistic merit which represent a significant or influential innovation; or d. Portray the environment of a group of people or physical development of an area in an era of history characterized by a distinctive architectural style." DRMC Sec. 30-3(2).

and Geography;⁷ and (3) Relates to a historic context or theme.⁸ There are presently more than 300 landmarked properties and 52 local historic districts in Denver.⁹

Landmark designation has numerous effects, many of which can be beneficial to the property owner and the community overall. For example, the property becomes eligible for various tax credits, and the fabric and character of the neighborhood remains intact. However, landmark designation can also encumber what an owner can do with the property. For example, prior to altering an exterior element of the structure (e.g., a window), the owner of a landmarked property must undergo an application and review process with the Denver Landmark Preservation Commission (a division of Denver’s Community Planning and Development Department) and obtain a special permit.¹⁰ The owner may also be required to demonstrate “significant economic hardship” in order to obtain a demolition permit.¹¹

One notable aspect of Denver’s landmark ordinance is that it permits “hostile” designation, i.e., landmark designation initiated without the consent or against the will of the property owner.¹² The City “strongly suggest[s] that if the owner does not consent to designation the applicant should meet and discuss application with owner prior to filing an application”; however, owner consent – or event participation – is not required under the ordinance. Such a framework has made historic preservation emerge as a contentious issue in Denver and elsewhere, where individuals without any legal interest in a property increasingly employ the designation process as a tactic to encumber development.¹³

In 2015, there were several notable hostile designations in Denver that underscored the tensions that can arise under a landmark preservation regime that enables historic preservation where the property owner opposes it. One such matter involved a residence in the West Highland neighborhood, owned by an FGMC client; and another involved a residence in the Jefferson Park neighborhood. In each case, the owner purchased their respective property with the intention of developing it in accordance with the applicable zoning designation; sought a Certificate of Non-Historic Status from the City in order to obtain a demolition permit, prompting neighbors to file an application for landmark preservation under the DRMC; and ultimately ended up in front of Denver City Council for a final determination of the issue on the merits.

⁷ “To have geographical significance, the structure or district shall: a. Have a prominent location or be an established, familiar, and orienting visual feature of the contemporary city; b. Promote understanding and appreciation of the urban environment by means of distinctive physical characteristics or rarity; or c. Make a special contribution to Denver’s distinctive character.” DRMC Sec. 30-3(3).

⁸ DRMC Sec. 30-3.

⁹ HISTORIC DENVER, “Frequently Asked Questions About Historic Designation, HISTORICDENVER.ORG, <http://www.historicdenver.org/resources/landmark-designation-FAQs/>.

¹⁰ DRMC Sec. 30-6(c).

¹¹ DRMC Sec. 30-48(c). Such an economic hardship analysis involves looking at factors such as the “[s]tructural condition of the building and practicality of rehabilitation and reuse[.]”

¹² DRMC Sec. 30-4(1); *see* “Want a Denver Building to get Historic Status? It’s Up to You!,” WESTWORD (Feb. 2, 2016), <http://www.westword.com/news/want-a-denver-building-to-get-historic-status-its-up-to-you-7568910>.

¹³ Boulder, Colorado Springs and Fort Collins are among the Colorado municipalities that allow for designation without owner consent; Aurora, Broomfield and Westminster are among the municipalities that require owner consent. *See* BMC, Title 9, Chapter 11; Colorado Springs City Code, Chapter 7, Article 5, Part 16; Fort Collins Municipal Code, Chapter 14; Aurora Municipal Code, Chapter 146, Article 19; Broomfield Municipal Code, Title 17, Chapter 17-72; and Westminster City Code, Title XI, Chapter 13.

I attended the Denver City Council hearing when our client's West Highland property was at issue, and was struck by the vehemence in which the legal and equitable arguments were cast into the spotlight. On the one side were proclamations about the fundamental rights of property owners to control their property; the problematic way in which the neighbors in this particular instance sought to exploit the landmark preservation process to save the house without involving the property owner at all, despite the City's "strong suggestion" to do so; and the policy contention that non-owner applicants in a hostile designation situation should be required to meet a higher standard under the law. Meanwhile, on the other side were declarations about the need to preserve the character of the neighborhood; expressions of nostalgia for the past; and anti-development sentiments in general.

These broader themes were overlaid on the actual merits of the issue – i.e., whether the property met the landmark preservation criteria, as set forth in the Code – and clearly played a vital role in many City Councilmembers' ultimate analyses. Several Councilmembers made clear their discontent regarding the applicants' disregard for the property owner's interest, evidenced by their having made minimal efforts to involve him in the designation process; one denounced the "scare tactics" several applicants employed by pronouncing that the demolition of unique houses in the area would undercut their own property values as neighbors, despite evidence to the contrary; and another confessed that while he was unsure about whether the legal criteria were met, he was compelled to protect the property because he had memories of riding his bicycle past the home as a child growing up in west Denver.

Our client prevailed in the end. In an 8-4 vote, Denver City Council determined that the property did not merit landmark preservation under the DRMC.¹⁴ Our client was subsequently issued a Certificate of Non-Historic Status, enabling him to move forward with his plans for demolition and development. City Council similarly denied designation for the Jefferson Park property, which was demolished in March of this year with new townhomes planned to take its place.¹⁵

Overall, there is no question that landmark preservation plays an invaluable role in preserving the invaluable; but as our client's matter underscored, there are many interests at stake on both sides of the debate. Although the Denver ordinance is effective in many ways, there is room for improvement. For one, the designation criteria could be more clearly defined so that the analysis of a property's eligibility for historic preservation is not so susceptible to inducing *ad hoc* decision-making grounded in emotion, rather than adhering to the letter of the law and lawmakers' intent. Secondly, Denver may also consider abandoning the procedure through which non-owners can apply for landmark designation without the consent of the property owner. The system as so modified would still function to protect properties that truly merit landmark designation because City staff and elected officials would still have the ability to apply for designation;¹⁶ and such a review of the property would continue to be required prior to the demolition of structure pursuant to existing requirement that a property owner obtain a Certificate of Non-Historic Status

¹⁴ See "Council shoots down historic designation for Lambourn home," DENVER REAL ESTATE WATCH (Dec. 1, 2015), <http://www.denverrealestatewatch.com/2015/12/01/council-shoots-down-historic-designation-for-lambourn-home/>.

¹⁵ See "Denver home that Jefferson Park neighbors rallied to save is demolished," THE DENVER POST (Mar. 3, 2016), http://www.denverpost.com/denver/ci_29590813/denver-home-that-jefferson-park-neighbors-rallied-save.

¹⁶ DRMC Sec. 30-4(1).

as a condition precedent for demolition.¹⁷ Modifying the current landmark preservation ordinance as suggested could result in more consistent and equitable outcomes, and better serve Denver citizens and the City's historic character as a whole.

¹⁷ DRMC Sec. 30-6(1)(c).