

## MEMORANDUM OF LAW

DATE: July 26, 1991

TO: Ron Buckley, Secretary to the Historical Site Board

FROM: City Attorney

SUBJECT: Proposed Historic Resources Ordinance; Denial of Demolition Permit - "Taking"

At the request of Councilmember Tom Behr, you have asked for an opinion from the City Attorney as to whether the provision in the proposed Historic Resources Ordinance that allows the Historic Resources Board to deny the issuance of a demolition permit in some instances, results in a "taking."

### Background

The current Historical Site Board (the "Board") ordinance, Municipal Code section 26.0201 et seq., states that an owner of a designated historic site, must go before the Historical Site Board prior to obtaining a permit for "demolition, substantial alteration or removal of any building, structure or site." Section 26.0205(A). If the Board denies issuance of the permit, the matter goes before the City Council, and Council may sustain the Board's ruling and delay issuance of the permit 180 days, with an additional 180-day extension. At the end of the 360 days, if some accord has not been reached, the City loses jurisdiction over the property under Section 26.0201, and the property owner may obtain the permit, barring any other regulations he or she may have to comply with. Section 26.0205(D).

The proposed new ordinance allows the Board to actually deny issuance of the permit unless the property owner can show that economic hardship would result from the denial. The decision of the Board may be appealed to the City Council.

### Analysis and Conclusion

Kathleen Finley, a legal intern in this office extensively researched the issue raised by Councilmember Behr. I have attached her memorandum to this one and herein incorporate its reasoning and conclusions. Please note: Her reference to Municipal Code cites is from the proposed new ordinance unless specified otherwise.

In short, Ms. Finley has concluded that the provision in question would not be considered a "taking" by a court of law based on the following factors: (1) The United States Supreme Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), concluded that regulations which prohibited certain land uses were valid if they

promoted the public's "health, safety, morals or general welfare" and that historic preservation regulations were valid under this principal, provided they did not deprive the landowner of reasonable use of the property; (2) The proposed ordinance contains a provision allowing a property owner to demonstrate economic hardship and if economic hardship is found, the property owner may obtain the desired permit; and (3) The property owner may appeal the decision of the Board to the City Council.

If you have any questions or wish to discuss this issue further, please contact me.

JOHN W. WITT, City Attorney

By

Allisyn L. Thomas

Deputy City Attorney

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Attachment

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