

Grassroots Historic Preservation

Excerpts from *Grassroots Historic Preservation*, written for the New Mexico Historic Preservation Division by Anita P. Miller, Attorney at Law

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Chapter One: How Can a Citizen Preserve a Historic Residence, Building or Archaeological Site?

Say you have purchased an old home—a "handyman's special," or perhaps an old commercial building in a neighborhood filled with buildings of similar design.

It has been added onto and renovated over the years. You would like to restore it, yet you want modern conveniences. Where do you begin?

Your first step is to visit your city or county planning office. The planners can tell you if there has been a survey of historic properties in the community, if your residence has been identified in the survey and if it is in a designated "historic district." They can give you further information concerning any ordinances or procedures required for homes in that district. If there is no planning office or no local ordinances affecting your property, contact the Historic Preservation Division. Tell the staff person about the location of your property and provide photographs of the exterior and interior of the building, as well as other properties in the neighborhood. The staff person might visit the property. Possibly it can be rehabilitated in a manner consistent with the Secretary of Interior's Standards for the Treatment of Historic Properties. HPD might suggest that you register the property on the National Register of Historic Places and/or the State Register of Cultural Properties. Even if your property does not meet the criteria for listing on the Registers, there are many worthwhile things which you, your community or association can do to preserve it.

Listing a Property In the National and State Registers

Historic preservation became a national priority in the United States with the passage of the National Historic Preservation Act of 1966 (16 U.S.C. Section 470) usually referred to as NHPA. The enactment of NHPA was supplemented by the enactment of similar statutes by state and local governments. The Act established the position of the State Historic Preservation Officer, known as the SHPO. In NM the SHPO is the Director of the Historic Preservation Division of the NM Office of Cultural Affairs.

The NHPA gives the federal government direct responsibility for the identification of historic resources and establishes the National Register of Historic Places. It is the official list of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering and culture that have been deemed worthy of preservation. New Mexico has over 1000 listings in the National Register. Some districts include only a few contributing buildings. The largest district, the Santa Fe Historic District, has 1240 contributing

buildings.

National Register of Historic Places—Criteria for Eligibility

The National Park Service has published the following criteria for listing in the National Register of Historic Places:

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

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

Other criteria are also considered. Ordinarily cemeteries, birthplaces or graves of historical figures, properties owned by religious institutions or used for religious purposes, resources that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature and properties that have achieved significance within the past 50 years are not normally considered eligible for the National Register. Such properties will qualify if they are integral parts of districts that do meet the criteria or if they are considered to be of exceptional significance. For further information about criteria for listing on the National Register, refer to the forms for listing and the guidelines for completing these forms, known as Bulletin 16, published by the National Park Service, which is available from HPD.

State Register of Cultural Properties

The New Mexico Cultural Properties Act (NMSA 1978, Sections 18-6-3 to 18-6-16, 1969) declared that the "historic and cultural heritage of the state is one of the state's most valued and important assets." It set forth policies for preservation, protection and enhancement of structures, sites and objects of historical significance within the state, in a manner conforming with, but not limited by, the National Historic Preservation Act of 1966. The Cultural Properties Act created a Cultural Properties Review Committee (CPRC) to review proposals for preservation of cultural properties, to determine what constitutes historical, archaeological, scientific, architectural and other cultural significance for the purpose of identifying cultural properties, and to prepare and keep up to date the official register, among other functions. Trinity Site on White Sands Missile Range is the location of our nation's first atomic tests. The site is open to the public twice a year.

The official register is the State Register of Cultural Properties, maintained by the HPD. It includes historic, archaeological, architectural, scientific and other culturally significant properties that have been identified and documented in New Mexico. Identification may be made by the land owner, by a community, or by HPD surveys. Although the State Register requirements and benefits are similar to those of the National Register, they differ in emphasizing state and local significance. Also, collections of objects are included on the State Register.

The HPD helps New Mexicans identify, evaluate, register and protect the state's prehistoric and historic properties. One of its most significant activities is nominating and facilitating the nomination of non-federal NM properties to the National Register. Federal agencies recommend the nomination of historic properties on federally owned land, such as on National Forests, and state agencies in cooperation with the HPD recommend the nomination of historic properties on

state land.

A combined procedure for listing on both the State and National registers can be obtained from the HPD.

Q. How do I list my property?

Procedures for listing resources on either the State or National registers can be obtained from the HPD. Both listings involve research, filling out standardized forms, and preparing documentation.

Q. What are the benefits of listing my house in the National Register of Historic Places?

1. Your house will be recognized for its historic, architectural, and/or cultural significance.
2. Your house will receive individual consideration prior to implementation of a federal or federally funded project.
3. Income-producing properties may qualify for federal tax incentives for substantial, certified rehabilitation. If your house is in a district, it must be "contributing" to be eligible for tax credits. (A "contributing" property adds to the historic significance of the district.)
4. Your house will be eligible for a National Register plaque. (You must pay for the plaque.)

Q. What are the benefits of listing my house in the State Register of Cultural Properties?

1. Your house will be recognized for its state or local significance.
2. Your house will receive individual consideration prior to the implementation of state-funded projects.
3. Your house should qualify for state tax credits for certified rehabilitation. If your house is in a registered district, it must be "contributing" to be eligible for tax credits.
4. Your house will be eligible for a State Register plaque. (You must pay for the plaque.)

Q. What will listing on the National and State registers NOT do?

1. Listing will not restrict the rights of private property owners in the use, development, or sale of private historic property, nor require that properties be maintained, repaired, or restored.
2. Individual properties will not be listed if the owner objects, nor will historic districts be listed if a majority of the property owners object.
3. Listing will not automatically invoke local historic district zoning or local landmarks designation.
4. Listing will not stop federally or state funded, licensed, or permitted projects which may affect historic properties, although listed properties must be considered individually to avoid or minimize adverse project effects.

Q. Will I receive any guidance as to how to rehabilitate my property?

The Secretary of the Interior's Standards for the Treatment of Historic Properties, codified as 36 CFR 67, along with Guidelines for Rehabilitating Historic Buildings, were developed by the Department of the Interior to assist in the long-term preservation of a property's significance through the preservation of historic materials and features. These two publications are compiled in a single booklet available from the HPD. The Standards pertain to historic buildings of all materials, construction types, sizes and occupancy

and include both the exterior and interior of the building. They also include related landscaping, the building's site and environment, and attached, adjacent, or related new construction. To be eligible to receive the financial benefits of listing your property in the National Register, you must plan to rehabilitate your property following the Standards and Guidelines.

Q. How can listing of my property on the National and State registers protect it?

Listing of a historic property on the National and State registers does not assure its preservation, nor does it restrict the use of private property by its owner. It merely assures that the impact of federal and state agency actions will be ascertained and mitigated as much as possible. Federal and state actions include federal and state agency projects, federal and state funded projects and projects that require federal or state licenses.

Construction of a new federal courthouse on the same block as a registered commercial or residential building is an example of a federal action that could affect a private property listed or eligible for listing in the National Register. Section 106 of the NHPA requires federal agencies to determine whether properties listed or eligible for listing in the National Register will be affected by this project. The proposed project is reviewed by the HPD, which determines the project's impact on the properties and consults with the agency to develop a mitigation strategy to reduce that impact. The courthouse can still be built.

Section 106 applies only to properties listed in or eligible for listing in the National Register. The New Mexico Cultural Properties Act, (NMSA 1978, at Section 18-6-8.1 [added to the Act in 1986]), requires that the head of any state agency or department with jurisdiction over a land or structure modification that will affect a cultural property gives the HPD an opportunity to participate in the planning of the project so as to preserve and protect, and to avoid and minimize adverse effects on the registered property.

The NM Prehistoric and Historic Sites Preservation Act (NMSA 1978, Sections 18-8-1 to 18-8-7, 1989) offers protection to properties listed on both the State Register and the National Register from projects funded by state agencies or political subdivisions of the state, which includes local governments. It is stronger than the protection offered by Section 106 of the NHPA. These state funds shall not be spent "on any program or project that requires the use of any portion of or any land from a significant [registered] prehistoric or historic site unless there is no feasible and prudent alternative to such use, and unless the program or project includes all possible planning to preserve and protect and to minimize harm to the . . . site resulting from such use" (NMSA 1978, Section 18-8-7, 1989).

Financial Benefits of National or State Register Listing

State Tax Credits

If your property is listed on the State Register, there is also a tax credit benefit available. The NM State Income Tax Credit Income Tax Act and Corporate Income Tax Act (NMSA 1978, Section 7-2-18.2 and 7-2A-8.6, 1984) provides credits on state income tax due from owners of sites or structures listed in the State Register either individually or as a significant or contributing structure in a listed State Register Historic District.

Revolving Loans

The Historic Preservation Loan Act of 1987 (NMSA 1978, Sections 18-6-19 to 18-6-23, 1987) created the New Mexico Historic Preservation Loan Fund, which makes loans available to owners or lessees of properties listed in the National or State registers at

low interest rates for a maximum of five years. You may apply for this program at the Historic Preservation Division and if approved, HPD will work with your local lending institution as a partner in the loan. The loans come from the NM Historic Preservation Loan fund, with money allocated by the State Legislature and funding from a local lending institution (a commercial bank, savings and loan, or credit union). The loans may only be used for certain "eligible" purposes, including architectural, engineering and rehabilitation/repair costs, and the costs of meeting building codes. Ineligible costs include acquisition, legal costs or fiscal agents' fees. Your loan repayments replenish the fund."

Federal Tax Credits

If your commercial, industrial, agricultural or residential property is used to produce income, for example, in rental to persons other than the owner, (i.e., is "depreciable" property); it qualifies for listing on the National Register; and you plan to rehabilitate it according to the Standards for Rehabilitation, you may qualify for a Federal Investment Tax Credit under Section 251(a) of the Tax Reform Act of 1986, (Section 47 of the Internal Revenue Code of 1986).

A tax credit differs from a tax deduction (which lowers the amount of income subject to taxation); a tax credit lowers the amount of tax owed. Two types of tax credits are allowed:

- The 20% rehabilitation tax credit equals 20% of the amount spent in a certified rehabilitation of a certified historic structure.
- The 10% rehabilitation tax credit equals 10% of the amount spent to rehabilitate a non-historic building built before 1936.

A "certified historic structure" is a building listed in the National Register of Historic Places or located within a registered historic district and certified by the US Secretary of the Interior as "contributing" to the historic significance of that district. The planned rehabilitation must meet the Standards for Rehabilitation. An amount equal to or more than the adjusted basis of the property or \$5000, whichever is greater, must be invested in qualified rehabilitation benefits. The "adjusted basis" is the cost of the property, minus the cost of the land, plus capital improvements already made, minus any depreciation already taken by the taxpayer.

If your building is not listed in the National Register individually or as contributing to the district, the building must be certified as non-historic by NPS. You may qualify for the 10% tax credit if the building was built before 1936. This credit applies only to non-residential uses, so rental housing is not eligible, but hotels (i.e., commercial uses,) qualify. The rehabilitation must be substantial, exceeding either \$5000 or the adjusted basis of the property. There are specific tests for retention of external walls and internal structural framework that must be met to qualify.

Federal Grants

The Department of the Interior, through the National Park Service, makes historic preservation block grants to the states. Some of these funds are used by HPD to cover administrative costs. Other funds are passed through to individuals, nonprofit entities, corporations, businesses and certified local governments, which will be discussed later in this booklet. Although these funds are not available to individuals for actual restoration projects (bricks and mortar), they may be available to pay for archaeological and historical surveys, restoration plans and other preservation activities. Thus if your historic or archaeological property is deemed significant, you may qualify for a grant.

A Success Story!

A savvy individual property owner, after listing her property on the National and/or State registers, might be able to qualify for a grant to study the restoration of the property, receive a revolving loan to do the rehabilitation work, and then qualify for federal and state tax credits based on the costs incurred in restoration. One such owner in Albuquerque has utilized these benefits to list and restore several residential properties and one commercial property, and is about to restore a family oratorio (chapel) in Taos!

Financial incentive: USDA Community Development Funds

You may qualify for a grant from the USDA Community Development Program and receive up to \$75,000 per house. Grants are available to individuals to retrofit historic homes so that they are energy efficient and remain in use. You may be required to consult with HPD on your planned activities. Contact the Community Development Officer, US Department of Agriculture (505 Gold SW, Albuquerque, NM 87102; (505) 761-4973)

Archaeological Finds on Private Property

There may be more than one million archaeological sites in New Mexico, many of these on private property. All archaeological sites and artifacts found on private property belong to the owner of the land, with the exception of unmarked human burials and any funerary objects associated with such burials. If someone other than the owner goes on the land without the owner's permission or if artifacts are taken without permission, then that person is subject to civil and criminal penalties for trespass or theft or both.

If someone, perhaps from a university, approaches you about excavating an archaeological site on your property or making surface collections of artifacts, it is necessary first to obtain your written permission. When any person, other than the owner of the land on which an archaeological site is located, wishes to excavate an archaeological site with the use of "mechanical earth-moving equipment" such as a backhoe, front-end loader or other machinery, it is necessary to obtain a permit for the use of such equipment from the Cultural Properties Review Committee. Information about the permitting requirements for archaeological excavations can be found in the Cultural Properties Act (NMSA 1978, Sections 18-6-1 to 18-6-17, 1969) and from HPD. If you are the owner of the property, you do not have to obtain this permit if you intend to excavate the site yourself, provided that this site was not bought or sold to evade the permitting requirements of the law and preamble to the Cultural Properties Act.

Q. What if I find an unmarked burial?

Unmarked human burials located on state or private land, including associated funerary objects and artifacts interred with the burial, may not be excavated, removed, or destroyed by any person, including the land owner, without a permit issued or by the Cultural Properties Review Committee. Removing pottery from a burial and leaving the bones behind, for example, is also illegal.

Each human burial interred in any unmarked burial ground located in NM is accorded the protection of the law (Section 18-6-11.2 of the Cultural Properties Act) and shall receive appropriate and respectful treatment and disposition. Any person who knowingly, willingly, and intentionally excavates, removes, disturbs, or destroys an unmarked human burial without the necessary permits and approvals, is guilty of a fourth degree felony, and shall be punished by a fine of up to \$5000, or by imprisonment for 18 months, or both. If convicted, the offender must forfeit to the state all objects, artifacts, and burials excavated or removed from the unmarked burial ground and all proceeds from any sale of these objects. If the offense occurs on state land, the offender is subject to forfeiture of the instruments (including machinery) used or intended to be used to commit the crime.

If you find bones that might be an unmarked human burial, leave the site undisturbed

and the bones and other objects and artifacts in place. Call the local police, the Office of Medical Investigator, and the NM State Archaeologist and ask them to investigate pursuant to NMSA 1978 Section 18-6-11.2.

Q. What about marked cemeteries?

State law also protects cemeteries, as detailed in *Disturbing a marked burial ground* (NMSA 1978 Section 30-12-12, 19, 1963). A marked burial ground means "any interment visibly marked according to traditional or customary practice," which includes rocks, shells, headstones, and crosses. In addition, a separate statute, *Defacing tombs* (NMSA 1978 30-12-13, 1963), protects any tomb, monument, gravestone, memento, memorial or marker, any ornamental plant, tree or shrub, any fence, post, rail or wall within a cemetery. If you see someone disturbing a marked burial or cemetery, call the local police immediately.

Q. How can I protect an archaeological site on my property?

You can leave it alone. You also can protect an important archaeological site through use of a conservation easement, which is a legal agreement in which the owner of a property voluntarily restricts the type and amount of development that may take place on the property in the future. The property owner still owns the land and can sell it or pass it on to his/her heirs. Conservation easements are discussed in more detail in Chapter 3. *The Prehistoric and Historic Sites Preservation Act* (NMSA 1978, Sections 18-8-1 to 19-8-9, 1989) offers another way to preserve a registered property. If your property is listed on the National or State register, the state and a nonprofit tax-exempt corporation created specifically to preserve significant historic sites may acquire, stabilize, restore or protect it. The state may pay up to 90% of these costs. The title to the property will vest in the state or a "political subdivision of the state" (any local government or state agency) or may be held jointly with the nonprofit corporation if it has put up 10% of the acquisition costs.

Located in Albuquerque, the Archeological Conservancy, a national nonprofit corporation, acquires and preserves archaeological sites. Some sites have been donated to the Conservancy by their owners who receive tax benefits for a charitable donation. In NM, the Archeological Conservancy owns and preserves several properties, including Pueblo ruins and Spanish colonial sites. It also has purchased Fort Craig and Chacoan outliers and turned these sites over to federal agencies to manage. Contact SW Regional Director, Archeological Conservancy (5301 Central Avenue NE, Albuquerque, NM 87108; (505) 266-1540).

Chapter Two: Community-based Preservation Efforts

Individual historic preservation efforts are sustained by community commitment to preservation. A community that preserves its past and retains a uniqueness is usually a livable community as well as a community others like to visit. How do communities foster preservation? Municipalities and counties may set an example by preserving historic and archaeological sites on properties they own, such as in public parks. They also use planning, creation of historic districts and zoning to support the preservation efforts of individuals.

New Mexico affirmed the importance of historic preservation with the enactment of the Historic District and Landmark Act (NMSA 1978, Sections 3-22-1 to 3-22-5, 1965). This act empowers municipalities and counties to preserve, protect and enhance the historic areas within them, to create historic zoning districts and to adopt historic preservation regulations, and to spend public funds for preservation purposes and to exercise the power of "eminent domain." This

governmental power involves taking private property for a public purpose and paying the owner just compensation. It may be used to acquire a partial or total interest in historic landmarks. The Historic District and Landmark Act authorizes municipalities and counties to regulate the exteriors of landmark buildings.

Building a Community Preservation Program: The Historic Survey

A community interested in historic preservation should begin by conducting a survey or study of its historic, architectural and cultural resources. Such a survey will provide the basic information essential to developing an effective, informed preservation program. Many community people are familiar with the resources they want to protect such as old neighborhoods, remaining motels on Route 66 and archaeological sites. A careful survey identifies and evaluates buildings and districts deserving recognition, provides the basis for possible official listing on the National and State registers and helps establish preservation goals. A resource identified through survey listing may also help delay—and perhaps avert—actions that would adversely affect a historic building or district.

Surveys may be conducted by a planning department, a historic preservation review board or committee, a private preservation organization, or others, but all should meet the qualifications set out in 36 CFR 61. The HPD provides assistance in conducting the survey, which includes appropriate forms for identification of historic properties. The survey may be conducted prior to a comprehensive planning process, so as to assure that historic preservation is considered. It may be conducted as part of that process, or subsequent to the adoption of a comprehensive plan that includes a strong preservation policy. In any event, a historic preservation survey should be related to comprehensive planning.

The Comprehensive Plan

Comprehensive planning is at some level a process found in every NM community. The earliest Anasazi communities in NM reflect a "plan." Colonial Spanish communities were governed by a plan for development, as well. The Law of the Indies (Recopilacion De Leyes De Los Reynos De Las Indias, 4 vols., in facsimile edition [Madrid: Cultura Hispanica, 1973]) set forth the design of villages, with plazas in the center, surrounded by private individual homesites with small gardens, and "common lands" for grazing beyond the privately held land. Although the settlers along the Western frontier in the 19th century believed that each person could do what he wanted with his own land, population growth in the 20th century has resulted in the adoption of comprehensive plans and zoning ordinances by many New Mexico communities.

Comprehensive plans can include policies for future land use and development, economic development, transportation, extension of water and sewer services, environmental conservation, affordable housing and other elements. Comprehensive plans can also:

- Help the community develop regulations for preservation.
- Prioritize public preservation efforts.
- Assist property owners in making decisions concerning preservation.
- Motivate community organizations to undertake preservation efforts.

In comprehensive planning, public officials identify structures, sites and areas of historic significance that embody the community's identity. A plan can promote the economic development potential of these properties, both as draw for heritage tourism, and for the use of historic buildings as locations for new businesses when restored. Rehabilitated historic homes may also be a source of affordable housing that enhances the community's ambience.

Moratoria

New Mexico communities threatened by proposed development often impose a moratorium. A moratorium is a resolution or ordinance adopted by a municipality or county that prohibits

development in all or part of the jurisdiction for a specific period of time while the community adopts a comprehensive plan, subdivision regulations, zoning or other strategies to address the perceived threat to the community. The increase groundwater contamination by too many septic tanks, a shortage of water to serve new development, the inadequacy of the existing water, sewer or road systems to serve new residents or the threat of destruction of cultural properties may trigger a moratorium.

Moratoria have been enacted in New Mexico to allow communities to address problems not covered by existing land use regulations. A moratorium could be used to address protection of historic properties, such as land in traditional agricultural uses or acequias, from the threat of unregulated development.

Moratoria are upheld if they are for a reasonable public purpose and for a reasonable period of time, considering the problem being addressed. If these criteria are not met, the enacting jurisdiction could be held liable for a temporary taking of property without the payment of just compensation. It is preferable for a community to plan ahead and be prepared for the consequences of new development, rather than wait until the last minute and enact a moratorium.

Zoning

When properly applied, zoning can be a powerful tool in protecting historic properties. It is important to learn about zoning in your community to understand how it affects (or could even protect) historic resources and archaeological sites. A zoning ordinance affects the use of land. Other land use regulations include building and fire codes, environmental regulations and subdivision ordinances. Zoning is in force in virtually all NM municipalities and counties experiencing urban growth.

Traditional zoning is the division of the land area of a municipality or county into districts or zones, each with a set of regulations governing the development of private land. Traditional zoning separates uses allowed in each district into variations of residential, commercial, industrial, agricultural and other uses. In addition to land use restrictions, each district has its own regulations governing the density of development, maximum size of the buildings, lot size, building setbacks from lot lines, required spaces around the building, etc. Even without the creation of specific historic districts or overlay zones, zoning can assure that a new building will not affect the existing design context of a neighborhood, in terms of bulk, height and other characteristics.

Conditional Uses

Conditional uses are land uses that are acceptable, even complementary, in a district, such as a school or church in a residential zone. Conditional uses are listed in the text of the zoning ordinance along with the "permitted uses," which are those permitted as a matter of right or by right under the ordinance. A conditional use designation might facilitate the rehabilitation and continued use of a historic church in a single family neighborhood. Other conditional uses in a single family residential zone might include accessory living quarters (guest houses) and day care centers. The property owner must apply to the local government for approval of these uses and submit a site plan showing the layout of the land use on the property. There will be notice to neighboring property owners and neighborhood associations and a public hearing on the application, with the right to appeal the decision. Conditional uses may be approved with "conditions," such as provision of adequate landscaping, parking and other traffic control measures.

Planned Unit Development, Floating Zones and Special Use Zones

Some land uses may not be compatible with uses in any neighborhood without special regulations, because of either their size or the nature of the use. These uses are addressed by means of planned unit developments (PUD), which may also be called floating zones, special use zones or special use permits. A community may have criteria for proposed development to be placed on a lot above a specified minimum size, addressing such issues as traffic flow, parking, lighting and buffering from existing uses. The impact of a proposed PUD on a historic property or district could be one of the criteria.

Development proposals are analyzed by a community's planning staff or planning and zoning commission to determine whether they meet specific requirements and to determine the impact. For example, the City of Albuquerque designates neighborhoods that have engaged in sector planning, which is an additional layer of planning for that specific neighborhood, as a "SU2-Special Neighborhood Zone." This is of special relevance to historic preservation. These zones may have more flexible zoning regulations specifically appropriate to the needs of a district, which often do not reflect the separation of uses characteristic of traditional zoning. They may allow mixed uses reflecting the historic character and culture of the district, with residences, stores and offices allowed to exist close to each other as they did when the neighborhood was developed.

Zone Map

Zoning districts must be mapped. These maps are part of the ordinance and are available at all times so citizens can determine the zoning classification of their properties.

Zoning Amendments

Historic preservation is commonly accomplished through a zoning amendment, which must be adopted by the legislative body of the community—the city or village council or the county commission. A zoning amendment includes both an amendment to the text of the comprehensive zoning ordinance and a change to the zoning map. Amendments to change the zoning of an individual property, several properties or an entire zoning district may be initiated by a property owner or owners or their agent, or by the city or county if it believes that existing zoning is no longer appropriate.

Variances

A variance from a land use requirement may allow an owner to restore a historic building, which, without restoration, would no longer have an economically viable use. Since the beginning of zoning in the early 20th century, it was recognized that, although every property in a district would be bound by the same requirements, in some cases exceptions would have to be made. A variance is an exception in which a property owner is exempted from some of the provisions of the zoning ordinance, because the owner will be faced with extreme hardship and/or may lose all economically viable use of the property if compliance with all of the requirements of the zoning ordinance is enforced. Variances should be granted only for uses allowed by the ordinance, such as setbacks or building size.

Historic Districts

The Historic District and Landmark Act of 1965 (NMSA 1978, Section 3-22-3 1965), as stated earlier, enables municipalities and counties to exercise their zoning authority to designate landmarks and create historic districts and regulations in accordance with a comprehensive plan. They may "for the purpose of preserving, protecting and enhancing such historical areas and landmarks, adopt and enforce regulations and restrictions within such districts relating to the erection, alteration and destruction of those exterior features of buildings and other structures subject to public view from any public street, way or other public place." Albuquerque's Old Town, Santa Fe's Downtown Historic District and the Old Mesilla Historic

Residential and Historic Commercial Zones are examples of historic districts.

Historic Overlay Zones

Historic overlay zones are a locally governed form of historic district. They are used within conventional zoning districts, which, because of characteristics particular to that area, need an extra level of protection. In addition to the requirements for the underlying zoning district, overlay zones have an additional overlay of requirements (e.g., design guidelines), which must be followed. Albuquerque's Huning Highland neighborhood is an example of a historic overlay zone.

Certificate of Appropriateness

Structures or other resources within a historic district or historic overlay zone are classified as "contributing" and "non-contributing." Contributing structures reflect the architectural design of the period in which they were built. Non-contributing structures or resources do not contribute to the historic character of the area, having been built earlier or later than the contributing structures, or having been altered extensively so as to destroy their historic integrity. In order to do any construction, addition or renovation to a structure in a historic district or historic overlay zone, the owner of both contributing and non-contributing resources must apply for a certificate of appropriateness. The application is reviewed by a historic review board, Historic Preservation or Landmarks Commission. If the project is approved, the owner receives a certificate of appropriateness. Denial of this certificate may be appealed to the local governing body, and if the denial is upheld, to the state district court.

Demolition in Historic Districts or Historic Overlay Zones

The authority granted by the Historic District and Landmark Act to a local government to review proposed construction, additions, renovation or demolition of historic buildings or structures is one of the most effective tools for historic preservation. Historic zoning ordinances usually provide that individual landmarks, contributing properties and even non-contributing properties in historic districts and historic overlay districts may not be demolished without a certificate of appropriateness or demolition permit approved by the historic preservation review board. Demolition will only be allowed if no alternative can be identified that will produce a reasonable economic return to the owner of the building, or if there is no means of preserving the resource. This is a powerful preservation tool. Complete documentation of the building including photographs may be required before granting permission to demolish a structure.

Conservation Districts

Conservation districts can protect the character of a neighborhood without the burden of meeting the criteria for designation as historic districts. Conservation districts are mapped and have design guidelines to preserve neighborhood identity and character, rather than historic authenticity, as is the case in historic districts and overlay zones. Conservation districts are particularly appropriate for communities that include an older area which has lost a number of its historic buildings, or one that does not qualify for the State or National registers.

Conservation districts are a preservation tool used by citizens who seek to protect their neighborhood's character when it is threatened by deterioration of housing, creeping blight, or new development both within or adjacent to the neighborhood. It is also an appropriate means by which to protect an area adjacent to a historic district or individual landmark or an archaeological site from development that would detract from these sites and landmarks. A historic district or historic overlay zone designation may not be appropriate because the area does not contain a sufficient percentage of intact historic resources or because political support does not exist for historic district designation. It can be used to maintain community character, enhance livability and attract investment. Construction, alteration or demolition affecting the

exterior appearance of a structure within the zone may also require an approved certificate of appropriateness.

Innovative Land Use Regulations—Beyond Zoning

The traditional zoning system—separation of land areas into single use districts—was developed to separate noxious industrial uses from residential uses and to identify commercial areas in growing urban communities in the early 20th century. The strict separation of uses was intended to protect property values as well. Traditional zoning has been rejected in many rural communities, where mixed uses have not had a negative impact on neighboring property and there was sufficient land to buffer one use from another. Many urban communities are seeking more flexible land use alternatives to remedy freeway gridlock and the cost of providing services to sprawling subdivisions.

A perfect example of the use of flexible zoning in a historic area can be found in the Sawmill/Wells Park Sector Development Plan for an area immediately north of Albuquerque's Old Town. Despite years of neglect and its proximity to vacant property contaminated by earlier industrial development, the Sawmill area has retained a strong sense of neighborhood identity. Families have lived in small single family homes for generations. A few vacant properties existed, some because the former structures on them had deteriorated beyond rehabilitation.

A strong neighborhood association, the Sawmill Advisory Council, worked with the City of Albuquerque on the sector plan and land use controls to reflect the community's identity and its desires for future development. The Advisory Council rejected traditional single use zoning, except in a well-preserved and maintained single family area. It opted for mixed use in other developed areas, allowing all kinds of residential buildings (single family, townhouse and apartment) as well as the needed neighborhood commercial uses as defined in the sector plan. The Sawmill group has utilized many sources of funding to purchase 27 acres of former industrial land, now vacant, from the City. This area is planned for both mixed use residential and commercial development and single use industrial development, which will provide jobs to present and future residents.

Design guidelines assure that new multifamily and commercial uses will be compatible in design and scale with existing small single family residences. Senior citizen housing, cottages and "granny flats" will be the rule, not a special exception. The recent construction of affordable townhouse units, integrated into the neighborhood on a vacant lot, have changed the minds of skeptics in the community. Flexible zoning will enable Sawmill/Wells Park to preserve its historic character, while meeting the economic and social needs of a traditional community. Sawmill/Wells Park is also a National Enterprise Community entitling it to accelerated development procedures and tax credits to lure private investors.

Contact:

- Albuquerque Planning Department (505) 924-3860
- Albuquerque Development Services (505) 764-0037
- Sawmill Advisory Council (505) 764-0429

Route 66 Communities

Route 66, a major New Mexico tourist attraction, passes through some of New Mexico's poorest communities and neighborhoods whose original growth and development were tied to the coming of the road, and which dried up with its replacement by I-40 in the 1960s. Route 66 communities are appropriate candidates for conservation districts rather than formal listings on the state or national registers, since many of the remaining structures have been modernized and have lost much of their historic identity.

Several Route 66 restoration projects are underway. Funding and incentives for restoration are available. Each community along the route can participate in this movement to preserve and enhance Route 66 through comprehensive planning efforts. Contact the HPD for information on this study. A historic context that sets up a framework for identifying, evaluating and listing Route 66 properties has been developed by historian David Kammer.

For other Route 66 information, contact:
New Mexico Route 66 Association
1415 Central Avenue NE
Albuquerque, NM 87106
(505) 224-2802

Mora County Development Guidance System

A variation of performance zoning can be found in the Development Guidance System adopted by rural Mora County. An extensive comprehensive planning process preceded the adoption of performance criteria. The resulting Mora County Comprehensive Land Use Plan sets forth strong policies favoring preservation of the historic and cultural traditions of the County. Historic districts and structures were identified and mapped. The plan also contains policies favoring sustainable development and opposing any development that would threaten the County's water supply and quality. The status of water in the County was recognized as a most critical element in preserving the history and culture of the community. The capacity of existing water systems was analyzed as a determinant of future development.

The Mora County Development Guidance System includes performance standards for design and improvements, including development within the identified traditional communities, open space, drainage and flood control, water quality and availability, forest preservation, ridge top development, and liquid waste disposal systems. An environmental assessment, based on these standards, is required before development review can proceed. If and when performance standards are met, the development proposal then must go through a "Compatibility Assessment" in the community where the development is proposed. If the community finds the development compatible, it can be approved administratively, having met the performance standards. If the community finds the proposed development to be incompatible with the existing community's character, then the development application must be heard by the Planning and Zoning Commission in a public hearing. Development may be turned down if the evidence of incompatibility is credible and indicates that the development will violate planning policies. The Mora County plan provides an alternative to traditional zoning, which can allow NM rural communities to preserve their customs, culture and historic communities without using the "z" word. For more information, call (505) 387-2448.

Performance Zoning

With a few exceptions, performance zoning eliminates single or mixed use zoning districts. It may retain them for heavy industrial uses, including manufacturing, mining, oil and gas and chemical industries, solid and hazardous waste disposal, and other land uses highly likely to have a negative effect if located too close. It may also retain a single use zoning district in a developed, well-maintained neighborhood within a community, such as a historic single family area of continuously occupied gracious Victorian homes. Instead of single use districts, planners and local officials, with community input, establish criteria that must be met for a proposed development to be approved. The criteria could include the ratio of the size of the building to the size of the lot, how to buffer use on one lot from adjoining land uses, traffic management and design guidelines.

Transfer of Development Rights

To save a historic property, which, in its present configuration, will provide the owner with no economically viable use, a local government could allow the owner to transfer development rights to another piece of property. This other property may be owned by a municipality or county, or privately owned and/or zoned at a density that would allow the owner of the historic property to get the same economic return the owner would have received if the historic property had been demolished and replaced with an economically viable building and/or use. Development rights are part of the "bundle of sticks" that are property rights. They can be quantified, and then either used by the owner elsewhere, or purchased by the local government or a developer to be used on another property. This was the technique used by the City of New York to save Grand Central Station. In this case the rights to build a skyscraper were transferred to another piece of property and used by the owner to build a new building there.

Subdivision Regulations

Although only a few New Mexico counties have adopted any form of comprehensive planning or zoning, all counties are required to have subdivision regulations. Subdivision regulations address how land will be prepared for development. They govern division of land into smaller tracts for more intense development, as compared to zoning regulations, which address how land will actually be used. In New Mexico, regulation of the subdivision of land within municipalities and immediately adjacent to municipal boundaries is closely tied to the requirement that municipalities must make a master plan for public facilities such as streets, water and sewer systems, parks, drainage, etc. Planning and Platting (NMSA 1978, Sections 3-19-1 to 3-19-12, 1965) discusses the planning and platting (subdivision) jurisdiction of municipalities and requires that municipalities adopt subdivision regulations to assure the "harmonious development of the municipality and its environs." The intent of these regulations is to coordinate development with planned public facilities. While this law makes no specific reference to historic cultural properties, they should be addressed in municipal subdivision regulations.

The New Mexico Subdivision Act (NMSA 1978, Sections 47-6-1 to 47-6-27, 1973, 1995) applies to counties. It requires that counties adopt regulations protecting cultural properties, archaeological sites and unmarked burials, as required by the Cultural Properties Act (NMSA 1978, Sections 18-6-1 to 18-6-7, 1969).

The regulations developed by the County require that a subdivider must submit a plan for the protection of cultural properties, archaeological sites and unmarked burials with the preliminary plat, as required by the Cultural Properties Act (NMSA 1978, Sections 18-6-1 to 18-6-7, 1969). OCA must review the subdivider's protection proposal and give an opinion as to its adequacy. Although the County may approve the subdivision despite an unfavorable opinion from OCA, it may only do so after a public hearing at which the subdivider has the burden of showing that the opinion is "incorrect either as to factual or legal matters" (NMSA 1978, Sections 47-6-9 to 47-6-11, 1995).

In general, county regulations can require that plats be redrawn to leave a greater buffer to protect cultural properties, archaeological sites and unmarked burials. They can require additional mitigation measures as well, as long as they do not result in a "taking" by denying the property owner all economically viable use of the land. Regulation of subdivisions should be tied to comprehensive planning that addresses preservation issues.

Building Codes

Building codes in force in many communities may make it difficult to maintain historic integrity in a rehabilitation of the historic building while still meeting code requirements. Variances that do

not compromise safety may be appropriate. Your local historic preservation review board and the HPD can assist in striking a balance between restoration or demolition to meet code. Preservation of historic buildings also may require compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. Sections 12101 to 12213 (ADA). The statute was designed to prevent discrimination against the disabled in housing, employment, public accommodations and other areas. Historic buildings such as hotels, which are places of public accommodation, must conform to certain standards of accessibility to handicapped persons.

Any project to alter or restore a historic structure for public accommodation purposes must be reviewed by the state or local entity that enforces the ADA. As in the case of building codes, to comply with ADA standards, some historic characteristics of the building may have to be compromised.

The ADA requirements are set forth in the Americans with Disabilities Act Accessibility Guidelines (ADAAG) and the Uniform Federal Accessibility Standards (UFAS), which are available from the HPD, the New Mexico Construction Industries Division, or a local building department.

Archaeological Preservation Ordinances

Archaeological preservation ordinances contain requirements for the preservation of archaeological sites present on a property proposed to be developed, or which are discovered during the course of development. The City of Santa Fe and Santa Fe County are the only jurisdictions in New Mexico that have adopted archaeological preservation ordinances.

Albuquerque's LUC ordinance also has provisions to protect archaeological sites.

The Archaeological Review Committee of the City of Santa Fe reviews development applications within three mapped archaeological review districts. Owners who propose development in these districts must obtain Archaeological Clearance Permits, based on studies performed at their expense. They may be required to submit Treatment Plans if proposed development will impact significant archaeological sites on the properties. Contact City of Santa Fe Planning Division (200 Lincoln Avenue, Santa Fe, NM 87501; (505) 984-6657).

Santa Fe County Ordinance 188-8 also requires archaeological review of development in archaeological districts. Contact Santa Fe County Land Use Department (102 Grant Avenue, Santa Fe, NM 87501; (505) 986-6225).

Another model Archaeological Protective Ordinance exists in Pima County, AZ, which kicks in when grading permits are obtained, rather than when rezoning or development approval is sought for a property that contains an archaeological site. Contact:

The Archaeological Conservancy
5301 Central Avenue, Suite 1218
Albuquerque, NM 97108-1517
(505) 266-1540).

Financial Incentives For Local Governments

Many communities do not move forward with historic preservation because they lack the financial resources to do so. Funding is available from a number of federal and state programs that have specific historic preservation intent. These funding sources, although not intended specifically for historic preservation, can help a community to preserve a landmark or a historic district when used alone, or in combination with other programs. This guidebook will only discuss a few of these resources. (A more comprehensive list of resources for historic preservation is included in Appendix A.)

Certified Local Government Program

The Certified Local Government (CLG) Program, a cost-effective local, state and federal partnership assists hundreds of diverse communities across the nation to preserve their unique

historic character. This national initiative provides valuable technical assistance and small grants to local governments seeking to keep for future generations what is important and significant from their past.

Local governments can receive Historic Preservation Fund (HPF) Grants, which are passed through the State Historic Preservation Offices (SHPO), such as HPD, via the National Park Service. The HPD is required to pass 10% of the HPF funds it received to CLGs. To qualify for these funds, a municipality or county must be a Certified Local Government (CLG). To be certified as a CLG, a municipality or county must have explicit historic preservation policies, adopt a historic preservation ordinance in compliance with the NM Historic District and Landmark Act and New Mexico's Certified Local Government Regulation (4NMAC 10.10), and establish a historic review board. The local government is then certified by HPD and the National Park Service. In New Mexico the current CLG communities include Albuquerque, Deming, Las Vegas, Village of Lincoln in Lincoln County, Santa Fe, Silver City and Taos. Contact the Historic Preservation Division for information regarding this program, which assists preservation planning at the local level.

Federal Grants to Certified Local Governments

Local governments can receive Historic Preservation Fund Grants, which come from the Department of the Interior's National Park Service, and are passed through the HPD. The HPD is required to pass 10% of the NPS grant money it receives to qualified Certified Local Governments (CLGs). To be certified as a CLG, a municipality or county must have explicit historic preservation policies, adopt a historic preservation ordinance in compliance with the NM Historic District and Landmark Act, and establish a historic review board. The local government is then certified by the HPD. The HPD would like the NM Legislature to adopt a statute authorizing unincorporated historic villages to achieve certified local government status so that they, too, can qualify for historic preservation fund grants.

MainStreet

The MainStreet Program is administered by the NM Economic Development Department. The Main Street concept was launched by the National Trust for Historic Preservation in 1977, with the goal of creating economic revitalization for abandoned and underused downtowns, many of which met the criteria for listing in the National Register. New Mexico's MainStreet program is affiliated with the National Trust, which continues to provide information and technical resources to Main Street programs in many states.

The NM MainStreet Coordinator works closely with the HPD and the New Mexico Community Development Council, which develops criteria for designation of communities to participate in the program. To qualify for the MainStreet program, a community must show a commitment to the redevelopment of its main street, or to some other area of the community which, if redeveloped, could have economic benefits for the community. This commitment is demonstrated when the community hires a full or part-time MainStreet Director, whose salary is paid by the local government (e.g., Bernalillo) or by the private sector (e.g., Roswell).

Once the commitment is demonstrated, the MainStreet office will pick up the tab for experts to help public officials and local business people to engage in the following four-point approach to preserve and rebuild historic downtown.

1. **Design:** MainStreet teaches communities to restore their old buildings, respecting the past and their architecture, and also helps them look for new opportunities and possibly designs.
2. **Promotion:** MainStreet helps communities to develop an image for them-selves and to market it. For example, MainStreet helped Gallup promote the fact that it is a trading post community catering to Navajo and Zuni peoples and provides Indian arts and crafts to the general public.

3. **Organization:** MainStreet works to involve the entire community in the revitalization effort, partnering with the local Chamber of Commerce, local government and other business groups.
4. **Economic restructuring:** MainStreet works with local government and business groups to find ways to change the economy of downtown so that people will return. This may include enhancing an area with improved lighting, more entertainment (theaters and restaurants), altering pedestrian and traffic flows, and taking measures to decrease crime.

Successful NM MainStreet communities include Gallup, Deming, Bernalillo, Roswell, Las Vegas, Silver City, Aztec, Los Alamos, and the Nob Hill district in Albuquerque. Cuba, Lovington, Portales and Santa Rosa benefit from MainStreet programs for communities under 5000 in population. MainStreet has assisted a multi-community "collective" ♦the Salt Mission Trail communities of Moriarty, Mountainair, Estancia and Willard ♦to develop a regional tourist destination centered on the missions at Abo, Quarai and Gran Quivera.

The communities get no hard cash but receive expert assistance in locating and leveraging public and private funding sources to implement their revitalization efforts. Examples include grant programs from the NM Economic Development Department (local government division), National Trust for Historic Preservation, and private foundations.

Silver City, Las Vegas, Bernalillo and Gallup have been particularly successful in restoring historic downtown buildings, which are now used for retail, offices and hotels. They have created community pride as well as attracted tourists. Contact: MainStreet Coordinator (NM Economic Development Department, (505) 827-0300).

Transportation Related Programs

New Mexico's historic roads, rails and railroads are a significant part of its heritage. Many Americans seek experiences to recreate an earlier time, when travel was slower and each stop along the way offered something new. Preservation, rehabilitation, and restoration of sites along historic roads and railroads can create attractions for these travelers and enhance stagnant economies. Several federal, state and local programs provide incentives for such preservation and revitalization.

TEA-21 and ISTEA

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (23 U.S.C. Section 133) and its successor, the Transportation Equity Act for the 21st Century (TEA-21) (PL105_178), provide federal funding, which is then administered by the states. Each state must prepare a state transportation plan, which includes transportation plans prepared by metropolitan regions and rural regions. In New Mexico, grants under TEA-21 and ISTEA are administered by the State Highway and Transportation Department (NMSHTD), although some grants have been available to other state agencies.

ISTEA dedicated 10% of its funding for enhancement projects, some of which involve historic preservation. New Mexico projects using these funds include the creation and public art in the Route 66 communities of Gallup, Tucumcari, Moriarty and Albuquerque. TEA-21 retained the enhancement program and added transit-related historic preservation and bike and pedestrian access improvements. This enhancement could make it possible for NM communities to restore their historic railroad depots and bridges. ISTEA also included the National Scenic Byways Act, which funded the National Scenic Byways Program. This program made grants to states (a) with their own scenic byways programs or (b) to those that identified an agency to establish and administer such a program. State roads designated under a state program had to have scenic, historic, recreational, cultural, archaeological or natural qualities, and had to be designated through legislation or other official declaration. The Indian Pueblo Cultural Center received

two National Scenic Byways Grants for a corridor management study of Route 66, from Albuquerque to Arizona and from Albuquerque to Tucumcari. These funds support preparation of the application to designate Route 66 as a State and National Scenic Byway.

The National Scenic Byways program funds scenic pullovers, special signs and added lanes to accommodate travelers, among other projects, on nationally designated Scenic Byways. New Mexico's Scenic Byways are the Billy the Kid Trail, El Camino Real, Jemez Mountain Trail and Santa Fe Trail. When NMSHTD applies for National Scenic Byways grants through the Scenic Byways Coordinator, it must have a minimum of 20% in matching funds from local governments or private foundations available for a project when a grant application is submitted.

Projects of relevance to historic and archaeological preservation that are eligible for TEA-21 grants include the following:

- Construction along the scenic byway of facilities for the use of pedestrians and bicyclists, rest areas, turnouts, highway shoulder improvements, passing lanes, overlooks, and interpretive facilities.
- Protecting historical, archaeological and cultural resources in areas adjacent to the highways.
- Developing and providing tourist information to the public, including interpretive information about the scenic byway.

New Mexico communities with transportation-related scenic and historic sites should develop plans for their preservation that can be implemented partially with TEA-21 transportation enhancement funds and Scenic Byway grants.

Contact:

Program Coordinator NMSTD

State Scenic Highways Program

P. O. Box 1149 Santa Fe, NM 87505

(505) 820-2021

NM Division Office, Federal Highway Administration

604 W. San Mateo Road

Santa Fe, NM 87505 (505) 820-2021; 1-800-4-BYWAYS

New Mexico Scenic and Historic Byways Program

New Mexico established its own Scenic and Historic Byways Program in 1991, which is administered by the NMSHTD. Funds to protect the scenic, historic, recreational, cultural, natural and archaeological integrity of New Mexico's highways and adjacent areas are provided by the Federal Highway Administration. Annual funding is available for safety improvements, construction of pedestrian_use facilities, highway improvements to enhance scenic/historic area access, protection of historical and cultural resources, and for the development of tourist information. Criteria for nomination of a byway include the following.

- Does it possess one or more of the following characteristics: unusual or distinctive scenic, recreational, historical, educational, geographical, archaeological, natural, cultural, or ethnic features?
- Is there strong local support with proponents demonstrating coordination with relevant agencies? A road will not be designated if there is no assurance (through planning) that its scenic or historic characteristics will be preserved and enhanced.

State Scenic & Historic Byways

- Abo Pass Trail
- Billy the Kid Scenic Byways
- Camino Real Historic Trail
- Corrales Road Scenic Byway

- Dry Cimarron Scenic Byway
- Enchanted Circle Scenic Byway
- Geronimo Trail
- Gila Cliff Dwellings
- Narrow Gauge Scenic Byway
- Jemez Mountain Trail
- Lake Valley Back Country Byway
- Mesalands Scenic Byway
- Route 66 Historic Trail
- Salt Missions Trail
- Sandia Crest Scenic Byway
- Santa Fe National Historic Trail
- Sunspot Scenic Byway
- Turquoise Trail
- Wild River Back Country Byway

Local Government in Action

The City of Albuquerque established an Urban Enhancement Trust Fund (UETF), which is used to fund beautification and preservation projects in the City. The source of the fund is a 1/4 cent tax, approved by the City's voters; UETF funds have been used to (a) finance a survey of 750 homes in the Huning-Highland neighborhood, and (b) rebuild the Mountain Road Streetscape in the Sawmill/Wells Park area. Contact Capital Implementation Program (City of Albuquerque, P.O. Box 1293, Albuquerque, NM 87103; (505) 768-3830).

Chapter Three: Private Preservation Initiatives

As summarized by the State Historic Preservation Officer recently in the Albuquerque Tribune, "historic places get preserved because people care about them." Although one person can make a difference, the political process responds better to organized efforts to achieve goals. If you are serious about preservation, examine your opportunities and seek out friends, neighbors and community leaders whose names carry weight. Their support will speed planning for historic preservation, development of historic and archeological preservation ordinances, and adoption of appropriate land use regulations that may include historic preservation districts and overlay districts and crusades to accomplish identified preservation projects.

Preservation Associations

Private historic preservation entities are organized as 501(c)(3) or 502 (c)(4) corporations and are exempt from payment of federal income taxes. They are organized exclusively for religious, charitable, scientific, and other "public benefit" educational purposes and are an essential element in historic preservation. These organizations cannot try to influence legislation nor can they be involved in political campaigns. They can, however, (a) inform and educate their communities about buildings, structures, objects, sites and districts that are archaeologically, historically and culturally significant, and (b) spearhead registration of historic districts and properties and develop design guidelines.

Historic preservation organizations should have officers and a board of directors to set goals, policies plans and programs. If possible, they should be salaried. Incorporation is desirable to avoid the possible liability of officers and members.

Historic preservation organizations can undertake projects such as:

- writing a series of newspaper articles describing the history and architecture of

significant structures, sites and places in the community or region

- publishing a newsletter containing items on preservation projects in the community, letters to the editor about preservation issues, and articles about opportunities for preservation or threats to historic resources
- preparing educational programs for local schools
- coordinating public events, e.g., awards ceremonies honoring people active in preservation, re-enactments of historic events, or living history presentations that educate the public about local or regional history
- conducting tours of historically significant sites and places
- preparing brochures about historic sites and places
- presenting workshops on preservation law and preservation techniques
- organizing a visiting lecturer series

These organizations may also assist the HPD and local governments in performing the actual historic surveys required for listing on the State and National registers. Other community service projects include collecting and distributing reference materials, and creating resources, for example:

- a preservation reference section in your local library
- a conservation easement program
- a revolving fund for preservation. Repayment of these loans provides funding for future projects.
- a list of architects, contractors, painters, etc., skilled in preservation

Roswell

In Roswell, the Historic Preservation Committee of the Historical Center for SE NM created the Downtown Historic District and prepared nomination applications to the State Register of Cultural Properties for the District and 295 contributing and 97 non-contributing buildings within it. The Committee has also nominated rural properties outside the city and developed design guidelines for district properties

The Committee has been the driving force in the drafting of a Historic Overlay Zone Ordinance for the City of Roswell to apply to the District, which would include the design guidelines already developed. Even if the City ultimately does not adopt the ordinance, the Historic District will continue to exist, and private property owners within it may reap the benefits of listing.

Contact: Historic Preservation Committee, Historical Center of SE NM (200 North Lea Avenue Roswell, NM 88201).

The New Mexico Route 66 Association, dedicated to the restoration and promotion of Route 66, is planning major events to celebrate the 75th anniversary of the construction of the route.

"Lincoln Days," sponsored by the Lincoln County Historic Society, celebrates historic events in the Village of Lincoln connected with Billy the Kid.

El Rancho de las Golondrinas, a living history museum owned by a private nonprofit association, is open to the public. Volunteer members dress in costume and portray people living and working in an agricultural community in colonial NM.

Conservation easements, land trusts and water banking

Conservation easements, land trusts and water banking may be used by private associations to achieve preservation of historic properties and acequias. Conservation easements were

discussed briefly in Chapter 2 in relation to archaeological sites. In New Mexico, unlike in other states, the state and local governments are not authorized by statute to hold conservation easements. They may be held by qualified private associations, however.

Conservation Easements

A conservation easement is a legal agreement in which a property owner voluntarily restricts the type and amount of development that may take place on the property. Each easement's restrictions are tailored to the particular property and to the interests of the individual owner. The NM Cultural Properties Preservation Easement Act (NMSA 1978, Sections 47-12A-2 to 47-12A-6) defines a cultural properties preservation easement, as "preserving the historical, architectural, archaeological or cultural significance of real property."

To understand the easement concept, think of owning land as a "bundle of sticks." A landowner may sell or give away the whole bundle, or just one or two of the sticks or rights. Those conveyed may include the right to construct buildings or to restrict access. A property owner may donate or sell certain sticks or rights while retaining others, by granting an easement to an appropriate third party, known as the "holder" of the easement. The specific rights given up by a property owner when granting a conservation easement are spelled out in each easement document.

A historic preservation easement may be used to protect the facade and surroundings of a historic structure listed as eligible for listing in the National Register. It may be used to protect an archaeological site on private property from future subdivision and development, or used to preserve a Civil War battlefield as open space, free of modern structures.

The NM Cultural Properties Preservation Easement Act provides for the creation of easements for the purpose of protection of "structures, places, sites or objects having historical, archaeological, scientific, architectural or other cultural significance." Only qualified Section 501(c)(3) nonprofit corporations, nonprofit associations and nonprofit trusts may hold these easements.

Q. Why should I donate a conservation easement for historic preservation? What are the financial benefits of cultural preservation easements?

Federal Tax Benefits

A historic property owner can benefit from conveying a limitation on the use of property and then continuing to use it as before. The owner may claim a federal income tax credit on the difference in value between the property as it is and the highest and best use of the property as determined by an appraiser, with the approval of the Internal Revenue Service. Federal tax law also encourages the donation of preservation easements by permitting charitable deductions for such donations, under Section 170(h)(1)(A) of the Internal Revenue Code.

Estate Tax Benefit

The donation of a conservation easement for historic preservation will allow the property to be taxed for estate tax purposes on the basis of its restricted use, rather than its "highest and best use," which may be in more intensive development. Many historic NM properties have been lost because, after the death of a family member, the heirs could not afford to pay an estate tax based on the highest and best use of the

property. A conservation easement enables the tax to be assessed on the current use as restricted, allowing the family to retain the property. Even if a property owner does not want to restrict the property during his or her lifetime, the owner can still specify in his or her will that a charitable gift of a conservation easement be made to a qualifying organization upon the owner's death.

Local Property Tax Benefit

Property tax assessment is usually based on market value, which reflects the development potential of the property. If a conservation easement reduces the development potential of the property, it may reduce the level of assessment. The actual amount of reduction, if any, depends on many factors, however. State law and the personal attitudes of local officials and assessors may influence or determine the decision to award property tax relief to easement grantors.

Q. What are the obligations of easement holders and grantors?

The 501(c)(3) organization that accepts a preservation easement also accepts affirmative responsibilities, such as the duty to enforce any restrictive clauses in the easement document. For example, the organization may have the duty to review and approve proposed alterations (usually exterior) to a historic structure, or to review and approve any development on a historic or archaeological site, or the responsibility to inspect a property periodically to ensure that the terms of the easement are being met. The property owner may be required to record the easement, to insert the easement in a subsequent deed, to meet certain insurance requirements, or to give the preservation entity that holds the easement a right of first refusal before selling the property.

Qualified Easement Holders

The only preservation association currently the holder of a cultural properties easement pursuant to the Cultural Properties Preservation Easement Act is the Historic Santa Fe Foundation, which holds an easement to the Original Trading Post (201 W. San Francisco Street, Santa Fe, NM 87501). Contact the Historic Santa Fe Foundation (545 Canyon Rd., Santa Fe, NM 87501; (505) 983-2567).

Other organizations hold conservation easements in order to preserve "natural or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, or protecting natural resources" in NM, under the terms of the Land Use Easement Act (NMSA 1978, Sections 47-12-1 to 47-12-6, 1991).

Land Trusts

Land trusts, are "qualified" nonprofit organizations (under Section 501(c)(3), which may hold cultural preservation easements as well as land use easements under NM law. A land trust is a community-based private nonprofit corporation that acquires and manages land or interests in land to preserve the community's unique natural or historic heritage. Some land trusts work to preserve park land or wildlife habitat; others focus on scenic areas or farmland; others endeavor to protect historic structures or battlefields. The community of concern to a land trust may be a single neighborhood, the watershed of a river, or an entire state. Each land trust strives to preserve land for the benefit of all in the community, land that helps give definition to the

community and determines its overall quality of life.

The Taos Land Trust has protected several farm and ranch properties from development by means of conservation easements. It is also seeking conservation easements for archaeological sites. The Santa Fe Conservation Trust has acquired a conservation easement on a part of the Old Santa Fe Trail and Los Trigos Ranch in San Miguel County and is seeking additional easements on other parts of the Trail.

Contact:

Taos Land Trust
P.O. Box 376
Taos, NM 87571
(505) 751-3134

Santa Fe Conservation Trust
P.O. Box 1901
Santa Fe, NM 87504
(505) 989-7019

A land trust has been created by the Sawmill Advisory Council (discussed above) to secure ownership of vacant land previously used for industrial purposes. The acquired land is adjacent to properties being restored with consideration for historic design. National land trusts active in New Mexico include the Trust for Public Land and the Nature Conservancy. Land use easements may protect cultural sites as well, if the land covered by the easement includes historic or archaeological structures or sites.

Water Banking or Water Rights Pooling

The private acequia associations of northern New Mexico have shown an interest in preserving both the acequia structures and the water rights held by acequia members. Acequias (irrigation ditches) form the basis of community and cultural life in much of rural New Mexico. The acequia, the community and local culture are threatened when individual owners of water rights in the acequia transfer them to others outside of the acequia. Locally administered water-banking or water rights pooling is one of several types of legal mechanisms that allow a water right to be temporarily held and managed by a local water-management entity, such as an acequia association. The intent is for the "banked" water right to be managed or reallocated for the benefit of the other members of the entity, or for the benefit of the local community as a whole. The water right owner has continued use of the water right so that it remains legally viable for future use and thus remains a part of the resource base of the community. Acequia lenders are just beginning to design such mechanisms in response to the threat of development interests that seek to transfer water rights away from their area of origin.

A conservation easement, land trust or water banking program, or a land use easement, are among the most effective methods of achieving the preservation of historic structures and districts. Through all types of private land use control, significant open spaces, historic building facades, and even acequias can be preserved at low cost to governments and private

preservation organizations, and to the financial benefit of the property owner.

Contact:

Northern New Mexico Legal Services
P.O. Box 5175
Santa Fe, NM 87502-5175
(505) 982-9886).

Resources for Private Preservation Associations

New Mexico Historic Preservation Division

HPD offers assistance to those interested in forming a historic preservation association and incorporating it as a nonprofit corporation under Section 501(c)(3) or (c)(4). It has programs and seminars on statewide preservation issues and provides technical assistance, working closely with individuals and associations who need information on appropriate restoration methods and materials for particular historic properties. Staff archaeologists give technical assistance to archaeological societies and others interested in protecting archaeological resources.

Contact:

New Mexico Historic Preservation Division
228 East Palace Avenue
Santa Fe, NM 87501
(505) 827-6320

National Trust for Historic Preservation

The NTHP is the premier national provider of information about historic preservation and can provide technical assistance to local preservation associations. The Trust sponsors many programs and seminars nationwide, and publishes Preservation Magazine. It also has grant programs available to individual communities and private associations for historic properties such as barns and railroad depots.

Contact

Southwest Field Office, National Trust for Historic Preservation
500 Main Street, Suite 606
Fort Worth, TX 76102
(817) 332-4038).

New Mexico Historical Society

The Society is a private organization that advises historic preservation associations. It encourages greater appreciation of New Mexico's historical, architectural and cultural heritage. It publishes a newspaper, La Cronica of New Mexico, publishes books in cooperation with the New Mexico Museum, sponsors an annual conference, administers the HPD program that places plaques on historic properties, raises funds to buy and preserve historic landmarks, encourages the preservation and collection of historic

documents, artifacts and other published materials, and presents special events.

Contact

New Mexico Historical Society
P.O. Box 1912
Santa Fe, NM 87504

Archaeological Society of New Mexico

This Society has as its purpose the preservation of historic and prehistoric remains, landmarks and monuments and the education of public about these resources. It sponsors seminars and workshops and provides a local and regional network for individual archaeology societies.

Contact

Archaeological Society of NM
P.O. Box 3485
Albuquerque, NM 87190

New Mexico Heritage Preservation Alliance

The Alliance is a non-profit organization formed in 1995 to serve as a policy forum for heritage preservation. Its purpose is to promote awareness and respect for New Mexico's cultural significance and distinct character. It has annual meetings to discuss state historic preservation issues.

Contact

New Mexico Heritage Preservation Alliance
P.O. Box 2490
Santa Fe, NM 87504
(505) 989-7745).

Millennium Trails

Millennium Trails is a national initiative of the U.S. Department of Transportation, in partnership with the Rails to Trails Conservancy and the American Hiking Society. One criterion for nomination is the trail's significance in defining aspects of America's heritage and culture. The NM Route 66 Association applied for designation for New Mexico Route 66. Technical assistance is available for restoration and marketing of a designated road.

Contact

NM Division Office, Federal Highway Administration
604 W. San Mateo Road
Santa Fe, NM 87505

Chapter Four: A Little Law for the Layperson

Some basic legal concepts applicable to historic preservation are described in brief in this chapter.

Private Property Rights

When government regulation deprives a landowner of all economically viable use of his or her land, it is a "taking" and requires payment of compensation to the owner under the Fifth Amendment of the US Constitution and Article II, Section 20 of the NM Constitution. The Fifth Amendment also prohibits the federal government from "depriving any person of life, liberty or property" without due process of law. The Fourteenth Amendment extends this prohibition to the States: "Nor shall any state deprive any person of life, liberty or property without due process of the law." Since local governments are created by the state, the Fourteenth Amendment applies to them as well. A "due process" clause is also included in the NM Constitution (Article II, Section 18).

Procedural Due Process

Government must follow certain procedures when it enforces a police power such as the regulation of property, which includes historic preservation.

Most historic preservation ordinances involve some limitation of private property use. For example, to renovate a building locally designated as a landmark, the owner must obtain a certificate of appropriateness from a local historic preservation commission. Whether or not the certificate is obtained will have an impact on the owner's use of the property and thus affect private property rights. A local ordinance might also require maintenance of the property. Whenever a historic review board makes a decision to apply a specific regulation to an individual piece of property or historic district, it must comply with the following procedures:

1. **Notice**
2. Notice must be given to the affected property owner and others that a public hearing will be held concerning the actions proposed by the government concerning the property. The notice must be in writing and published in a newspaper of record. It may also have to be sent to affected property owners.
3. The notice requirements for historic preservation by local NM governments are governed by NMSA 1978 (Section 3-21-6 (B), 1965) of the State's Zoning Enabling Act. The notice must be published within 15 days of the scheduled hearing. There must also be notification by mail of the owner and other property owners within a specific distance of the subject property. Municipalities and counties may enact more extensive notice requirements, such as requiring that a sign be posted on the property for which a decision is being made, and requiring that notice be given to more people than required by the state law.
4. **Public Hearing**
5. Affected property owners must have the right to be heard before the decision making body in a public meeting, which has been subject to notice as described above, also pursuant to Section 3-21-6 (B).
6. **Sworn Witnesses**
7. Witnesses before a legislative or administrative hearing must swear to tell the truth, and are considered to be "under oath," just like in a courtroom.
8. **Right to Cross Examine Witnesses**
9. A person appearing before a legislative or administrative hearing has the right to cross examine witnesses who oppose his position.
10. **Findings of Fact**
11. Due process requires that the decision-making body in government make written findings, giving the reasons why it has made its decision after evidence at a public hearing. These findings must be based on a record of the evidence submitted. Usually the record is made by tape recording. In some communities, only summary minutes are kept. Often persons appearing before a quasi-judicial body will bring a court reporter to record the meeting, to ensure that there is an accurate record.

12. A court may reverse a governing body decision if no findings were made or if it determines the findings were inadequate, based on the evidence presented at the hearing. Usually, however, the court will send the case back to the decision-making body requesting that it make written findings, which can then be appealed again by the losing party.
13. **Unbiased Decision**
14. To assure that a quasi-judicial decision is unbiased, individual members of the body hearing the case should not be contacted by any of the parties. Such individual contact is called "ex parte." If ex parte contact has occurred, then the decision-maker contacted has an obligation to make a written record of the contact and put it into the record of the proceeding. Of course, it is permissible for an applicant to do a "show and tell" presentation before the entire decision making body, taking them to the site in question.
15. If due process has not been followed, a decision may be reversed when the losing party appeals the case to court. For a detailed discussion of Procedural Due Process, see Bradford White and Paul W. Edmondson, *Procedural Due Process in Plain English* (Washington: National Trust For Historic Preservation, 1994).

Substantive Due Process

Although local governments have the authority to regulate the health, safety and general welfare—their police powers, there are limits to such authority. Most land use regulatory laws and ordinances actually say that their purpose is to "protect the public health, morals or safety." If an ordinance or regulation has no real or substantial relation to those purposes, or is an invasion of a property owner's rights, the court can invalidate the law, determining it to be a violation of "substantive due process."

To make a substantive due process claim, the federal courts have generally required that a property owner have an "entitlement." Thus the owner must show that all requirements of a law, ordinance or regulation have been met, but approval has still been denied.

Equal Protection

The Fourteenth Amendment to the US Constitution provides that "no state shall . . . deny to any person within its jurisdiction equal protection of the laws." This amendment was originally intended to protect the rights of the freed slaves after the Civil War, but Congress wrote it to cover the rights of all persons. The federal government is also held to the same standard of equal protection as state governments.

A historic preservation ordinance could be challenged on the ground that it violates equal protection, because it may not allow the owner of a designated historic property to renovate the property in the same manner as the owner of a non-historic property. Unless the ordinance infringes on a fundamental right, such as freedom of religion or speech, or is based on a suspect class, such as race, the government need only show that there is a rational relationship between the classification and a legitimate governmental objective, and the rational relationship need not be a strict one.

Freedom of Speech

The First Amendment to the US Constitution protects "freedom of speech." The Supreme Court has determined that this guarantee protects forms of activity that communicate a message, such as books and newspapers, as well as signs, and some types of artistic expression, including design, painting and sculpture as well as drama and dance. Some speech is not protected, such as defamation of character, obscenity and inciting to riot. Even protected speech may be regulated as to time, place, and manner if the government has a legitimate reason for doing so (*Hudgens v. NLRB*, 424 U.S. 507, 520 [1976]).

Freedom of speech becomes a historic preservation issue when architecture, as a form of

expressive speech, is regulated. When courts determine whether protected speech is being unconstitutionally restricted or denied, they balance the interests of the speaker against the interest of the government. Historic preservation is a valid government objective, while freedom of speech is a guaranteed right. As long as the regulation addresses the time, place and manner of presentation of the speech, it will usually be upheld. Most historic preservation ordinances restrict construction, alteration and demolition in defined districts. If the architect can find unrestricted expression elsewhere in the community, the architectural restrictions in the historic district will most likely be upheld.

Freedom of Religion

The First Amendment of the US Constitution also prohibits Congress from making any law "respecting the establishment of religion, or prohibiting the free exercise thereof." The NM Constitution contains an equivalent provision at Article II, Section 11.

The First Amendment clauses relating to religion are known as the "Establishment" and "Free Exercise" clauses. Since Spanish missionaries followed the Conquistadors to New Mexico in the 16th century, their churches are among the earliest and most significant historic structures in the State. Historic preservation of churches sometimes comes into conflict with freedom of religion when local historic preservation ordinances, which may restrict how renovation may be done or prohibit demolition, conflict with the wishes of a congregation as to the expansion, design or use of the church premises.

In recent years, many courts found that designating a church as a historic landmark violated the First Amendment right to free exercise of religion. For example, the Supreme Court of the State of Washington upheld the designation of a church as a historic landmark, but prohibited enforcement of preservation regulations until the building was no longer used primarily for religious purposes (*First United Methodist Church v. Seattle Landmarks Preservation Board*, 887 P. 2d 473 [Wash. 1995]). The Washington Supreme Court also found that designating the exterior of a church as a historic landmark violated its state constitution (*First Covenant Church v. City of Seattle*, 787 P. 2d 1252 [Wash. 1990]). The Massachusetts Supreme Court had no objection to the designation of the exterior of a church as a historic landmark, but found that the application of a historic preservation ordinance to the interior of the church violated free exercise of religion (*Society of Jesus v. Boston Landmarks Commission*, 564 N.E. 2d 571 [Mass. 1990]). The less impact a regulation has on the actual practice of a religion, the more likely it is to be upheld, as long as the intent of the regulation is not to inhibit religion.

In New York City, the officials of a church in a high rent commercial area, which had been designated a historic landmark, wanted to demolish the church's community building, replacing it with a skyscraper office building. They justified the proposed demolition by saying that the congregation had dwindled, and that the church no longer had the financial resources to conduct its charitable activities, which were part of its religious mission. It therefore needed to replace the community building with an office building to obtain needed revenue. The U.S. District Court for the Southern District of New York refused to allow the demolition, stating that the designation of a religious facility as a landmark "creates no more than an incidental burden on the practice of religion that does not require the state to come forward with a compelling reason justifying its action" (*Rectors, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 963)[SDNY 1989], affirmed 914 F.2d 348 [2d Cir. 1990]).

Soon after the St. Bartholomew opinion, the US Supreme Court issued an opinion which reinforced the application of historic preservation ordinances to church buildings, even though it had nothing to do with either historic preservation or church buildings. In *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court strengthened the principle that "neutral laws of general application" can curtail religious activities without triggering strict scrutiny. Historic preservation ordinances, which are characterized as zoning, are laws of

neutral application since they are not specifically intended to interfere with religious practice. They apply to all historic sites that meet their criteria, regardless of whether the site has a religious connection.

In response to the Smith case, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. Section 2000bb et seq. RFRA required a government to accommodate religious conduct unless it could prove that:

1. it had a "compelling interest" to justify a law or regulation; and
2. the law was the "least restrictive means" to achieving its compelling interest.

RFRA was invalidated by the US Supreme Court in *Flores v. City of Boerne* (Texas 117 S. Ct. 2157, 1997), a case that did involve historic preservation. A Catholic mission style church in a historic district sought a building permit to enlarge the church building. The City denied the permit on historic preservation grounds. The church filed a lawsuit, asking a U.S. District Court in Texas to declare that the City's denial of the permit was a violation of RFRA.

The US Supreme Court declared RFRA unconstitutional as a violation of the constitutional doctrine of "separation of powers" and restored the law in the Smith case. The Supreme Court also stated that RFRA required state and local governments to accommodate religion more than was required by the Constitution. The courts never reached the issue of whether Boerne's historic preservation ordinance resulted in a substantial burden on the church's free exercise of religion.

Appeals of Local Government Land Use Decisions

Each local government provides for appeals of decisions of planning or zoning officials and planning commissions, to the local governing body ♦ the city, town or village council or the county commission. (NMSA 1978, Section 3-21-8, 1965). Decisions of the local governing body may be appealed to the State District Court (NMSA 1978, Section 3-21-9, 1965). The District Court may only review whether the governing body acted fraudulently, arbitrarily or capriciously, whether the order (decision) was, supported by substantial evidence, and generally, whether the action was within the scope of its authority. The District Court may not substitute its judgment for that of the governing body (*Singleterry v. City of Albuquerque*, 96 NM 468, 632 P. 2d. 345 [1981] and *Downtown Neighborhoods Association v. City of Albuquerque*, 109 NM 186, 783 P2d. 962 [Ct. App. 1989]).

Appeals of land use decisions are brought under NMSA 1978 (Rule 1-074, 1995). Although the Court will generally limit its review to the entire record made before the local agencies and governing body, it may ask for additional evidence from the parties. This is why it is important for the local government to keep extensive written records of all information submitted to it by an applicant for a zoning, amendment, subdivision, conditional use, special use, variance, certificate of appropriateness or building or demolition permit. Tape recordings of public meetings, which can be transcribed later, are advisable. "Findings of Fact," the reasons why a decision was made, are an essential part of the record reviewed by the Court.

Although, the Court may not substitute its judgment for that of the governing body, citizens often win appeals when there has been denial of due process of law, an inadequate record of all proceeding or failure of the local governing body to make findings of fact to justify its decision.