

City of Rapid City, South Dakota

# Historic Preservation Program Development: Customer Service Review and Program Administration

## *Final Report and Recommendations*



Prepared by



September 9, 2014



City of Rapid City, South Dakota

## **Historic Preservation Program Development: Customer Service Review and Program Administration**

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# Executive Summary

## Findings

### *General findings*

- a. Impact of State Attorney General's opinion. According to the State Attorney General's opinion, the Historic Preservation Commission (HPC) is an advisory body without authority to act on a permit. The major impact of the State Attorney General's opinion is the determination that *State law "does not vest local historic preservation commissions with the final authority to grant or deny a permit."* It is only the "Memorandum of Joint Powers Agreement" (MOA), between the City and the State, which is set to expire shortly, that authorizes the Commission to issue a finding that either allows or denies a building permit.
- b. Customer service impacts of existing processes. The existing historic preservation review processes have poor customer service impacts at all levels and among most participants in the process.
  - ✓ Applicants are faced with approval procedures that seem vague, cumbersome and arbitrary. The Historic Preservation Commission members have sharply divided opinions on the interpretation of federal Secretary of the Interior Standards and State Historic Preservation Office and City approval criteria. As a result, City staff is burdened with the administration of lengthy and often contentious public meetings and inefficient review procedures.
  - ✓ In spite of the shortcomings of the HPC public hearing process and review procedures, the City's planning staff is very helpful and accommodating in facilitating the review process on behalf of applicants.
  - ✓ Reviews within the West Boulevard Historic District are limited to exterior changes that require building permits. Items that don't require building permits, such as painting, fencing, doors, and landscaping, appear to create extensive incompatibilities throughout the District.
  - ✓ Many of the homes in the West Boulevard District are in disrepair. The lack of clear and objective design standards to guide homeowners and excessive and inconsistent HPC approval criteria may be responsible for inhibiting needed repairs by adding significantly to their cost.
  - ✓ Interior reviews of downtown buildings by the HPC extend beyond the scope of the public interest and create friction between building owners and HPC members. The National Park Service already has a process in place to approve building interiors when an applicant is seeking Federal tax credits.

- c. Structure and size of the Historic Preservation Commission (HPC). The structure and size the existing Historic Preservation Commission are not suitable for it to effectively deliver customer services:
- ✓ The two Rapid City National Register Historic Districts (West Boulevard and Downtown) are distinctly different yet a single Commission serves both districts.
  - ✓ Stakeholders and property owners from each of the two districts are not fairly represented on the HPC as active participants in design review and planning processes.
  - ✓ HPC members are appointed for three year terms, but can be reappointed without a limit on the number of consecutive terms that can be served.
  - ✓ HPC reviews are not facilitated by clear and objective design review guidelines, resulting in often contentious disagreements among HPC members regarding their role, authority, and approval criteria.
  - ✓ Almost the entire HPC focus is on project review, which consumes almost all of its energies. Public education and advisory assistance to property owners are perhaps equally important functions that can benefit the preservation of the historic districts.
  - ✓ To fulfill their public obligations, Commission members are in continuous need of training in historic preservation and public outreach methods and should be required to attend City orientation sessions and annual training sessions.
  - ✓ In contrast to the HPC, the Historic Sign Review Committee operates very efficiently as an independent board with exceptional customer service.
- d. Staffing of the Historic Preservation Commission (HPC). The staff size is adequate to handle the customer service demands. In the last three years the Department has instituted new professional qualifications required for planners. Staff is well-grounded in the core planning principles, but specialized continuing education in historic preservation and downtown development is essential to the effective administration of the program and delivery of superior customer service. Upon expiration of the MOA between the City and State Historic Preservation Office (SHPO) at the end of this year, the need for specialized staff expertise will increase significantly, as the City's review responsibilities increase under the 11.1 standards. The City will rely less on the SHPO for decision making support and will shift to an advisory HPC review function with administrative authority to act on permits to be assumed by City staff.
- e. Historic Preservation as an Economic Development Tool. Economic development is a crucial link to historic preservation.
- ✓ The "Main Street Approach," promulgated through the National Main Street Center links historic preservation to commercial economic development in downtown locations. In particular, "Design" is one of the elements of the four-point Main Street Approach: "Organization, Promotion, Design, and Economic Restructuring." Main Street



encourages design review and the creation of design guidelines for preservation of historic buildings, in addition to non-historic rehabilitations and new construction. This comprehensive approach integrates downtown development with historic preservation and is very appropriate for Downtown Rapid City's continuing economic development.

- ✓ Reasonable historic preservation design standards that are cognizant of costs, without compromising historic integrity, in the primarily residential West Boulevard District could foster rehabilitation of homes and stimulate ongoing neighborhood investment and revitalization.
- ✓ Rapid City lacks local financial incentives for historic preservation, such as, donations of façade easements, grants for historic building rehabilitations, and competitive façade improvement grant awards. Examples of these incentive programs can be found elsewhere in South Dakota.

### ***Positive aspects and opportunities***

- a. Preservation of Rapid City's unique heritage is of paramount importance to the community and its elected officials.
- b. Historic Preservation Commission (HPC) members are enthusiastic and committed to preservation.
- c. The City's planning staff offers in-house professional planning services.
- d. The City's staff provides outstanding customer service to applicants and through its administrative support to the HPC. The staff keeps the historic preservation program well organized and on schedule.
- e. The planning staff has an excellent working relationship with the staff of the State Historic Preservation Office (SHPO).
- f. Outstanding rehabilitation examples in both historic districts demonstrate past successes of historic preservation review by the HPC.
- g. Destination Rapid City and the Rapid City Downtown Association offer ongoing opportunities to sustain the vitality and preservation of Downtown.
- h. The expiration of the MOA at the end of this year creates an opportunity for the City to enact its own unique 11.1 review process by ordinance.
- i. The City's new Comprehensive Plan calls for a specific plan for downtown development. The timing of the Comprehensive Plan recommendation fits the recommendations concerning downtown development and historic preservation in this report.

### ***Negative aspects and issues***

- a. Although the HPC has been in existence for almost 40 years, the Commission has never adopted clear guidelines for design review. HPC members are divided on their interpretations of the Secretary of Interior Standards, with directly opposing positions. One faction is very strict in the application and interpretation

of the Standards, and the opposing faction is very accommodating to working out “prudent and feasible alternatives.” Design review guidelines can provide clear and consistent interpretation of the Standards.

- b. The review and approval processes for applicants are perceived as vague, complex, cumbersome, lengthy, arbitrary and often costly. These difficult processes thwart attempts by staff and HPC members to facilitate customer service.
- c. Even the most simple and obvious approvals must undergo a rigorous process of public review under the existing process.
- d. Excessive rehabilitation standards - whether written, interpreted, or based on personal preference - will hinder investment in historic residential properties.
- e. The City has not taken advantage of financial incentives used by other South Dakota communities to foster rehabilitation of historic property, such as donation of historic façade easements and façade improvement grants.
- f. Despite the longstanding historic preservation efforts in the West Boulevard Historic District, the overall impacts on neighborhood investment and improved design are not as expected. Many properties are in marginal condition. In many instances, the exterior features that are exempt from review (colors, fencing, etc.) detract from the overall neighborhood attractiveness and historic integrity of the District.
- g. Historic preservation review is not integrated into the Zoning Ordinance. The only local ordinance is the 1975 ordinance creating the Rapid City Historic Preservation Commission. The City has no ordinance that prescribes the review process; the City authority is based upon its MOA with SHPO and State law.
- h. The Downtown Historic District comprises a small area of Downtown. The review process does not cover other vital areas of concern for impending Downtown redevelopment.
- i. The present organization of the HPC does not fully recognize the distinct differences between the essentially commercial Downtown District and the essentially residential West Boulevard District.
- j. Despite the rigorous review processes involving the SHPO, the HPC, planning staff, and the public, the City Council can, upon appeal, overturn any final determination.
- k. The Commission is focused almost entirely on its review function without much effort given to other preservation activities, such as public outreach, workshops, displays, awards, and other worthwhile activities to promote preservation.
- l. Although the Historic Sign Review Committee offers excellent customer services and functions extremely well, its functions could be absorbed by the HPCs.

## **Recommendations**

- a. Terminate the Memorandum of Joint Agreement (MOA) between the State and the City, which is set to expire on December 31, 2014.
- b. Adopt the recommended ordinance in Appendix E.

- c. Prepare and adopt design review guidelines for the West Boulevard Historic District and a separate set of design review guidelines for the entire Downtown area including the Downtown Historic District.
- d. Prepare and adopt staff guidelines for administrative approvals of minor exterior improvements.
- e. Provide professional-level continuing education in historic preservation, urban design, and main street management to the Planner.
- f. Provide ongoing training for members of both Design Review Boards (HPCs).
- g. Develop a comprehensive historic preservation public education program and annual action program of activities.
- h. Establish an awards program.
- i. Establish a Main Street Program.
- j. Prepare and adopt a Downtown Development Plan.
- k. Prepare and adopt a West Boulevard Neighborhood Conservation Plan.
- l. Create financial incentives to foster rehabilitation of historic property, such as, donation of historic façade easements and competitive grant awards for façade improvements and building rehabilitation.



# **Historic Preservation Program Development: Customer Service Review and Program Administration**

## **Section 1. Scope of this Report.**

On December 18, 2013, the City received a response to its request to the State Attorney General regarding the operations of the City's Historic Preservation Commission and its compliance with state law found in SDCL 1-19A-11.1 (see Appendix C). After Mayor Sam Kooiker discussed the State Attorney General's findings and other customer service issues with the City's Director of Planning, Brett Limbaugh, they determined that an overall assessment of the Historic Preservation Commission processes be performed by Lehe Planning, LLC, of Birmingham, AL, which offers a range of planning consulting services.

Jim Lehe of Lehe Planning had previously been retained by the City in 2010 to evaluate the City's planning and development review processes and again in 2013 to report on the City's progress on improvements to those processes. Among other findings in his 2013 report, Lehe remarked on the lack of guidance for historic reviews, as follows:

"The City's historic district lacks published design review guidelines. This can create arbitrary actions and hinders the ability of the Historic Preservation Commission and the Historic Sign Review Committee to implement sound design objectives."

In March of this year, the Mayor again retained Lehe Planning as the City's Consultant to focus on issues related to the operations of the Historic Preservation Commission. Specifically, the Mayor charged the Consultant with developing a "more customer service-focused process" for the administration of historic preservation programs, a process that applies the standards of "feasible, reasonable, appropriate, and prudent." The Mayor finds these four themes are necessary for a positive customer service experience, "not only to external customers but also internal customers," such as staff and members of the Historic Preservation Commission.

Among other concerns, Mayor Kooiker suggested this report include customer service reviews of the following specific items (see "General Findings" in Section 3 of this report):

- a. The "practical impacts of the AG's opinion" and its local implementation. The Mayor is especially concerned with the impacts on "customer service," that might result by an increased burden on the applicant.

- b. The customer service impacts of the existing ordinance, processes, and procedures of the Historic Preservation Commission, including these processes, in particular:
  - the application process for obtaining a permit,
  - the scope and depth of Commission examination of applications, and
  - the hearing process.
- c. How the structure and size of the Historic Preservation Commission can improve customer service.
- d. Staff support to the Historic Preservation Commission.

The Mayor added an additional element to this scope, as follows:

- e. “(T)reat the preservation of our local history ... as the true tool for economic development that it is -- I truly believe Historic Preservation can be a positive thing.”

## **Section 2. Historic Preservation Background**

In 1974 the State Historic Preservation Center (now the State Historic Preservation Office or SHPO) of the South Dakota State Historical Society (also referred to as the Office of History) surveyed the Downtown and West Boulevard Districts and added them to the National Register of Historic Places maintained by the National Park Service. Since 1974, the status of individual properties as contributing or not contributing to the historic districts has changed, and many individually-listed historic properties have been added to the National Register. Major changes occurred in 1992 with the resurvey of the West Boulevard District and its expanded boundaries, and in 1998 with the resurvey and expanded Downtown Historic District.

In March of 1975, the City adopted an ordinance creating the Rapid City Historic Preservation Commission (Title II, Chapter 2.68 of the Rapid City Municipal Code), as authorized by State law in SDCL 19B-2. The Historic Preservation Commission (HPC) is a board of local volunteers with interest and experience in historic preservation. The HPC organizes local preservation activities and participates in the required SDCL 19A-11.1 review of building changes which could affect historic properties (see Appendix A). The City’s Department of Community Planning and Development Services provides administrative and professional planning support to the HPC and maintains a website for the City’s historic preservation program at <http://www.rcgov.org/Growth-Management/hpc-home-page.html> .

On March 6, 2007, the State Historic Preservation Office executed a Memorandum of Joint Agreement (“MOA”) with the City of Rapid City that established

procedures that are unique to Rapid City to satisfy the City's compliance with required SDCL 19A-11.1 reviews of projects that could adversely affect historic property. The 2007 MOA had a five year term that was extended by a 2013 addendum to December 31, 2014. When the current MOA expires, the City must follow the standard procedures for preservation of historic property found in SDCL 19A-11.1, which will substantially change existing procedures.

Rapid City is one of eighteen South Dakota communities that participate in the State's Certified Local Government (CLG) program. The State first recognized Rapid City as a CLG in 1986. The program provides Federal grants and other State funding sources to help the Rapid City HPC protect historic properties. For example, in 2008, the Rapid City HPC used a CLG grant to document and determine the National Register eligibility of a prehistoric rock art site, and in 2014, the HPC initiated a resurvey and National Register District update for the West Boulevard Historic District. Rapid City receives an annual CLG allocation of approximately \$20-25,000 in funds (that is equally matched by in-kind services provided by City staff and the HPC) to support its local preservation programs. In addition to its project review responsibilities, the State encourages the Commission to be active in public education of local residents about historic preservation through workshops, tours, and other activities. Some South Dakota communities have awards programs to recognize outstanding preservation projects and individual contributions to historic preservation. Past and present education programs facilitated by the Rapid City HPC include the following examples:

- Booths at home shows and conventions, including special events during Historic Preservation Month in May of each year;
- The Rapid City HPC website (in progress);
- Walking tour pamphlets; and a
- Digital walking tour at [www.picturercpast.com](http://www.picturercpast.com).

Historic Downtown Rapid City is active and vibrant. Unlike many other downtowns nationwide which have experienced decline, it remains the center of business, government, and entertainment, and is a favored tourist destination for the region.

Founded in July 2008, Destination Rapid City has become the lead organization for promoting the continuing vitality of Downtown Rapid City and strives to strengthen Downtown's presence in the community. This organization's stated mission is to "foster Downtown Rapid City through economic development, creating a vibrant business district rich in appeal for the Rapid City community and its visitors." Through its partnership with the Rapid City Downtown Association of businesses and merchants, the Chamber of Commerce, the Convention and Visitor's Bureau, and City Hall, Destination Rapid City helps facilitate revitalization and development of Downtown through improved design, business development, and community events. It led the implementation of a Business Improvement District, a creative method for financing public infrastructure

improvements, and the development of Main Street Square, Downtown's plaza for community events, sometimes referred to as a "community living room." The impacts of Destination Rapid City projects and programs have been crucial to the successful preservation of the Downtown Historic District and ongoing economic health of the greater Downtown Rapid City area.

## **Section 3. Evaluation**

### **Background Research and Information Gathering**

To conduct a thorough assessment, the Lehe Planning team first reviewed extensive background information and documents provided by Brett Limbaugh, Director of the Department of Community Planning & Development Services, and Sarah Hanzel, the Planner assigned to historic preservation. The Consultant carefully reviewed the documents and resource materials listed below, among others. Most of these background materials were reviewed prior to Mr. Lehe making an on-site visit:

1. State of South Dakota, Office of the Attorney General. "Memorandum Opinion – Construction and Application of SDCL 1-19A-11.1 by Municipalities and Local Historic Preservation Commissions." Paul S. Swedlund, Assistant State Attorney General. December 17, 2013. (See Appendix B – State Attorney General's Opinion).
2. U.S. Department of the Interior, National Park Service. "National Register of Historic Places Inventory – Nomination Form: Rapid City Historic Commercial District (Downtown)." June 1974.
3. U.S. Department of the Interior, National Park Service. "National Register of Historic Places Inventory – Nomination Form: Rapid City West Boulevard Historic District." June 1974.
4. State of South Dakota, State Historic Preservation Office, State Historical Society. South Dakota Local Preservation Handbook. 1995, revised 2008.
5. State of South Dakota, State Historic Preservation Office, State Historical Society. Statewide Preservation Plan 2011-2015. 2011.
6. U.S. Department of the Interior, National Park Service. The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings. By Kay D. Weeks and Anne Grimmer. Washington, D.C. 1995.
7. U.S. Department of the Interior, National Park Service. "Introduction to Federal Tax Credits for Rehabilitating Historic Buildings - Main Street Commercial Buildings." Washington, D.C. Revised 2012.
8. "Memorandum of Joint Powers Agreement between the City of Rapid City, SD, and the Office of History, State of South Dakota." February 19, 2007.
9. "Addendum #2 to the Memorandum of Joint Powers Agreement between the City of Rapid City, SD, and the Office of History, State of South Dakota." December 2, 2013.



10. City of Rapid City, SD. "Bylaws of the Historic Preservation Commission of the City of Rapid City, South Dakota." 1999, as amended 2013.
11. Comprehensive Preservation Plan for Rapid City, South Dakota. Michelle L. Davis. August 1993, revised April 2009.
12. City of Rapid City, SD. Rapid City Comprehensive Plan: Plan Rapid City. Adoption draft, April 2014.
13. Design Guidelines for the West Boulevard Historic District. Winter & Company. Boulder, CO. Draft #1, April 4, 2012.
14. City of Rapid City, SD. "Historic Preservation Commission Annual Report 2012." 2013.
15. National Trust for Historic Preservation, National Main Street Center. "Main Street Programs." <http://preservationnation.org> . May 2014.
16. South Dakota Codified Laws, as amended. Chapters 1-19A Preservation of Historic Sites, 1-19B County and Municipal Historic Preservation Activities, 9-55 Business Improvement Districts, 11-4 Municipal Planning and Zoning.
17. Advisory Council on Historic Preservation. Section 106 of the National Historic Preservation Act of 1966, as amended. 36 CFR Part 800 (2013).
18. Rapid City, SD, Code of Ordinances, as amended. Title 2 Chapter 2.68 Historic Preservation Commission and Title 17 Zoning.

The Consultant further researched comparable programs to identify demonstrated methods successfully implemented by other communities within the State of South Dakota and nationwide, including the following programs:

1. City of Bellevue, WA. Zoning regulations for "Special and Overlay Districts."
2. Borough of Carlisle, PA. Borough of Carlisle Historic District: A Reference Guide for Property Owners. No date.
3. Fairfax County, VA. "Overlay and Commercial Revitalization District Regulations."
4. City of Gadsden, AL. Zoning regulations for "Overlay District/Design Review."
5. City of Knoxville, TN. Zoning regulations for overlay districts.
6. Louisville Metropolitan Government. "Standard Design Guidelines" for historic districts.
7. City of Madison, AL. Madison Station Historic District Design Review Guidelines. Schneider Historic Preservation, LLC. December 2010.
8. City of Urbana, IL. Zoning regulations for Design Review Board.
9. City of Sioux Falls, SD. Downtown Design Guidelines. Main Street Sioux Falls.
10. City of Sioux Falls, SD. 2015 Downtown Plan: A Vision for our Future.
11. City of Deadwood, SD. Downtown Design Guidelines. Community Services Collaborative. March 1991.
12. City of Deadwood, SD. Residential Neighborhood Design Guidelines.

Jim Lehe performed an on-site assessment that was facilitated by the City's planning staff during the entire week of May 12<sup>th</sup> through 16<sup>th</sup>, 2014, beginning early in the mornings and ending late each evening, while staying in the heart of the Downtown Historic District at the Historic Alex Johnson Hotel. During this period, Lehe interviewed 21 individuals, including seven public officials (the Mayor, the City Council liaison to the Historic Preservation Commission, the Historic Preservation Commission Chair, three other members of the Historic Preservation Commission, and one member of the Historic Sign Review Committee), five Planning Department City staff, two SHPO staff (by telephone conferences) and seven individuals from private sector interests affected by the review processes, as listed on the following table:

**Table 3-1. Interview Participants**

<b>Name</b>	<b>Position</b>	<b>Sector</b>	<b>Organization</b>
Sam Kooiker	Mayor	Public Official	Office of the Mayor
Brad Estes	City Council liaison to HPC	Public Official	City Council
Shawn Krull	Commission chair	Public Official	HP Commission
Jean Kessloff	Commission member	Public Official	HP Commission
Bill Freytag	Commission member	Public Official	HP Commission
Lance Rom	Commission member	Public Official	HP Commission
Lee Geiger	Committee member	Public Official	Historic Sign Review Committee
Brett Limbaugh	Director	City Staff	Community. Planning. & Development. Svcs.
Sarah Hanzel	Long Range Planner I	City Staff	Community. Planning. & Development. Svcs.
Kip Harrington	Long Range Planner III	City Staff	Community. Planning. & Development. Svcs.
Jeanne Nicholson	Administrative Assistant to HPC	City Staff	Community. Planning. & Development. Svcs.
Brad Solon	Building Services Manager	City Staff	Community. Planning. & Development. Svcs.
Kate Nelson	Restoration Specialist	State Staff	State HP Office
Chris Nelson	HP Specialist	State Staff	State HP Office
Dan Senftner	President and CEO	Private	Destination Rapid City
Jim Shaw*	President	Private	West Blvd. Neighborhood Association
Vince Braun	Member	Private	West Blvd. Neighborhood Association
Peter Anderson	Downtown builder and developer	Private	Mac Construction Co.
Wade Lampert	Downtown business manager	Private	Hotel Alex Johnson
Justin Henderson	Downtown business owner	Private	Independent Ale House
Dan Tribby	Downtown business manager	Private	Prairie Edge Trading Co. and Gallery
*former Mayor			

During the on-site visit, City planning staff led Mr. Lehe on a tour of the two historic districts, all of the individually-listed historic properties, and the larger Downtown environs. Towards the end of the week-long visit, a second tour was made to create a photographic record of select locations. During this same week, he also attended public meetings of the Historic Preservation Commission and the Historic Sign Review District Board for first hand observations of the review processes, paying particular attention to customer service.

Many telephone and email communications with the City's planning staff took place during the preparation of this report. In addition, the Consultant participated with the planning staff in five lengthy conference calls with the individuals assigned to Rapid City by the State Historic Preservation Office (SHPO), Kate Nelson and Chris Nelson.

Lehe Planning also retained Downtown Management Consultant Cathy Back of Gadsden, Alabama, to advise on the organization of the Rapid City Downtown District, design review processes, and downtown development programs. Ms. Back reviewed the background materials, interviewed SHPO staff, and offered suggestions for reorganizing Downtown Rapid City under the “Main Street Approach,” which is later discussed in the findings and recommendations of this report.

## General Findings

- a. Impact of State Attorney General's Opinion. The State Attorney General's opinion (see Appendix C) explains the processes required under SDCL 1-19A-11.1 (see Appendix A) by responding to a series of questions presented by the City. The major practical impact this opinion might have on customer service or local implementation of historic preservation is the role set forth for the Historic Preservation Commission. The State Attorney General's opinion states that under SDCL 1-19A-11.1, the Commission should function as an advisory body in the local review process, without the authority to act on a permit. According to the opinion, *State law “does not vest local historic preservation commissions with the final authority to grant or deny a permit.”* It is only the “Memorandum of Joint Powers Agreement” (MOA) between the City and the State that authorizes the Commission to issue a finding that either allows or denies a building permit, as set forth in paragraph 6B of the MOA. This agreement is set to expire at the end of 2014, however. At that time, the Commission's advisory role will be established according to the authorized municipal historic preservation activities found in SDCL 19B et seq.

The questions and responses in the State Attorney General's opinion are paraphrased here:

- 1) *What State administrative rules (ARSD) apply to SDCL 1-19-11.1 reviews?*

ARSD 24:52:07:02 (see Appendix B) forms the basis for the Case Reports that must be applied to all local reviews:

“24:52:07:02. National historic preservation methods required. The methods, policies, technical notes, preservation briefs, and guidelines used by the National Park Service of the U.S. Department of the Interior and the Advisory Council on Historical Preservation created by Pub. L. No. 89-665 (October 15, 1966) as amended to December 22, 2006, are the methods to be used to protect state register properties. These methods are published in the Historic Preservation Fund Manual Appendices (2007) and in The Secretary of the Interior's

Standards for the Treatment of Historic Properties, National Park Service, revised 1995.”

2) *Who bears the burden of proof in the 11.1 review process?*

Generally, the applicant bears the burden of proof that all conditions have been met for the City to approve a permit for a proposed project. If the City, with the advisement of the State Historic Preservation Office, determines that a proposed project could have an adverse impact on a historic property, the applicant must further demonstrate that “no feasible and prudent alternatives” exist and the project “includes all possible planning to minimize harm to the historic property.”

3) *Does the City have the authority or duty to deny a permit for a project that could have an adverse impact on a historic property?*

The City has both authority and duty to deny a permit for a project that could have an adverse impact on a historic property if a “feasible and prudent alternative” exists to eliminate or mitigate the adverse effects.

4) *What is a feasible and prudent alternative?*

A “feasible and prudent alternative” is not just a speculative alternative; it is one which is “capable of being done,” according to the State Attorney General. This broad standard is “highly individualized” and, as such, must be applied on a case-by-case basis and consider technical feasibility of the alternatives.

5) *What planning must be undertaken by an applicant to minimize harm?*

If a proposed project could have an adverse effect on a historic property, the applicant must “undertake all possible planning to identify methods to minimize harm or mitigate the adverse impacts.” The opinion explains this through case examples where the applicants thoroughly investigated all alternatives and carefully assessed all possible impacts before deciding on the best and most feasible plan to minimize harm. This standard also applies to demolition and new construction.

6) *Who decides if all planning has been undertaken to examine all feasible and prudent alternatives?*

SDCL 1-19A-11.1 does not grant the Historic Preservation Commission the authority to approve or deny a permit. The Commission is a recommending body charged with carrying out the required 11.1 review

processes and fact finding to aid the decision maker(s). The authority to act on a permit is reserved to the City Council, and the Commission is limited to making an advisory report to the governing body. Although not mentioned in the opinion, the Council can appoint an individual or board to make such determinations on its behalf, but it has never done so. The only City ordinance addressing the powers and duties of the Historic Preservation Commission can be found in chapter 2.68 of the City Code, but those powers do not delegate the Council's authority to grant or deny the issuance of building permits to the HPC. This delegation of decision-making authority has been temporarily assigned through the end of 2014 to the Historic Preservation Commission through the "Memorandum of Joint Powers Agreement" (MOA) between the City and the State.

- 7) *Are individual members of the Historic Preservation Commission permitted to visit a project site and meet with the applicant and other interested parties outside of official public meetings?*

The State Attorney General bases his opinion on the assumption that the Commission acts on an advisory basis and does not exercise final decision-making authority. As previously stated, that authority is granted to the Council (or board or individual appointed by Council). On the basis of this assumption, the opinion is to allow individual commissioners to negotiate with applicants. As a matter of practice, however, Rapid City has discouraged this type of individual negotiations and favored open discussions at public meetings with the entire Commission. The Planning Commission functions in a similar advisory capacity and restricts itself to discussions with an applicant or any other interested party in public forums only.

- b. Customer service impacts of existing processes. The existing processes are lengthy and arduous, and the applicant has no clear guidelines on which to base a proposed project design. The entire process takes weeks before a decision can be reached, even on a minor project, such as replacing a window. An applicant must attend an often long, early morning public hearing before the Historic Preservation Commission and could be subjected to public scrutiny. Sometimes a hearing can be adversarial, pitting the Commission against an applicant and Commissioners in sharp disagreement among themselves. As a result, City staff is burdened with the administration of often lengthy and contentious public meeting and inefficient review procedures. On a positive note, the City's planning staff is very helpful and accommodating in facilitating the review process on behalf of applicants, in spite of the shortcomings of the HPC public hearing process and review procedures.

Reviews are required for any project requiring a building permit within the historic districts and their environs and on historic properties that are individually-listed on the National Register (except for signs, which are reviewed by a special Historic Sign Review Committee). Reviews within the West Boulevard Historic District are restricted to exterior changes that require a building permit, but do not cover any other exterior changes, such as painting, fencing, doors, and landscaping, which appear to create extensive incompatibilities throughout the District. A sizeable number of homes within the District are rental properties. Absentee ownership often affects the upkeep of properties; owner-occupied properties are generally better cared for. Many of the homes are in disrepair. The lack of clear and objective design standards to guide homeowners and excessive and inconsistent HPC approval criteria may be responsible for inhibiting needed repairs by adding significantly to their cost.

Development in the Downtown Historic District, the core of Downtown Rapid City, is impressive, where most buildings have been restored and are in solid condition. The Historic Preservation review processes appear to have had a more positive impact to the exterior of these Downtown buildings than in the West Boulevard Historic District.

Unlike West Boulevard, the review of Downtown projects, also reaches into the building interiors, which seems to have created friction between building owners and the HPC. The HPC operates with authority to manage virtually every detail of interior design. Even reconfiguring a space within a previously approved building interior must be submitted to the HPC for approval. Some of these same properties that undergo local review have undergone or are in some stage of approval by the National Park Service for Federal Rehabilitation Tax Credits. The two processes do not seem to be coordinated with one another, and the local standards for interior rehabilitation seem much more restrictive than the Federal criteria for tax credits. The National Park Service already has a process in place to approve building interiors when an applicant is seeking Federal tax credits.

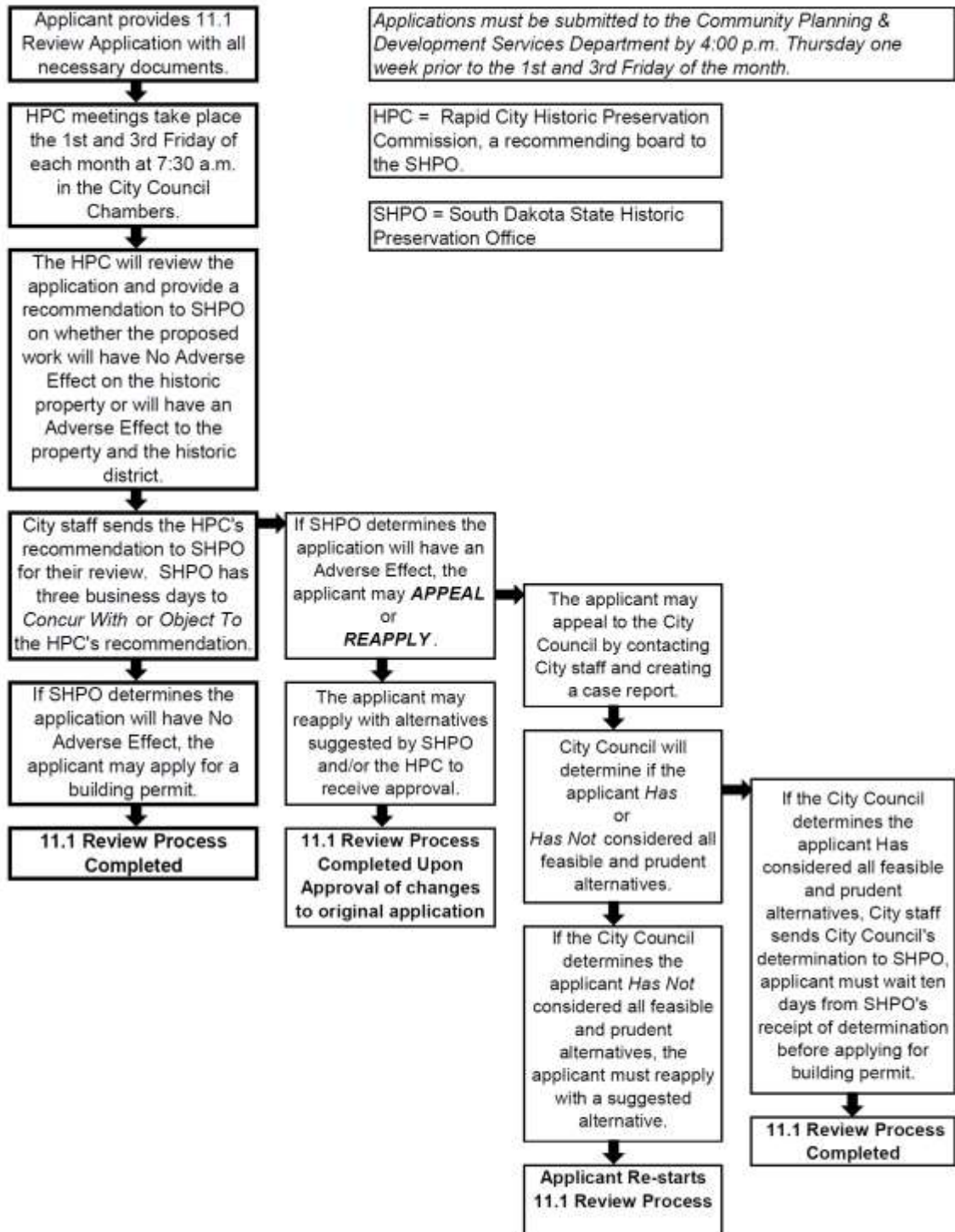
In contrast, the Historic Sign Review Committee has excellent customer service. Its meetings are brief and more often harmonious. The Committee members, most of whom have specialized expertise in commercial signage, typically offer technical advice to appreciative applicants. The only practical issue concerns whether the City should have a separate historic review board dedicated strictly for signage. Signage is an integral part of a building façade and needs to be reviewed within the context of other proposed exterior renovations by a single board.

- c. Structure and size of the Historic Preservation Commission (HPC). The structure and size of the existing HPC is established by Title 2 Sec. 2.68 et seq. of the

Rapid City Municipal Code. The Commission consists of seven members and two alternates who are legal residents of the City and represent various professions and academic fields of study. The Mayor recommends appointments for three year terms, which are confirmed by the City Council. Members can be reappointed without limitation to serve consecutive three year terms. The HPC oversees activities within the two historic districts and on individual historic properties outside of these districts. Meetings are held twice a month, which is often enough to prevent excessive delays in acting upon applications. The frequent meeting schedule is out of concern for customer service.

The following diagram (Figure 3-1 – “Current Historic Preservation Review Process with MOA”) describes the existing processes under the MOA between the State and the City. This process differs significantly from the standard 11.1 procedures (see Figure 4-1 – “Diagram of Proposed Review Process without MOA”), in that the HPC is given decision making authority, and the Council serves as the appeals body. Under standard 11.1 procedures, the Council or an individual designated by the Council makes decisions to approve or deny an application. The SHPO will typically provide comments in one to five days, although State law allows them up to 30 days to review a project. (See the State Attorney General’s answer to question 6 paraphrased above and in Appendix C – “State Attorney General’s Opinion”).

**Figure 3-1. Current City Historic Preservation Review Process with MOA**





The existing historic preservation review process begins with an application submitted to the City Staff for review by the HPC at a public hearing to determine if the proposed project has an adverse effect. If the HPC finds no adverse effect, the SHPO must first concur before the applicant can obtain a building permit. Many minor building exterior changes that obviously have no adverse impacts must still undergo HPC and SHPO review. The MOA only allows the staff to approve a very limited range of activities, which are exempt from HPC and SHPO review. These exemptions include in-kind replacement of identical roofing and siding materials on a house and replacement of non-historic roofing (e.g., asphalt or metal) with historic roofing materials (e.g., wood shakes). All other proposals must begin with a public hearing before the HPC, followed by SHPO concurrence or objection.

In cases where the HPC determines an adverse effect, SHPO must concur with the determination that “feasible and prudent alternatives” have been considered with “all possible planning to mitigate the adverse effects” of the proposal. These vague standards are difficult to interpret, creating an unusual burden on both applicants and the HPC members to apply to projects under review. Under the current processes, the HPC and SHPO must come to an agreement on approval conditions for a project, with the applicant given no clear picture of the potential outcome. Between July 1, 2013 and August 1, 2014, the HPC determined no adverse effect for 76% of their project reviews (59 total cases). The SHPO concurred on about 90% of those cases.

If the applicant disagrees with the outcome of an HPC determination, an appeal can be filed with the City Council, and in most cases, the Council can be expected to grant the appeal for the convenience of the applicant. The Council is not bound to base its appeal decisions on any standard other than what it deems fair and reasonable or, in some cases, politically expedient.

The two Rapid City National Register Historic Districts are distinctly different: the primarily commercial Downtown Historic District and the primarily residential West Boulevard Historic District. Under the existing organization, the same Commission serves both districts. With two separate Commissions of smaller size, each could better focus on the distinctive goals of each District. Stakeholders and property owners from each of the two districts are not fairly represented on the HPC as active participants in design review and planning processes.

To facilitate its review functions, guidelines must be developed for each of the districts. The guidelines must be unique to the districts, usable by lay members of the Commission, and customer-service friendly; that is, the guidelines must be easy to both understand and apply to proposed projects by applicants, staff, and HPC members alike. In recent years, the HPC retained a

nationally-recognized consultant to draft design review guidelines for the West Boulevard Historic District, but the Commission decided to cancel the contract and not adopt the guidelines. The guidelines prepared by the consultant are very detailed, thorough, and fully consistent with the Secretary of Interior's Standards. The failures of these guidelines seem to be their utility in facilitating design review by a lay commission and the capabilities of applicants to understand and apply the criteria to their projects. The guidelines appear to be written for historic preservation professionals and architects grounded in historic building design.

The function of the Commission includes duties in addition to project reviews, but review consumes almost all of its energies. Public education and advisory assistance to property owners are perhaps equally important functions that can benefit the preservation of these areas. To fulfill their public obligations, Commission members are in continuous need of training in historic preservation and public outreach methods. Members should be required to complete City orientation sessions and annual training sessions.

The Historic Sign Review Committee operates independently of the HPC. This Committee consists of five members. The membership includes two members of the Historic Preservation Commission: a regular member and an alternate. The Mayor appoints the remaining four members. Members should have knowledge and experience in historic preservation, architecture, and sign manufacturing and be a property or business owner within the historic district. The current membership includes an architect experienced in historic preservation, three sign industry representatives, and one HPC member. Meetings take place twice a month immediately after the HPC meetings. Although this Committee operates effectively with outstanding customer service, its function could be absorbed by the HPC by including representation by the sign industry.

- d. Staffing of the Historic Preservation Commission (HPC). The City's Department of Planning and Development Services administers and oversees the historic preservation program and review processes. The Director supervises department staff assigned to assist with historic preservation activities. An Administrative Assistant serves the HPC, and the Director has devoted a Planner within the Long Range Planning Division to focus on historic preservation and provide professional staff support to the HPC.

The Planner works closely with two individuals from the State Historic Preservation Office to fulfill the 11.1 and MOA requirements. The staff size is adequate to handle the customer service demands. In the last three years, the City has instituted new professional qualifications required for Planners. Consequently, staff is well-grounded in core planning principles and practices, but specialized continuing education for the Planner in historic preservation and

downtown development is essential to the effective administration of the program and delivery of superior customer service. Upon expiration of the MOA at the end of this year, the need for specialized staff expertise will increase significantly, as the City's review responsibilities increase under the 11.1 standards. The City will rely less on the SHPO for decision making support and shift to an advisory HPC review function with administrative authority to act on permits to be assumed by City staff.

- e. Historic Preservation as an Economic Development Tool. The National Main Street Center programs help link historic preservation to commercial economic development in downtown locations. First initiated as a demonstration project of the National Trust for Historic Preservation in 1980, the Main Street Approach has evolved into a nationwide center encompassing more than 2,000 programs and leaders who use the Main Street approach to create "sustainable, vibrant downtown centers" within communities throughout the nation. It presents a formalized approach to downtown development with a nationwide network of successes.

The comprehensive Main Street approach integrates downtown development with historic preservation and is very appropriate for Downtown Rapid City's continuing economic development. In particular, "Design" is one of the elements of the four-point Main Street Approach: "Organization, Promotion, Design, and Economic Restructuring." Main Street encourages design review and the creation of design guidelines for preservation of historic buildings, in addition to non-historic rehabilitations and new construction.

The linkages between historic preservation and economic development are equally important but differ within the primarily residential West Boulevard District. To sustain this neighborhood's economic development and vitality, historic preservation should foster investment. Reasonable and cost-sensitive standards for rehabilitation should stimulate neighborhood investment in home repairs and improvements, without compromising historic integrity.

Review criteria and rehabilitation standards imposed through the 11.1 review process must be cognizant of costs. Although it is desirable to restore all elements of a historic building to its original materials and character, there are costs associated with such an objective. The "prudent and feasible alternative" must remove excessive impediments to neighborhood investment. For example, the exact replacement of a deteriorated window in an 80 year old historic home might require the costly skill of a craftsman. A very similar replacement window that is significantly less costly and much more energy efficient could be purchased at a home improvement store and achieve the same appearance from the public view. A simple change in a design standard, as shown in this example, could create an economic stimulus that fosters rehabilitation rather than

hinders it. Design guidelines should identify such examples of appropriate replacement materials within each historic district.

Finally, Rapid City lacks local financial incentives for historic preservation, such as, donations of façade easements, grants for historic building rehabilitations, and competitive façade improvement grant awards. Examples of these incentive programs can be found elsewhere in South Dakota.

### **Positive aspects and opportunities**

- a. Preservation of Rapid City's unique heritage is of paramount importance to the community and its elected officials.
- b. Historic Preservation Commission (HPC) members are enthusiastic and committed to preservation.
- c. The City's planning staff offers in-house professional planning services.
- d. The City's staff provides outstanding customer service to applicants and through its administrative support to the HPC. The staff keeps the historic preservation program well organized and on schedule.
- e. The planning staff has an excellent working relationship with the staff of the State Historic Preservation Office (SHPO).
- f. Outstanding rehabilitation examples in both historic districts demonstrate past successes of historic preservation review by the HPC.
- g. Destination Rapid City and the Rapid City Downtown Association offer ongoing opportunities to sustain the vitality and preservation of Downtown.
- h. The expiration of the MOA at the end of this year creates an opportunity for the City to enact its own unique 11.1 review process by ordinance.
- i. The City's new Comprehensive Plan calls for a specific plan for downtown development. The timing of the Comprehensive Plan recommendation fits the recommendations concerning downtown development in this report.

### **Negative aspects and issues**

- a. Although the HPC has been in existence for almost 40 years, the Commission has never adopted clear guidelines for design review. HPC members are divided on their interpretations of the Secretary of Interior's Standards, with directly opposing positions. One faction is very strict in the application and interpretation of the Standards, and the opposing faction is very accommodating to working out "prudent and feasible alternatives." Design review guidelines can provide clear and consistent interpretation of the Standards.
- b. The review and approval processes for applicants are perceived as vague, complex, cumbersome, lengthy, arbitrary and often costly. These difficult processes thwart attempts by staff and HPC members to facilitate customer service.

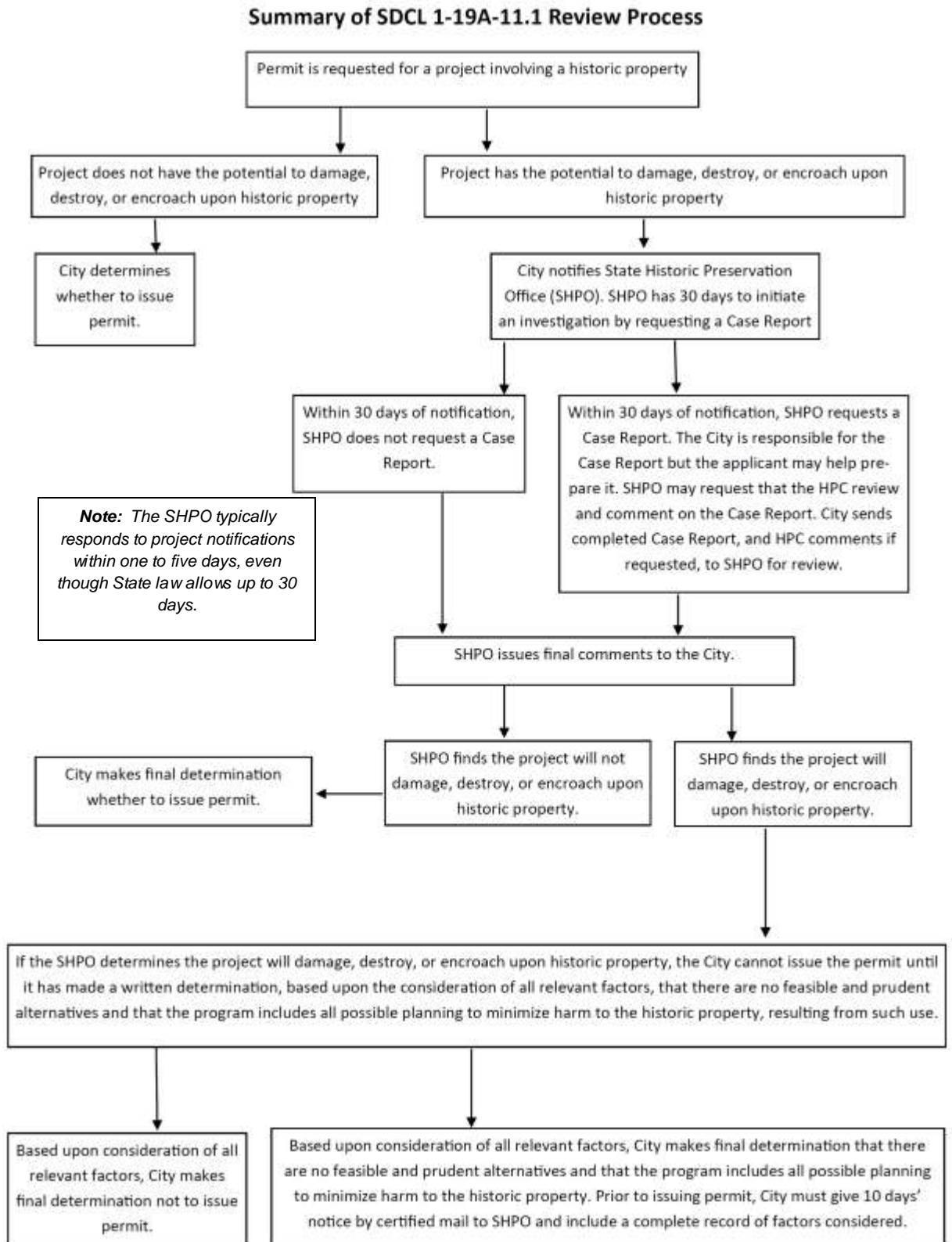
- c. Even the most simple and obvious approvals must undergo a rigorous process of public review under existing processes.
- d. Excessive rehabilitation standards hinder investment in historic residential properties.
- e. Excessive rehabilitation standards - whether written, interpreted, or based on personal preference - hinder investment in historic residential properties.
- f. Despite the longstanding historic preservation efforts in the West Boulevard Historic District, the overall impacts on neighborhood investment and improved design are not as expected. Many properties are in marginal condition. In many instances, the exterior features that are exempt from review (colors, fencing, etc.) detract for the overall neighborhood attractiveness and historic integrity of the District.
- g. The City has not taken advantage of financial incentives used by other South Dakota communities to foster rehabilitation of historic property, such as donation of historic façade easements and façade improvement grants.
- h. Historic preservation review is not integrated into the Zoning Ordinance. The only local ordinance is the 1975 ordinance creating the Rapid City Historic Preservation Commission. The City has no ordinance that prescribes the review process; the City authority is based upon the MOA with the SHPO and State law.
- i. The Downtown Historic District comprises a small area of Downtown. The review process does not cover other vital areas of concern for impending Downtown redevelopment.
- j. The present organization of the HPC does not fully recognize the distinct differences between the essentially commercial Downtown District and the essentially residential West Boulevard District.
- k. The existing HPC membership does not adequately represent stakeholders and property owners who have direct interests in design review and planning activities within each historic district.
- l. Despite the rigorous review processes involving the SHPO, the HPC, planning staff, and the public, the City Council can, upon appeal, overturn any final determination.
- m. The Commission is focused almost entirely on its review function without much effort given to other preservation activities, such as public outreach, workshops, displays, awards, and other worthwhile activities to promote preservation.
- n. Although the Historic Sign Review Committee offers excellent customer services and functions extremely well, its functions could be absorbed by the HPCs.

## **Section 4. Recommendations**

- a. Terminate the Memorandum of Joint Agreement (MOA) between the State and the City, which is set to expire on December 31, 2014. This would allow the City to put the proper ordinances and administrative procedures in place ahead of expiration date. The flow diagram in Figure 4-1 on the following page generally describes the required 11.1 process without the MOA. The SHPO typically

responds to projects between one and five days, even though State law allows them up to 30 days. (also refer to Appendix D -“Proposed Historic Preservation Review Procedures”):

**Figure 4-1. Diagram of Proposed Review Process without MOA**



- b. Adopt the recommended ordinance in Appendix E. The proposed ordinance would establish the authority for historic preservation and design review within the Rapid City Zoning Ordinance and comply fully with the requirements of SDCL 1-19A-11.1 and 1-19B. The changes proposed by this recommended ordinance would dramatically improve customer service by delegating most decisions to City planning staff. Figure 4-1 above and Appendix D describe the streamlined historic preservation review procedures under the recommended ordinance.

In summary, the ordinance would make the following changes to the scope and extents of historic preservation and design review:

- The ordinance would create two new “Design Review Overlay Zoning Districts” for the West Boulevard Neighborhood Conservation Overlay Zoning District and the Downtown Development Overlay Zoning District.
- Separate Design Review Boards of five members and one alternate for each Board would be created for each district and serve as separate Historic Preservation Commissions.
- Board membership will be appointed by the Planning Commission and approved by the City Council. This creates a vital tie between comprehensive planning and historic preservation.
- As drafted, Board members will serve three year terms, but a restriction on reappointments should be considered. Consider adding a provision that allows Board members to serve two consecutive terms but no more without an absence of one year.
- Design review within the West Boulevard District will be limited to the Historic District and its environs and select residential properties that are individually-listed on the National Register.
- The extents of design review within the Downtown would be enlarged beyond the Downtown Historic District to encompass all of the Business Improvement District (except where it overlaps the West Boulevard Historic District).
- Interior changes to a building would be exempt from design review.
- The Historic Sign Review Board responsibilities will be reassigned to the two Design Review Boards and include all signs within the entire overlay district boundaries. This extends sign approvals to a much broader area of Downtown beyond the Downtown Historic District to include the Business Improvement District.
- The ordinance would delegate the City’s final authorization to act on an application to the Planning Director or an individual designated by the Planning Director. A Planner could be dedicated to this role.



- The Historic Preservation Commissions shall serve in an advisory role to the Director (or designee) in conjunction with the SHPO on proposals that could have an adverse impact.
  - Minor proposals that are in accordance with approved guidelines, such as replacement of deteriorated windows, siding, or roofing, would be acted upon administratively, within the limitations of approved guidelines and with SHPO concurrence.
  - New permitting and review procedures would be instituted to include a Design Review Compliance Certificate required as proof that the project has been approved through the design review process before a building or other permit could be issued.
- c. Prepare and adopt design review guidelines. The guidelines are essential for improving customer services among the applicants, City staff, and the HPC (proposed Design Review Boards). District-specific guidelines should be developed for the West Boulevard Historic District, the Downtown Historic District, and the extended Downtown locations proposed for the Downtown Development Overlay Zoning District. These guidelines should be prepared by an expert consultant.
  - d. Prepare and adopt staff guidelines for administrative approvals of minor exterior improvements. “Minor exterior improvements,” as defined within the ordinance, can be administratively approved without HPC review and comment. These include such improvements as “installation of fences, construction of small sheds/outbuildings, construction of small decks/patios, and similar exterior improvements.” These guidelines should be prepared by staff, reviewed and approved by the SHPO, and adopted by the City Council for staff use in administrative reviews and advising applicants of compatible design. These guidelines should be clear, concise, illustrated, and simple for applicants to understand. The staff should also have manufacturers’ samples on hand of acceptable siding and roofing materials and product brochures for windows to advise applicants.
  - e. Provide professional-level continuing education in historic preservation, urban design, and main street management to the Planner. The Planner would be designated by the Director to administer the historic preservation and downtown development programs and should receive training to maintain proficiency in these specialized areas of professional planning practice.
  - f. Provide ongoing training for members of both Design Review Boards (HPCs). Board members should be trained in the application of the City’s adopted design review guidelines.
  - g. Develop a comprehensive historic preservation public education program and annual action program of activities. Under the proposed ordinance, the primary role of the Design Review Boards will shift from one of review to public education. City staff, in conjunction with SHPO liaisons, should work closely with the Boards to develop a wide range of public outreach activities.

- h. Establish an awards program. The Design Review Boards should work together to recognize exemplary project designs and outstanding individual contributions in historic preservation, neighborhood conservation, and downtown development. Perhaps the program could be conducted at an annual awards banquet.
- i. Establish a Main Street Program. The City should work with Destination Rapid City and the Rapid City Downtown Association to participate in the National Main Street Centers as a designated Main Street Program and encourage the SHPO to set up a statewide program, as well. The Downtown Association is a 501(c)(3) tax exempt organization that offers an established framework for the program. The Association should be reorganized along the four-point Main Street Approach for Organization, Design, Promotion, and Economic Restructuring. A City partnership could provide professional planning support to the program.
- j. Prepare and adopt a Downtown Development Plan. The City's recent Comprehensive Plan recommends this area-specific plan to address opportunities for development and redevelopment within the Downtown Business Improvement District. The City's long range planning staff should work in conjunction with a reorganized Downtown Development Association, Destination Rapid City, and the new Design Review Board to develop this plan. The Design Review Guidelines should be incorporated into this plan.
- k. Prepare and adopt a West Boulevard Neighborhood Conservation Plan. This plan should be developed by the City's long range planning staff under the direction of the Design Review Board and in association with the West Boulevard Neighborhood Association. The Design Review Guidelines should be made a part of this plan, and the plan should analyze and identify economic opportunities to stimulate neighborhood investment.
- l. Create financial incentives to foster rehabilitation of historic property. Examples of incentives used by other South Dakota communities include programs to allow for tax deductible donations of historic façade easements and competitive grants for façade improvements and building rehabilitation.

## Appendices

- A - SDCL 1-19A-11.1. Procedures of Preservation of Historic Property
- B - ARSD 24:52:07:03. State Standards for Case Report
- C - State Attorney General's Opinion
- D - Proposed Historic Preservation Review Procedures
- E - Recommended Ordinance



**Appendix A –**

**SDCL 1-19A-11.1. Procedures for Preservation of Historic  
Property**



**1-19A-11.1. Preservation of historic property--Procedures.** The state or any political subdivision of the state, or any instrumentality thereof, may not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places until the Office of History has been given notice and an opportunity to investigate and comment on the proposed project. The office may solicit the advice and recommendations of the board with respect to such project and may direct that a public hearing be held thereon. If the office determines that the proposed project will encroach upon, damage or destroy any historic property which is included in the national register of historic places or the state register of historic places or the environs of such property, the project may not proceed until:

(1) The Governor, in the case of a project of the state or an instrumentality thereof or the governing body of the political subdivision has made a written determination, based upon the consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to the historic property, resulting from such use; and

(2) Ten days' notice of the determination has been given, by certified mail, to the Office of History. A complete record of factors considered shall be included with such notice.

Any person aggrieved by the determination of the Governor or governing body may appeal the decision pursuant to the provisions of chapter 1-26.

The failure of the office to initiate an investigation of any proposed project within thirty days from the date of receipt of notice thereof is approval of the project.

Any project subject to a federal historic preservation review need not be reviewed pursuant to this section.





## **Appendix B –**

### **ARSD 24:52:07:03. State Standards for Case Report**



**ARSD 24:52:07:03. Standards for case report.** If a state entity or a political subdivision of the state is required by law or rule to report possible threats to the historical integrity of a property on the state register, the threat must be reported by means of a case report that meets the requirements of this section.

Case reports must provide the Office of History with sufficient information for the office to make an independent review of effects on the historical integrity of historic properties and shall be the basis for informed comments to state entities and the public. Case reports shall thoroughly examine all relevant factors involved in a preservation question. They must contain the following:

(1) A description of any impending project which may adversely affect historic property;

(2) Photographs, maps, or drawings showing the existing project site, the extent of projects, and details of the proposed projects, which may include three-dimensional models or accurate computer-generated representations of proposed new construction. Models or representations must clearly show the visual impacts of new construction on surrounding neighborhood or landscapes;

(3) The planning and approval schedule for projects which may adversely affect historic property;

(4) A statement explaining how projects adversely affecting the historic property were brought to the attention of a state entity or political subdivision;

(5) A description of potentially affected historic property with any relevant physical, economic, or situational information on the property;

(6) A description of the potential effects of a proposed project on historic property and the basis for the determinations of effect;

(7) A historic preservation plan or description and evaluation of all feasible and prudent alternatives which a state entity or political subdivision proposes in order to minimize adverse effects of a project on historic property and alternatives which the state entity or political subdivision has examined and rejected. The reasons for rejection must be included. This section of the case report must clearly substantiate that all possible efforts to minimize harm to the historic property have been undertaken. Alternatives to aspects of the project which may adversely affect the historic property must:

(a) Receive consideration based on factual reports, research, tried methods, and professional and lay preservation advice;

(b) Explore alternatives beyond the immediate project, taking into account broad community or regional issues in which the historic resources may play a contributing role;

(c) Take into account the impact of potential adverse effects on surrounding historic resources, community preservation plans, and long-range community opportunities;

(d) Be based on professional assessments of the value and basic structural condition of the affected property and estimates of a range of rehabilitation or mitigative options prepared by people experienced in historical preservation work; and

(e) Provide adequate periods of time for information to be prepared and for preservation options to be attempted;

(8) Documentation of consultation with the Office of History regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;

(9) A description of the efforts of a state entity or political subdivision to obtain and consider the views of affected and interested parties;

(10) Documentation that a local historical preservation commission constituted under SDCL 1-19B with jurisdiction in the city or county where the affected historic property is located was provided a specified period of time to examine plans for proposed projects. Official comments of the commission must be included. The Office of History shall specify periods of time not to exceed 180 days to be given local historical preservation commissions to examine plans and may specify such periods for each set of revised plans submitted for a project. The commission shall:

- (a) Agree with the findings of the case report;
- (b) Disagree with the findings of the case report; or
- (c) Decline to comment on the findings of the case report;

(11) Copies of written views submitted by the public to the state entity or political subdivision concerning the potential adverse effects of projects on historic properties and alternatives to reduce or avoid those effects.

The Office of History may require an abbreviated case report if, in its opinion, less than a comprehensive review of a preservation issue is needed. The office shall determine the elements needed for an abbreviated case report case by case.

**Source:** 16 SDR 239, effective July 9, 1990; 21 SDR 50, effective September 21, 1994; 24 SDR 73, effective December 4, 1997.

**General Authority:** SDCL 1-19A-5, 1-19A-11, 1-19A-29.

**Law Implemented:** SDCL 1-19A-5, 1-19A-11.1.

**Appendix C –  
State Attorney General’s Opinion**



STATE OF SOUTH DAKOTA



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**MARTY J. JACKLEY**  
ATTORNEY GENERAL

RECEIVED

DEC 18 2013

MAYOR'S OFFICE

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

December 16, 2013



Sam Kooiker, Mayor  
City of Rapid City  
300 6th Street  
Rapid City, SD 57701

Jean Oleson Kessloff, Commission Member  
Rapid City Historic Preservation Commission  
1015 12th Street  
Rapid City, SD 57701

Re: *Opinion Request - Construction and Application of SDCL 1-9A-11.1*

Dear Mayor Kooiker and Commissioner Kessloff:

You have requested an official opinion from this office regarding the construction and application of SDCL 1-19A-11.1. The Office of Attorney General issues official opinions on specific legal questions. You are asking guidance on how the municipality should address historic preservation issues under a statutory scheme. The breath of the questions posed implicate both legal and policy questions that are more appropriately addressed by the state agency responsible for oversight in this area, the Office of History, and your city attorney's office.

Very truly yours,

A handwritten signature in cursive script that reads "Jeffrey P. Hallem".

Jeffrey P. Hallem  
Assistant Attorney General

JPH/rar



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**MARTY J. JACKLEY**  
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**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

December 17, 2013

Jay Vogt, Director  
South Dakota State Historical Society  
900 Governor's Drive  
Pierre, SD 57501

**MEMORANDUM OPINION**

**Construction And Application Of SDCL 1-19A-11.1 By Municipalities And Local Historic Preservation Commissions**

Dear Jay:

This office received a request for an official opinion from the Mayor of Rapid City and a Commissioner of the Rapid City Historic Preservation Commission concerning the proper construction and application of SDCL 1-19A-11.1. This office is aware that some local preservation commissions, such as Rapid City's, operate pursuant to intergovernmental agreements with the State Office of History (SOH). Others do not. State law also recognizes that a local historic preservation commission formed pursuant to state law may also function as a municipal historic district commission pursuant to local ordinances. SDCL 1-19B-38; SDCL 1-19A-62. Deadwood has its own unique structure. In light of the variations in local historic preservation commission structures, this office did not wish to issue a one-size-fits-all letter in response to Rapid City's questions.

However, this office has previously observed that by enacting SDCL 1-19A *et seq.*, "the legislature has attached substantial importance to the preservation of historic structures in this state." Attorney General Opinion No. 89-41, 1989 WL 505682 (AGO 89-41). Because Rapid City's questions implicate legal questions that affect historic properties statewide, this office believes that answers to Rapid City's questions are important and that they should be addressed to the state agency responsible for oversight and enforcement in this area. Broadly speaking, the conclusions contained herein apply to any entity tasked with performing a review under SDCL 1-19A-11.1, whether it is the SOH itself, local commissions acting on behalf of the SOH through an intergovernmental agreement (like Rapid City's), and any governmental entity responsible for issuing a permit for a project adversely affecting a listed historic property. This opinion, however, does not seek to anticipate every form a permitting



entity or reviewing authority may take. To the extent your office encounters atypical situations, this office is available to you for further interpretation as needed.

SDCL 1-19A-11.1 requires local governments to extend certain protections to historic properties listed on national, state, or local registers. In furtherance of this policy, South Dakota's legislature and the SOH have made low interest loans and substantial tax benefits available to assist owners in maintaining and preserving historic properties. These state programs augment significant federal tax credits. "Given the benefits that may accrue to individuals placing structures on the list of historic places, it is not inconceivable that the legislature intended some negative consequences to attend an attempt to demolish structures so benefitted." AGO 89-41.

Naturally, it is important to preserve and protect South Dakota's historic resources without discouraging urban redevelopment through unnecessary restrictions on the use of property. This office has previously identified SDCL 1-19A-11.1 as a "state level section 106," referring to Section 106 of the National Historic Preservation Act from which SDCL 1-19A-11.1's standards and procedures are derived. Thus, this memorandum opinion looks first to published South Dakota judicial opinions for its interpretation of SDCL 1-19A-11.1 and, in the absence of express controlling authority by our state's highest court, it looks to the line of authority interpreting Section 106 as applied at the federal level and by states whose statutory schemes utilize the Section 106 "feasible and prudent" standard.<sup>1</sup>

Rapid City's request for an official opinion posed the following questions.

1. Are the standards for the treatment of historic properties adopted in South Dakota's administrative rules authoritative standards to be applied to reviews under SDCL 1-19A-11.1?
2. Who bears the burden of proof in SDCL 1-19A-11.1 reviews?
3. Does a city have the authority or duty to deny a permit for projects adversely affecting designated historic properties if there are feasible and prudent alternatives to the proposed project?
4. What are the standards by which feasible and prudent alternatives are judged?
5. What is the scope of all possible planning to minimize harm?
6. Who decides if all alternatives and planning have been exhausted?
7. May individual commission members visit project sites and with property owners outside of formal commission proceedings to investigate the effect of a

<sup>1</sup> See *State v. Strauser*, 63 N.W.2d 345, 347 (1954) ("Inasmuch as the state law follows so closely the federal law, as . . . comparison discloses, there is a presumption that the legislature intended to enact a law with the meaning that the [United States Supreme] Court had previously placed upon the statute that served as the pattern for the later enactment"); *Lawrence Preservation Alliance v. Allen Realty*, 819 P.2d 138, 144 (though "not binding, case law interpreting this federal statute is helpful"); *Hornich v. Lake Co. School Bd.*, 779 So.2d 567 (Fla.App.5 2001) (legislature's adoption of "feasible and prudent" standard interpreted to give same "paramount importance" to protection of state's historic resources as is observed by federal government).

proposed project on an historic property and the feasibility and prudence of alternatives.

#### **SHORT ANSWER**

Local municipalities and their historic preservation commissions are required to apply state administrative standards to reviews performed pursuant to SDCL 1-19A-11.1. Also they are not to issue a permit for any project that would encroach upon, damage or destroy a designated historic property if there is a feasible and prudent alternative that would prevent such encroachment, damage or destruction.

#### **ANALYSIS**

Per SDCL 1-19A-11.1, if a "proposed project will encroach upon, damage or destroy any [listed] historic property," the project may not proceed until the city or county has "made a written determination, based on the consideration of all relevant factors, that there is no feasible and prudent alternative to the [proposed project] and that the [proposed project] includes all possible planning to minimize harm to the historic property." A "project" includes any building or demolition permit involving a listed historic property.<sup>2</sup> A city or county may not issue any such permit without first obtaining review and comment from the SOH. Projects that encroach upon, damage, or destroy a historic property are said to have an "adverse effect" or "adverse impact."

##### **1. What Is The Role Of Administrative Rules In SDCL 1-19A-11.1 Reviews?**

The SOH has adopted administrative rules for the implementation of SDCL 1-19A-11.1 pursuant to its authority under SDCL 1-19A-29. ARSD 24:52:07:02 requires use of historic preservation "methods, policies, technical notes, preservation briefs, and guidelines" published in the Historic Preservation Fund Manual Appendices (2007) and in the Secretary of the Interior's Standards for the Treatment of Historic Properties (1995). ARSD 24:52:07:04 also expressly states that the Secretary of Interior Standards apply to new construction on property or additions to existing structures within an historic district as well as eleven additional enumerated standards governing scale and form. ARSD 24:52:13:03 itemizes the information relevant to the SOH's (and therefore a city's) evaluation of a proposed project's effect on a property's historic integrity – such as a description of the project, a preservation plan, or an "evaluation of all feasible and prudent alternatives" which may minimize the project's adverse effect on the historic property. The SOH's administrative rules have the force of law.<sup>3</sup> Accordingly, a municipality acting under SDCL 1-19A-11.1(1) must apply these rules.

A local historic preservation commission formed by local ordinance acting pursuant to SDCL 1-19B-3 and/or SDCL 1-19B-62 must also comply with these rules. SDCL 1-19B-62 expressly provides that decisions "to approve or deny a permit shall be based on the standards adopted by rules promulgated pursuant to 1-19A-29." *City of*

<sup>2</sup> ARSD 24:52:00:01(14) defines a "project" as "an activity, permit, plan, or action, including restoration or rehabilitation, which affects or may affect the physical structure or physical setting of a historic property." See also AGO 89-41 (a "project" under SDCL 1-19A-11.1 includes the issuance of building or demolition permits).

<sup>3</sup> *Krsnak v. Department of Environmental and Natural Resources*, 2012 SD 89, ¶ 16, 824 N.W.2d 429, 436 (S.D. 2012); *Allen Realty, Inc. v. City of Lawrence*, 790 P.2d 948, 955-56 (Kan.App. 1990).

*Deadwood v. M.R. Gustafson Family Trust*, 2010 SD 5, ¶ 3, 777 N.W.2d 628, 630. Accordingly, both local historic preservation commissions and a cities must follow the standards established by ARSD 24:52A:07 in determining whether to approve or deny a permit for a proposed project that will encroach upon, damage, or destroy any listed historic property.

## **2. Who Bears The Burden Of Proving The Various Standards Governing SDCL 1-19A-11.1 Reviews?**

Generally, a permit applicant bears the burden of proving that the conditions for issuing a permit have been met.<sup>4</sup> This general rule applies equally in the context of applications for permits for projects affecting historic properties.

SDCL 1-19A-11.1 is implicated only if a proposed project adversely impacts an historic property. Once a reviewing authority – the SOH, a local historic preservation commission, or the city – makes a *prima facie* determination that a proposed project will adversely impact an historic property, the burden shifts to the project proponent to show the absence of feasible and prudent alternatives and, should that succeed, appropriate planning to minimize the resulting harm.<sup>5</sup>

According to court decisions from states with preservation statutes similar to SDCL 1-19A-11.1, to meet this burden a permit applicant must consider all reasonable alternative plans to the proposed project, not just the least expensive option. For example, in *Norwalk Preservation Trust, Inc. v. Norwalk Inn and Conference Center, Inc.*, 2008 WL 544508 (Conn.Super.), the project proponent wanted to demolish a neighboring historic home so that he could build a 44-room addition to his hotel. The court enjoined the demolition finding that the hotel owner had failed to consider other expansion options that would retain the historic home, such as incorporating the historic home into the hotel with an addition as part of a 24-room expansion, or building on other land owned by the hotel and selling the historic home for redevelopment as office space. Though economies of scale made the 44-room option the most profitable, the hotel owner had failed to demonstrate that the alternative plans could not meet his objective of profitably adding luxury rooms to the hotel.

Likewise, the *B.Y. Development* court found that any determination of the existence or non-existence of feasible and prudent alternatives must be “supported by sufficient

<sup>4</sup> *Cole v. Board of Adjustment*, 2000 SD 119, ¶ 29, 616 N.W.2d 483, 490 (S.D. 2009)(burden on applicant to demonstrate right to zoning variance); *Ed Phillips & Sons Co. v. Schmidt*, 195 N.W.2d 400, 404 (S.D. 1972); *c.f. Breckwag v. Knochenmus*, 133 N.W.2d 860, 254 (S.D. 1965)(applicant may not be assigned the burden of proving right to building permit when the law does not set any preconditions for issuance of the permit).

<sup>5</sup> *Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993)(once SOH makes *prima facie* showing that a proposed project will damage or destroy a historic resource, project proponent had burden of proving absence of feasible and prudent alternatives); *Friends of Bethany Place, Inc. v. City of Topeka*, 222 P.3d 535 (Ct.App.Kan. 2011)(after SOH made determination that project would adversely impact church grounds, church was obligated to demonstrate that there were no feasible and prudent alternatives to his proposed parking lot); *Save Old Stamford v. St. Andrew's Protestant Episcopal Church*, 2010 WL 625991 (Conn.Super.); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.); *Friends of the Riverfront v. DeLaSalle High School*, 2007 WL 4110617 (Minn.App.); *Lawrence Preservation Alliance v. Allen Realty, Inc.*, 819 P.2d 138 (Ct.App.Kan. 1992); *MB Associates v. D.C. Department of Licenses*, 456 A.2d 344 (Ct.App.Dist.Col. 1982).

facts.<sup>6</sup> While *B.Y. Development* did not further describe sufficiency in terms of quantity or quality of evidence, courts in other states have found evidentiary thresholds satisfied by testimony or evidence from experts in preservation-related fields such as architecture, engineering, property development, city planning, construction contracting, and environmental mitigation.<sup>7</sup> Project opponents can suggest alternatives not considered by a permit applicant, but those suggested alternatives must be "supported by sufficient facts to indicate they are feasible and prudent."<sup>8</sup> Alternatives that are properly factually supported are statutory "relevant factors" that the city and a project proponent must consider and rule out before undertaking any project that would adversely impact an historic resource.<sup>9</sup>

### 3. Does A City Have The Authority Or Duty To Deny A Permit To Protect An Historic Property From The Adverse Impact Of A Proposed Project?

Under SDCL 1-19A-11.1, cities and municipalities have both the authority and the duty to deny a permit for any project adversely affecting an historic property if there is a feasible or prudent alternative to the project that will eliminate or mitigate its adverse impact.

The leading authority interpreting SDCL 1-19A-11.1's standards is the United States Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971). *Overton Park* is the foundational case underlying much of the country's historic preservation jurisprudence as the standards of SDCL 1-19A-

<sup>6</sup> *In re B.Y. Development, Inc.*, 2000 SD 102, 615 N.W.2d 604 (S.D. 2000)(a permitting authority must take a "hard look" at the proposed project, and alternatives to it that will avert damage to protected historic resources, before issuing a permit); *Kalorama Heights Limited Partnership v. District of Columbia*, 655 A.2d 865 (Cl.App.Dist.Col. 1995)(fifteen witnesses testified at hearing on demolition permit application, including engineer who found building structurally sound and a property development expert); *Citizen Advocates for Responsible Expansion, Inc. (i-CARE) v. Dole*, 770 F.2d 423 (5<sup>th</sup> Cir. 1985)(administrative record was "wholly inadequate" when agency gave no consideration to the effect of interstate overpass expansion plans on historic buildings located in and along its path).

<sup>7</sup> *Honich v. Lake County School Board*, 779 So.2d 567 (Fla.Cl.App.5 2001); *Norwalk Preservation Trust, Inc. v. Norwalk Inn and Conference Center, Inc.*, 2008 WL 544508 (Conn.Super.); *MB Associates v. D.C. Department of Licenses*, 456 A.2d 344 (Cl.App.Dist.Col. 1982); *Block House Municipal Utility District v. City of Leander*, 291 S.W.3d 537 (Cl.App.Tex. 2009); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Cl.App.Mo. 1980)(substantial evidence is adduced through testimony of architects, structural engineers, contractors, and developers regarding the historic property's condition, structural and historic integrity, cost, adaptive reuses, return on investment, and marketability); *Project Authorization Under The New Jersey Register Of Historic Places Act*, 975 A.2d 941 (App.Div.N.J. 2009); *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423 (5<sup>th</sup> Cir. 1985)(administrative record contained testimony from engineers, city planners, designers, architects, and developers regarding the impact of interstate highway overpass expansion plan); *National Trust for Historic Preservation v. City of Albuquerque*, 874 P.2d 798 (Cl.App.N.M. 1994)(record was devoid of expert testimony respecting the impact of noise, visibility, or dust and exhaust caused by proposed highway).

<sup>8</sup> *B.Y. Development*, 2000 SD 102 at ¶ 16, 615 N.W.2d at 610; *Friends of the Riverfront v. DeLaSalle High School*, 2007 WL 4110617 (Minn.App.)(though city's contemplation of alternatives was not confined to project proponent's demand to construct athletic facility on-site at school, city was not required to consider alternatives of off-site construction where project opponents did not identify potential off-site alternatives).

<sup>9</sup> *B.Y. Development*, 2000 SD 102 at ¶ 16, 615 N.W.2d at 610; *Lawrence Preservation Alliance v. Allen Realty, Inc.*, 819 P.2d 138 (Cl.App.Kan. 1992)(a proposed alternative is a "relevant factor" if it includes sufficient factual information to support a conclusion that it is feasible and prudent); *Friends of Bethany Place, Inc. v. City of Topeka*, 222 P.3d 535 (Cl.App.Kan. 2011); *Don't Tear It Down v. D.C. Dept. of Housing*, 428 A.2d 369 (D.C. 1981).

11.1 (and many other state preservation statutes) are replicated from the federal counterpart statute interpreted in that case.<sup>10</sup>

In *Overton Park*, the court examined the application of federal statutes that governed the use of federal funds to finance any highway project requiring the use of public parkland. Those statutes prohibit the use of public parkland for federal highway projects "unless there is no feasible and prudent alternative to use of such land" and "such program includes all possible planning to minimize harm to such park." *Overton Park*, 401 U.S. at 411, 91 S.Ct. at 821. The court interpreted the statute to be a "plain and explicit bar" to the construction of highways through parks except in "the most unusual situations." *Overton Park*, 401 U.S. at 411, 91 S.Ct. at 821. "If the statutes are to have any meaning, the secretary cannot approve the destruction of parkland" if there is a feasible or prudent alternative. *Overton Park*, 401 U.S. at 413, 91 S.Ct. at 822.

South Dakota's legislature enacted SDCL 1-19A-11.1 sixteen years after the *Overton Park* decision. The legislature's selection of the "feasible and prudent" and "all possible planning" standards, after substantial jurisprudence had developed surrounding those standards and their application, suggests that it intended for the state's historic resources to receive protections commensurate with those enunciated in *Overton Park*.<sup>11</sup>

Reduced to its essence, SDCL 1-19A-11.1 holds that if there is a "feasible and prudent alternative" to a project that would adversely affect a designated historic property the project "may not proceed." Though no party in the leading South Dakota decisions in *B.Y. Development* or *Korzan* challenged the city's authority to deny a permit, the court's reasoning in both cases reveals that the accepted controlling premise in both cases was that the statute, of necessity, does impart that authority. Specifically, the *E.Y. Development* court stated that the subject project would proceed "unless the Office of History" were successful in its appeal. *B.Y. Development*, 2000 SD 102 at ¶ 11, 615 N.W.2d at 610 (S.D. 2000); *Korzan v. City of Mitchell*, 2006 SD 4, ¶ 15, 708 N.W.2d 683, 687 (S.D. 2006).

#### 4. What Is A Feasible And Prudent Alternative?

The operative segment of SDCL 1-19A-11.1 states that a "project may not proceed until . . . [t]he governing body of the political subdivision has made a written determination . . . that there is no feasible and prudent alternative to the proposal."

Since neither "feasible," "prudent," nor "alternative" have been defined by statute or rule, it is good to start with their meanings in common usage.<sup>12</sup> *Webster's Dictionary* defines "feasible" broadly as "capable of being done" and "prudent" as "marked by wisdom or judiciousness" or "circumspection" or "shrewd in the management of

<sup>10</sup> In addition to South Dakota, the following states expressly employ the federal "feasible and prudent" standard in their historic preservation laws: Connecticut, Minnesota, Kansas, Texas, New Jersey, New York, Pennsylvania, Florida, Ohio, Iowa, Wisconsin, New Mexico, Michigan, and Massachusetts. Other states have adopted close variations on the same standard.

<sup>11</sup> *State v. Strasser*, 63 N.W.2d 345, 347 (1954).

<sup>12</sup> *Jackson v. Canyon Place Homeowner's Assoc.*, 2007 SD 37, ¶ 11, 731 N.W.2d 210, 213 (dictionary definitions may be used to interpret meanings of undefined statutory terms).

practical affairs." "Alternative" means "a choice" between "one of two or more incompatible things, courses, or propositions."<sup>13</sup>

As used in SDCL 1-19A-11.1, "feasible and prudent" modify the clause "alternative to the proposal." A feasible alternative to a proposal is something that is "capable of being done" in light of technical, structural, engineering, and project design considerations.

As noted in *B.Y. Development*, the SDCL 1-19A-11.1 determination does not require examination of "any and all alternatives," but only those supported by "sufficient facts to indicate they are feasible and prudent." *B.Y. Development*, 2000 SD 102 at ¶ 15, 615 N.W.2d at 610.

The *Korzan* decision illuminates the concept that alternatives must be supported by sufficient facts. In *Korzan* the analysis turned on the feasibility and prudence of two proposed alternatives: (1) mothballing the historic building for future restoration or (2) delaying demolition while a community group tried to raise money to compensate for the added cost of restoration. *Korzan* rejected these proposals because concerns about basic maintenance while the building was mothballed and the opposition group's ability to raise the incremental funding within an acceptable timetable were not allayed with sufficient facts showing that they were feasible and prudent. *Korzan*, 2006 SD 4 at ¶¶ 16-17, 708 N.W.2d at 687.<sup>14</sup>

Thus, the definition of "feasible and prudent" in the context of an SDCL 1-19A-11.1 determination requires sufficient facts to establish that a project alternative is "capable of being done" as opposed to being merely speculative. This highly individualized determination is made on a case-by-case basis considering the historical and architectural significance of a building, its condition, its relationship to a commercial or residential historic district, and its adaptability to alternate, economically viable uses.

A project proponent's proposed use of an historic property is a relevant, though not necessarily determinative, consideration. The proposal is the building or demolition permit request.<sup>15</sup> Although no South Dakota court decision has directly reached this issue, SDCL 1-19A-11.1's use of the word "alternative," by definition, means that an alternative need not necessarily be compatible with the proposal described in a project proponent's permit application.<sup>16</sup> Authorities from other states have consistently examined alternative uses for which a property is adaptable, such as reconfiguring or

<sup>13</sup> Webster's New Collegiate Dictionary (7<sup>th</sup> Ed.)

<sup>14</sup> Though *Korzan* looked solely to *B.Y. Development* for guidance, authorities from states with the same model statute adopted by South Dakota's legislature have also observed that "relevant factors" are "something more than mere suggestions as to possible alternatives. A proposed alternative would be a relevant factor if it included sufficient factual information to support a conclusion that such alternative was feasible and prudent." *Allen Realty*, 790 P.2d at 956.

<sup>15</sup> AGO 89-41; *Allen Realty*, 790 P.2d at 956.

<sup>16</sup> To the extent that the *Korzan* decision suggest *contra*, it does so in *dicta* in the context of rejecting two alternatives it deemed infeasible and imprudent. *Korzan*, 2006 SD 4 at ¶ 17, 708 N.W.2d at 687. *Korzan* did not examine a situation where the owner could make use of the property through other feasible and prudent alternatives. SDCL 1-19A-11.1 would, very clearly, be meaningless if its protections could be defeated simply by proposing a project wholly incompatible with a protected building as it exists. *Archabal*, 495 N.W.2d at 423.

scaling back the proposed project within parameters that preserve its profitability, putting a property to a different use,<sup>17</sup> relocating an historic structure, pursuing rezoning or code modification options that will assist with adaptively reusing the property, integrating an historic structure into new construction,<sup>18</sup> or selling the property to a buyer willing to preserve an historic structure.<sup>19</sup>

For example, in *Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993), the county sought a permit for the demolition of an historic art deco armory to build a new county jail. There was no dispute that the county urgently needed a new jail facility, or that the armory site was the optimal location for it. However, after extensive examination of the security needs of a modern jail facility, the *Archabal* court determined that alternative sites would meet the county's needs even if those sites did not provide the county with every convenience that the armory site offered, i.e. the armory was the only site that allowed the county to tunnel between the jail and the county courthouse.

According to the county, the tunnel offered the safest and most cost effective means of transporting inmates to court. With the assistance of expert testimony, the *Archabal* court determined that it was feasible to safely transport inmates between alternative jail sites and the courthouse in busses or vans so that the armory building need not be demolished for the sake of the county's preference for a tunnel. According to *Archabal*, it was inappropriate to "place [the] primary emphasis [of the feasibility analysis] on the needs of the criminal justice system, rather than addressing whether siting the [jail] on a site other than the armory site would cause 'community disruption of an extraordinary magnitude.'" *Archabal*, 495 N.W.2d at 423.

The "prudent" component generally involves the examination of economic considerations.<sup>20</sup> Strictly speaking, preservation and restoration of a property is rarely technically infeasible, but the associated costs may prove prohibitive, and, therefore,

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<sup>17</sup> *Kalorama Heights Limited Partnership v. District of Columbia*, 655 A.2d 865 (Ct.App.Dist.Col. 1995) (developer failed to explore preservation alternatives, such as renovating the subject home as multi-family condominiums or offices, adding a sympathetic addition to increase housing or office space on the site, partial demolition of the home with new construction behind a retained facade, or possibly selling the home to a buyer who would preserve it); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.) (alternatives that are different from the owner's purpose in owning protected property must be considered because to consider the owner's purpose in owning the property as paramount would be to ignore statutory protections and the burdens of proof placed on the parties); *Save Old Stamford v. St. Andrew's Protestant Episcopal Church*, 2010 WL 625991 (Conn.Super.). However, a proffered restoration alternative may be deemed infeasible if the surviving remnants of an historic structure are insufficient to restore. *Friends of Hillhouse Avenue v. Yale University*, 1999 WL 300904 (Conn.Super.); *Citizens Committee to Save Rhodes Tavern v. District of Columbia*, 432 A.2d 710 (Ct.App.D.C. 1981); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Ct.App.Mo. 1980).

<sup>18</sup> *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.).

<sup>19</sup> *MB Associates v. D.C. Department of Licenses*, 456 A.2d 344 (Ct.App.Dist.Col. 1982); *First Presbyterian Church of York v. City of York*, 360 A.2d 257 (Comm.Ct.Pa. 1976); *Maher v. City of New Orleans*, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.); *Historic Preservation Alliance, Inc. v. City of Wichita*, 892 P.2d 518 (Ct.App.Kan. 1995); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Ct.App.Mo. 1980).

<sup>20</sup> *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Ct.App.Mo. 1980).

economically imprudent.<sup>21</sup> Consequently, the analysis of prudent alternatives often turns on the question of economic viability. Consistent with *Overton Park*, the *B.Y. Development* decision suggests that this analysis is broader than economic considerations alone. *B.Y. Development*, 2000 SD 102 at ¶ 17, 615 N.W.2d at 611.

In *Overton Park* the court considered alternative routes outside of protected parkland imprudent only if they "present[ed] unique problems" of cost, routing, and community disruption that reached "extraordinary magnitudes." *Overton Park*, 401 U.S. at 413, 91 S.Ct. at 822. Inquiry into the prudence of a proposed alternative did not require a "wide-ranging balancing of competing interests" given that "it will always be less costly and safer to build [a highway] straight through a park," just as it is often less costly to demolish an existing historic structure and build anew, or more costly to bring work on an historic property up to preservation standards. Knowing that preservation often entails higher costs, the *Overton Park* court nevertheless decided that "[i]f Congress intended [costs and other interests in competition with preservation objectives] to be on an equal footing with preservation of parkland there would have been no need for the statutes." *Overton Park*, 401 U.S. at 412, 91 S.Ct. at 821. Likewise, in *Archabal* the court found that "economic considerations alone" did not justify demolition of the historic armory because the increased costs associated with transporting defendants from the jail to the courthouse by bus or van "did not . . . create extreme hardship."<sup>22</sup>

No South Dakota Supreme Court case has interpreted the term "hardship" in the historic preservation context, but, in the larger scheme of zoning of which historic preservation is a part, "hardship" generally means that the denial of a variance or rezoning request would work a *de facto* taking.<sup>23</sup> Through the adaptation of South Dakota's customary test for challenges to zoning restrictions, the analysis of economically prudent alternatives would consider (1) whether the property could yield a reasonable return if used for a purpose consistent with historic standards, (2) whether a project proponent's claimed hardship is due to unique circumstances and not the historical character of the property, and (3) whether the proposed project would alter the historical character of the property or of an historical district in which it is located.<sup>24</sup> A project would be imprudent only if denial of a permit, in light of the

<sup>21</sup> *Friends of Hillhouse Avenue v. Yale University*, 1999 WL 300904 (Conn.Super.)(restoration of home located in historic district not prudent where \$1.8 million cost of reconstruction exceeded the expected post-renovation market value of \$450,000); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58 (4th Cir. 1990); *Hanich v. Lake County School Board*, 779 So.2d 567 (Fla.Ct.App.5 2001)(demolition of historic buildings appropriate where rehabilitated buildings would have half the useful life of new construction and would cost more than twice as much).

<sup>22</sup> *Save Old Stamford v. St. Andrew's Protestant Episcopal Church*, 2010 WL 625991 (Conn.Super.); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1067088 (Conn.Super.); *Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993)(preservation of protected resource the paramount consideration).

<sup>23</sup> SDCL 1-19B-46; *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 [1978](historic property protections are in the nature of zoning laws); *Cole v. Board of Adjustment of the City of Huron*, 2000 SD 119, 616 N.W.2d 483 (S.D. 2000); *City of Madison v. Clarke*, 288 N.W.2d 312, 314 [S.D. 1980]; *Chokecherry Hills Estates, Inc. v. Deuel Co.*, 294 N.W.2d 654 (S.D. 1980); *Kalorama Heights Limited Partnership v. District of Columbia*, 655 A.2d 865 (Cl.App.Dist.Col. 1995)(standard for determining whether "no reasonable alternative economic use" exists for historic structure is in the nature of takings analysis, which examines if denial of demolition permit would deprive applicant of "all viable economic uses of the property").

<sup>24</sup> *Clarke*, 288 N.W.2d at 314, citing *Deardorf v. Bd. of Adj. of Planning and Zoning Commn.*, 118 N.W.2d 78, 82 (Iowa 1962).



foregoing considerations, would deprive a property owner of all viable economic use for the property. An alternative need not afford the highest or most profitable use to be prudent, but is prudent under SDCL 1-19A-11.1 so long as it provides some viable economic use for the protected property.<sup>25</sup>

When evaluating the economics of alternatives, permitting authorities and project proponents should factor in all funding sources, such as insurance proceeds, grant funding, preservation tax incentives,<sup>26</sup> or community donations.<sup>27</sup> These financial benefits can offset the higher costs sometimes associated with restoration of properties to applicable standards. Hardship, however, does not encompass increased restoration or rehabilitation costs caused by an owner's neglect of basic maintenance and repair.<sup>28</sup> Such "demolition by neglect" would obviously defeat SDCL 1-19A-11.1's protective purposes.

### 5. Minimization And Mitigation Of Harm

If there are no feasible and prudent alternatives to a proposed project, SDCL 1-19A-11.1 requires a project to engage in all possible planning to minimize its adverse impact on an historic resource.<sup>29</sup> *Citizens Committee to Save Rhodes Tavern v. District of Columbia*, 432 A.2d 710 (Cl.App.D.C. 1981), provides an instructive case study in minimizing harm. In *Rhodes Tavern* a developer proposed to redevelop a blighted downtown city block located adjacent to another property of high historical significance. The block contained three historic structures - a bank, a theater, and an eighteenth century tavern. The developer determined that fully preserving the buildings was not feasible. This determination, however, did not mean that the

<sup>25</sup> *First Presbyterian Church of York v. City of York*, 360 A.2d 257 (Comm.Ct.Pa. 1976)(application for demolition permit properly denied where applicant had failed to show that commercial rental could not yield a reasonable return, that there were no other potential uses for property, and where fire insurance proceeds provided offsetting funds for the cost of restoration); *Maher v. City of New Orleans*, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975).

<sup>26</sup> SDCL 1-19A-20 (tax moratorium applies to properties restored to historic standards); SDCL 1-19A-13.1 (historic preservation loan and grant fund); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.)(the availability grants, tax credits, and code modifications that will enable preservation are factors to consider when weighing alternatives).

<sup>27</sup> *Benton Franklin Riverfront Trailway v. Lewis*, 701 F.2d 784 (9<sup>th</sup> Cir. 1983)(available federal funds should have been considered); *Lawrence Preservation Alliance v. Allen Realty, Inc.*, 819 P.2d 138 (Cl.App.Kan. 1992); *Historic Preservation Alliance, Inc. v. City of Wichita*, 892 P.2d 518 (Cl.App.Kan. 1995)(project proponent did not demonstrate that preservation tax credits could not make project feasible); *Connecticut Historical Commission v. Wallingford*, 2011 WL 1087088 (Conn.Super.)(the availability of grants and tax credits are factors to consider); *Project Authorization Under The New Jersey Register Of Historic Places Act*, 975 A.2d 941 (App.Div.N.J. 2009); *Homich v. Lake County School Board*, 779 So.2d 567 (Fla.Cl.App.5 2001)(demolition allowed where community donations to save school were not forthcoming).

<sup>28</sup> *Clarke*, 288 N.W.2d at 314 [property owner could have avoided financial hardship associated with removing non-conforming use by complying with permitting process]; *First Presbyterian Church of York v. City of York*, 360 A.2d 257 (Comm.Ct.Pa. 1976)(applicant had contributed to disrepair by failing to perform maintenance); *Maher v. City of New Orleans*, 516 F.2d 1051 (5<sup>th</sup> Cir. 1975)(demolition permit properly denied where deteriorated condition of property, and associated higher cost of renovation, was due to the project applicant's neglect); see also SDCL 1-19B-52.

<sup>29</sup> SDCL 1-19A-11.1; *National Trust for Historic Preservation v. City of Albuquerque*, 874 P.2d 798 (Cl.App.N.M. 1994)(a project does not include all possible planning if it excludes consideration of other forms of the project that would cause less harm); *Neighborhood Association of the Back Bay v. Federal Transit Administration*, 393 F.Supp.2d 66 (D.Mass 2005).

buildings could be demolished in total. To minimize the harm to the buildings and their historical surroundings, the developer was permitted to demolish all but the facades of the bank and theater buildings to incorporate the preserved facades into the overall new construction.<sup>30</sup>

Minimization of harm is required even for projects other than full-scale demolitions or new construction. For example, if a city were to determine that an alteration must be made to an historic structure, such as, for example, by construction of an addition, a handicap access ramp, an exterior elevator tower, or an exterior fire escape stairwell, the project's design must minimize to the fullest extent possible its adverse impact on the historic resource, and it must further mitigate the extent of its adverse impact.<sup>31</sup> Or, if a project calls for reconstructing or replacing original historic features or materials, such as porches, windows, or siding, the project must minimize to the fullest extent the potential for loss of historic integrity and mitigate the effect of that loss through appropriate measures, such as, for example, installation of historically-appropriate windows that are replacing original windows. As discussed above, state administrative regulations prescribe standards for minimizing and mitigating a project's adverse effects.

#### 6. Who Decides?

The foregoing discussion raises the question of who decides whether all feasible and prudent alternatives have been properly examined and excluded, and whether the project has properly mitigated its adverse impact. A city historic preservation commission's role is limited to making initial findings regarding an applicant's compliance with SDCL 1-19A-11.1 and the feasibility or prudence of alternatives; to requiring further submissions from a project applicant to assist its review; to developing a record for later review by a governing authority; and to preliminarily granting or denying a permit on property within its jurisdiction. However, SDCL 1-19B *et seq.* does not vest local historic preservation commissions with the final authority to grant or deny a permit.<sup>32</sup>

"The ultimate determination [of whether to issue a permit] remains in the hands of the city."<sup>33</sup> The governing entity is free to accept or reject a commission's findings and recommendations, and to enter such findings and determinations of its own as are supported by substantial evidence, but the final authority to grant or deny a permit, and the ultimate responsibility for reviewing all relevant factors, belongs to the city. The city's decision, however, like the local commission's, "shall be based on the

<sup>30</sup> This practice, colloquially referred to as a "facsectomy," is a common compromise between preservation and development interests. It has been utilized in many cities, notably Boston and Washington, D.C. The practice retains the historic streetscape design and character while affording developers modern structures and increased densities. See also *Hopkins v. Mills*, 2005 WL 4020384 (N.Y.S.Ct. 2005)[school district adequately minimized impact of building school on land adjacent to, and formerly a part of, an historic farm where it lowered building occupancy density and incorporated significant mitigation measures proposed by the SOH into the project].

<sup>31</sup> *Friends of Bethany Place, Inc. v. City of Topeka*, 222 P.3d 535 (Ct.App.Kan. 2011)(plan to pave portion of historic church grounds for parking included all planning to minimize impact of project where church planned to conceal parking lot from street view with line of bushes and new tree plantings and SOH had not suggested any further mitigation activities the church could undertake).

<sup>32</sup> *Donovan v. City of Deadwood*, 538 N.W.2d 790 (S.D. 1995).

<sup>33</sup> AGO 89-41.

standards for historic preservation" promulgated by the state's Office of History.<sup>34</sup> SDCL 1-19A-11.1 permits any person or entity who is aggrieved by the city's decision, and who has proper standing, to appeal to a court of competent jurisdiction:

#### 7. Fact-Finding By Individual Commissioners

Finally, Rapid City asked whether individual commissioners are permitted to visit a project site, or communicate with a project proponent, opponent, or interested party outside of official meetings in order to gather information on a permit application before the commission. Unlike a court of law, a local preservation commission is not an adjudicative body to which principles of strict impartiality and the prohibition on *ex parte* contacts would apply. As noted above, the authority to grant or deny a project permit rests with the governing entity.

Thus, for example, personnel from the South Dakota Department of Water and Natural Resources are permitted to negotiate permitting conditions with applicants when it is the Board of Minerals and Environment that decides whether a permit should issue. *In re: SDDS Inc.*, 472 N.W.2d 502 (S.D. 1991).

By its very nature, an historic preservation commission is partial toward preservation and protection of a city's historic resources. Its mission, of necessity, requires it to negotiate with property owners to cure project deficiencies that would encroach upon, damage, or destroy a protected historic resource. *In re: SDDS Inc.*, 472 N.W.2d at 510-11. Indeed, state law requires that such commissions be staffed with persons qualified in the field of historic preservation and dedicated to that purpose. SDCL 1-19B-3. Thus, unless local ordinance delegates final decision-making authority on permits affecting listed properties to a local commission per SDCL 1019B-62, *ex parte* restrictions that might apply to an adjudicative body would not apply to individual historic preservation commissioners.

Respectfully submitted,

  
PAUL S. SWEDLUND  
ASSISTANT ATTORNEY GENERAL

cc. Sam Kooiker, Mayor, City of Rapid City  
Jean Kessloff, Commissioner, Rapid City Historic Preservation Commission

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<sup>34</sup> SDCL 1-19B-62.



**Appendix D –**  
**Proposed Historic Preservation Review Procedures**



## **Proposed Historic Preservation Review Procedures**

Step 1: Determination of historic preservation review required. The Building Official or designee determines that the permit requested has an impact on a historic property, district, or environs. If so, the applicant schedules a pre-application conference (Step 2).

Step 2: Pre application conference. The applicant confers with the designated Planner regarding historic preservation approval procedures and conformance with the Secretary of Interior's Standards and the City's design guidelines.

Step 3: Application submission. The applicant submits a project application for a Design Review Compliance Certificate. The Planner checks the application for completeness and determines the level of review required for the proposed project. Projects that are eligible for administrative approval are limited to roofing, windows, siding, or any minor exterior maintenance improvement which require a building permit, provided such changes meet the Secretary of Interior's Standards and City's design guidelines. Administrative approvals proceed to Step 4 and all other projects proceed to Step 5.

Step 4a: Administrative approval. The Planner may grant administrative approval to certain projects that have been determined to have no adverse effect on historic property. These projects that are eligible for administrative approval are limited to roofing, windows, or any minor exterior maintenance improvement which require a building permit, provided such changes meet the Secretary of Interior's Standards and City's design guidelines. If approved administratively, the applicant may proceed with the improvements, provided the necessary building permits have been submitted and approved by the City. The Planner reserves the right to withhold the administrative action on any application and require referral to SHPO as outlined in Step 5.

Step 4b: Administrative determination of adverse effect. The Planner determines that the project has a potential adverse effect and, as a result of that determination, cannot issue an administrative approval. The Planner notifies the applicant in writing of the reasons for its determination of its adverse effect. Within five business days of an administrative determination of adverse effect, the applicant may: (a) withdraw the application, (b) revise and resubmit it to address the staff written comments (Step 3) or (c) disagree with the staff determination and request that the application proceed to an initial SHPO review (Step 5). Note: an appeal to the Zoning Board of Adjustment cannot bypass the initial SHPO review and subsequent steps.

Step 5: Initial SHPO review. Where the Planner determines that a project has the potential to damage, destroy, or encroach upon historic property, the Planner prepares a summary staff report of the project with potential adverse effects

described. The staff report and project application are sent to the SHPO for review. The SHPO, in turn, reviews the project file and reports its findings back to the Planner, as summarized in Step 6.

Step 6a: SHPO determination of no adverse effect. Where the SHPO finds the project will have no adverse effect, the SHPO submits its determination in writing to the Planner, and the application proceeds to Step 9.

Step 6b: SHPO determination of potential for adverse effect. Where the SHPO finds the project may have an adverse effect, a written notification is sent to the Planner to prepare a Case Report for submission to the Historic Preservation Commission, and a public hearing is scheduled as outlined in Step 7.

Step 7: Historic Preservation Commission review and public hearing. The Historic Preservation Commission reviews the project application and Case Report at a public hearing. The Commission makes a determination, based upon all relevant factors, of whether there are no feasible and prudent alternatives to the proposed project and whether it includes all possible planning to minimize harm to the historic property. Further, the Commission comments on the Case Report by agreeing, disagreeing, or declining to comment on its findings. The Commission may also include additional comments, including proposed conditions for approval. The project application, Case Report, and Historic Preservation Commission's determination, findings, comments and conditions are sent to SHPO for their final determination in Step 8.

Step 8: Final SHPO determination. SHPO reviews the record of the Historic Preservation Commission's hearing, the Case Report, and the project file to make its recommendation to the City for approval or denial. For approval, the SHPO prepares a written determination that, based upon all relevant factors, there is no feasible and prudent alternative to the project, and the project includes all possible planning to minimize harm to historic property. If the SHPO cannot make such a determination, it makes a recommendation for denial by the City. The SHPO may also recommend feasible and prudent alternatives to mitigate the adverse effect or may find no possible alternatives that are feasible and prudent to mitigate the adverse effect. The SHPO sends a written summary of their determination, including any recommendations or conditions for approval, to the City.

Step 9: Final City review. The Planner performs a final review of the complete project file to consider all relevant factors from the application, SHPO, and the Historic Preservation Commission, when applicable, before taking final action to approve or deny the proposed project.

Step 10a: Final City approval. Where the City has received a written determination of no adverse effect by the SHPO (Step 6a) and the Planner grants approval or approval with conditions, the applicant is issued a Design



Review Compliance Certificate and may proceed with obtaining required City permits. For approved projects subject to a final SHPO determination (Step 8), the Planner transmits a record of the City's final approval to the SHPO by certified mail, and no permit may be issued by the City until ten days after the SHPO has received the certified mailing.

Step 10b: Final City denial. If the City's final determination is to deny the project application, the applicant may resubmit a revised application (Step 3) or appeal to the Zoning Board of Adjustment within 30 days for the denial.



**Appendix E –  
Recommended Ordinance**



## Recommended Ordinance

### **Creating New Design Review Overlay Zoning Districts, Granting Authority for the Newly-Created Design Review Boards to Serve as Separate Historic Preservation Commissions, Revising the Scope and Extents of Design Review by Enlarging the Downtown Area Subject to Design Review and Authorizing the Design Review Board to Act on Sign Permits, and Modifying Review and Permitting Procedures.**

- I. *Repeal Title I Chapter 2.68 “Historic Preservation Commission” of the Rapid City Municipal Code in its entirety.*
- II. *Amend Section 17.06.010 “Zoning districts—Established” of the Rapid City Zoning Ordinance by adding two new overlay zoning districts for the DD Downtown Development Overlay Zoning District and the WB West Boulevard Neighborhood Conservation Overlay Zoning District.*
- III. *Establish authority for the Design Review Boards to approve all signs within the Design Review Overlay Zoning Districts by amending Section 17.50.080, paragraph Q, of the Rapid City Zoning Ordinance, to read as follows:*
  - Q. Sign review district requirements.
    1. *Purpose.* This section creates sign review districts that correspond to the same boundaries of all Design Review Districts established under Chapter 17.62.
    2. *Design Review Board approval.* Approval for any sign located within a Design Review District shall be granted by applicable Design Review Board.
    3. In considering proposed signs within sign review districts, the Design Review Board shall consider the following criteria: size and position, projection, color, message, texture, materials, illumination and lettering style for the historic era for which the building or structure was constructed. In order to adequately review these factors, the applicant for a sign permit must, in addition to the requirements of §17.50.0801., submit the following: a photograph of the property and structure, a photograph or scaled drawing of the property or structure with the proposed sign sketched on it, color chips or color samples of the same colors that are to be used for the sign, and a scaled drawing of the proposed sign depicting the sign fonts and other attributes as they will actually appear on the sign.

- 4. Each Design Review Board may adopt rules in accordance with this section and design guidelines for appropriate signage that is compatible with the character of each Design Review District.
- 5. If the Design Review Board approves an application for a sign which meets the criteria established by this section, then a Design Review Compliance Certificate shall be issued by the Director, and a sign permit may be obtained by the applicant. In order to ensure compliance with the provisions of this section, the Board may approve applications with stipulations. If the Board denies an application for a sign which does not meet the criteria established by this section, the applicant shall be notified in writing as to the reasons for denial. Decisions of the Design Review Board may be appealed to the Zoning Board of Adjustment, as authorized by Sec. 17.54.010 B.3.

IV. *Identify the existing overlay zoning districts as Geographic Overlay Zoning Districts and reorganize into Chapter 17,60 of the Rapid City Zoning Ordinance, as follows:*

**CHAPTER 17.60: GEOGRAPHIC OVERLAY ZONING DISTRICTS**

**Section**

- 17.60.010 General provisions.**
- 17.60.020 CL Canyon Lake Overlay Zoning District.**
- 17.60.030 FS Fifth Street Overlay Zoning District.**
- 17.60.040 MH M Hill Overlay Zoning District.**

**17.60.010 General Provisions.**

- A. Purposes. The Geographic Area Overlay Zoning Districts are hereby created to advance special public interests of select geographic areas within the City by creating standards that supplement the requirements of the underlying zoning districts.
- B. Overlay District Requirements. The requirements of these overlay districts supplement the requirements of the underlying district. If the overlay zoning district imposes a greater restriction than the underlying zoning district regulations, the overlay zoning district shall control.
- C. Zoning Designation. The zoning designation of a property within a Geographic Overlay Zoning District shall combine the designations of the underlying and

overlay districts by adding a suffix to denote the designated overlay district, e.g. a residential property zoned LDR-1 shall be designated LDR-1-CL within the Canyon Lake Overlay Zoning District, LDR-1-FS within the Fifth Street Overlay Zoning District, and LDR-1-MH within the M Hill Overlay Zoning District. The boundaries of each Geographic Overlay Zoning District shall be depicted on the official Zoning Map.

**17.60.020 CL Canyon Lake Overlay Zoning District.**

**17.60.030 FS Fifth Street Overlay Zoning District**

**17.60.040 MH M Hill Overlay Zoning District.**

- V. *Create Design Review Overlay Zoning Districts that regulate the exterior design of development projects within designated areas of special public interest, including the Downtown Development Overlay Zoning District and West Boulevard Neighborhood Conservation Overlay Zoning District, by adding a new chapter 17.62 to the Rapid City Zoning Ordinance to read as follows:*

**Chapter 17.62**

**DESIGN REVIEW OVERLAY ZONING DISTRICTS**

**Sections:**

**17.62.010 General Provisions.**

**17.62.020 DD Downtown Development Overlay Zoning District.**

**17.62.030 WB West Boulevard Neighborhood Conservation Overlay Zoning District.**

**17.62.010 General Provisions.**

- A. Purposes. The Design Review Overlay Zoning Districts are hereby created to advance special public interests of select areas of the City which have unique character of design and recognizable attributes of buildings, streetscapes, and environmental design features that are in need of protection. These areas include Historic Districts and Historic Properties, the City center, and other areas of the City that give Rapid City its unique identity. The regulations in these overlay districts, therefore, are intended to protect and enhance these special attributes and improve the quality of city living for all of Rapid City’s citizens.

- B. Design Review Overlay Zoning District Requirements. The requirements of these overlay districts supplement the requirements of the underlying district by enacting procedures for review of certain building developments, in accordance with the procedures set forth in Section 17.54.010 E. Design Review Boards of this Zoning Ordinance. The land use, dimensional, and other zoning ordinance requirements of the underlying districts remain.
- C. Zoning Designation. The zoning designation of a property within a Design Review Overlay Zoning District shall combine the designations of the underlying and overlay districts by adding a suffix to denote the designated overlay district, e.g. a residential property zoned LDR-1 within the West Boulevard Neighborhood Conservation District shall be designated LDR-1-WB, and a commercial property zoned CB within the Downtown Development District shall be designated CB-DD. The boundaries of each Design Review Overlay Zoning District shall be depicted on the official Zoning Map.
- D. Applicable Definitions. The following definitions apply when used in this Chapter:
1. *Adverse Effect.* Any project that will encroach upon, damage, or destroy any Historic Property.
  2. *Alteration.* Any exterior change to a building that requires a building permit, sign permit, demolition permit, or other construction permit. Such alterations include any changes to exterior building components, such as, but not limited to, siding, roofing, windows, and signs; new construction of additions; and demolition. Routine maintenance and repairs, however, as defined in this Section, shall not be considered an alteration.
  3. *Case Report.* The means of reporting possible threats to a historic property to the South Dakota Office of History, State Historic Preservation Office, the standards for which are established in ARSD 24:52:07:03. “Standards for Case Report.”
  4. *Demolition.* Any act that destroys in whole or in part a building or structure that requires a demolition permit.
  5. *Design Guidelines.* For historic properties, the Secretary of Interior’s Standards and any supplemental guidelines approved by the Common Council for the review of projects, or for properties that are not historic properties but subject to design review, the guidelines approved by the Design Review Board.



6. *Design Review Compliance Certificate*. A document, issued by the Director, that certifies that the work to be done on property within a Design Review Overlay Zoning District complies with all design guidelines. No building permit, sign permit, demolition permit, or other construction permit can be issued for a project unless a Design Review Compliance Certificate has first been obtained.
7. *Director*. The Director of Community Planning and Development Services or his/her designee.
8. *Environs*. The area surrounding Historic Property within which a project could have an impact upon that property. The environs include any property or portion thereof that adjoins a Historic Property and also includes any adjacent property or portion thereof that is separated by a street, alley, or other public rights-of-way.
9. *Historic Property*. Any property that is listed on the National or State Registers of Historic Places.
10. *Historic District*. An area listed on the National or State Registers of Historic Places that contains Historic Properties.
11. *Minor Exterior Improvements*. Improvements to a residential building deemed minor by the Director but which require a building permit, such as, but not limited to, installation of fences, construction of small sheds/outbuildings, construction of small decks/patios, and similar exterior improvements.
12. *National Register of Historic Places*. The register created by the National Historic Preservation Act of 1966, as amended.
13. *New Construction*. An addition to an existing building or structure or the erection of a principal or accessory building or structure.
14. *Project*. Any of the following undertakings, all of which are subject to historic preservation or design review: (a) an alteration or new construction conducted on or within the environs of a Historic Property or within a Historic District; (b) an undertaking that meets the conditions of SDCL § 1-20-22 regarding projects endangering archaeological sites; (c) an alteration or new construction in a non-historic location but within a Design Review District; or

(d) demolition of a building on or within the environs of a Historic Property, within a Historic District, or in a non-historic location but within a Design Review District.

15. *Routine Maintenance and Repairs.* Work that corrects any deterioration or damage to a building or structure in order to restore it to its condition prior to the deterioration or damage. The work does not require a permit and does not involve a substantive change, as determined by the Director, in the design, material, or outer appearance of the building or structure.

16. *Secretary of Interior's Standards.* The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings, 1995, National Park Service, U.S. Department of Interior.

17. *State Historic Preservation Office or SHPO.* The South Dakota Office of History charged with the administration and enforcement of the historic preservation provisions of SDCL § 1-19A-11.1.

18. *State Register of Historic Places.* The State register prepared by the South Dakota Office of History.

E. Historic Preservation Review and Permitting Procedures. The Common Council hereby appoints the Director of Community Planning and Development Services or his/her designee (the "Director") to administer these procedures in accordance with the requirements of SDCL § 1-19A-11.1. Any alteration to an existing building or new construction within a Historic District and its environs or to an individually-listed Historic Property and its environs shall be subject to these historic preservation review and permitting procedures (except as provided below for signs and exempt projects in paragraphs 1a and 1b). No permit can be issued by the City unless the applicant has completed the approval process and the Director has first authorized the issuance of a permit, as provided here:

1. *Determination of required historic preservation review.* The Director shall determine whether the proposed project affects a Historic Property or its environs. A permit for alteration of a property within a designated historic location, shall first obtain a Design Review Compliance Certificate, except as follows:

a. A sign permit has been authorized by the Design Review Board as provided in Section 17.50.080, paragraph Q, or

- b. A project is specifically made exempt from historic preservation review, as provided under paragraph G of this Section 17.62.010 below, any person applying for Pre-application conference.
2. *Pre-application conference.* The applicant for a Design Review Compliance Certificate shall first confer with the Director regarding historic preservation review procedures and conformance with the Secretary of Interior's Standards and the City's design guidelines.
3. *Submission of Application for Design Review Compliance Certificate.* Following the pre-application conference, the applicant shall submit a complete application for a Design Review Compliance Certificate to the Director. The application requirements may vary from case to case but must clearly depict the proposed project and its impacts on surrounding properties through the use of such means as building elevations, construction plans, drawings, illustrations, photographs, or other means necessary to allow the City to adequately assess the conformity of the proposed project with the Secretary of Interior's Standards and the City's design guidelines. The Director shall advise the applicant of required submissions and determine the completeness of an application. If an application is subject to Design Review Board action, the Board may request additional application information. Upon review of a complete application, the Director shall determine its level of review required for approval.
4. *Administrative actions of certain residential projects.* Administrative action may be taken by the Director for certain residential projects, limited to roofing, windows, or siding or minor exterior improvements, as defined herein. The Director reserves the right to withhold administrative action on any application and refer any project to the SHPO for review and comment. For such residential projects, the Director may either issue an administrative approval or a determination of adverse effect, as follows:
  - a. *Administrative approval.* The Director may approve an application for a project determined to have no adverse effects on Historic Property, provided such changes do not have potential to damage, destroy, or encroach upon Historic Property and meet the Secretary of Interior's Standards and the City's design guidelines. If approved administratively, the applicant may proceed with the improvements, provided the necessary building permits have been approved by the City.

- b. *Administrative determination of adverse effect.* In cases where the Director determines that the project does not meet the Secretary of Interior's Standards and the City's design guidelines and, consequently, has an adverse effect on Historic Property, that is, the potential to damage, destroy, or encroach upon Historic Property, administrative approval cannot be issued. The Director shall notify the applicant in writing for his/her reasons for a determination of adverse effect. Within five business days of the Director's notification, the applicant may: (1) withdraw the application, (2) modify and resubmit the application, or (3) disagree with the Director's determination and request initial SHPO review of the application, as required by paragraph 5 below.
5. *Initial SHPO review.* Where the Director determines that a project has the potential to damage, destroy, or encroach upon Historic Property, the Director must prepare a summary report of the project with potential adverse effects described and send the project file, including the summary report and application, to the SHPO for an initial review. The SHPO, in turn, will review the project file and report its findings back to the Director.
6. *SHPO determination.* Following its review of the project file described in paragraph 5 above, the SHPO shall make a written determination to the Director, as follows:
- a. *SHPO determination of no adverse effect.* Where the SHPO issues a written determination that the project will not damage, destroy, or encroach upon Historic Property, the Director shall approve the project. The applicant may then proceed with the improvements, provided the necessary building permits have been approved by the City.
- b. *SHPO determination of adverse effect.* Where the SHPO issues a written determination that the project may damage, destroy, or encroach upon Historic Property, the Director shall prepare a Case Report, as defined herein, for submission to the Design Review Board for its review and response and schedule a public hearing.
7. *Design Review Board review and public hearing.* The Director shall submit the project file, including the application, the Case Report, and the written SHPO determination of adverse effect to the Board for a public hearing. The Board shall make a determination, based upon all relevant factors, of whether there are no feasible and prudent alternatives to the proposed project and whether it includes all possible planning to minimize harm to the historic

property, in compliance with the requirements SDCL § 1-19A-11.1. The Board shall comment on the Case Report by agreeing, disagreeing, or declining to comment on the Case Report's findings and may include additional comments, including proposed conditions for approval. The project application, Case Report, and Design Review Board's determination, findings, comments and conditions are sent to SHPO for their final determination, as described in paragraph 8 below.

8. *Final SHPO comments.* Following its review of the record of the Design Review Board hearing, the Case Report, and the project file the SHPO will issue its final recommendation to the City for approval or denial of the project application. For a recommendation for approval, the SHPO has determined that based upon all relevant factors, there is no feasible and prudent alternative to the project, and the project includes all possible planning to minimize harm to historic property. If the SHPO cannot make such a determination, its recommendation is for denial by the City.
9. *Final review by the City.* Following receipt of the final written SHPO determination, as described in paragraph 8 above, the Director shall perform a final review of the complete project file to consider all relevant factors from the application, SHPO, and the Design Review Board, and other relevant considerations, before taking final action to approve or deny the proposed project.
10. *Final action on behalf of the City.* The Director, following review of the complete project record, shall take final action on behalf of the City, as follows:
  - a. *Final City approval.* Where the City has received a written determination of no adverse effect by the SHPO, as described in paragraph 6a above, and the Director grants approval or approval with conditions of the project application, the Director shall issue a Design Review Compliance Certificate, and the applicant may proceed with obtaining required City permits. For approved projects subject to a final SHPO determination, as described in paragraph 8 above, the Director shall transmit a record of the City's final approval to the SHPO by certified mail, and no permit may be issued by the City until ten days after the SHPO has received the certified mailing.
  - b. *Final City denial.* If the Director denies the project application, the applicant may accept the denial, resubmit a revised application, or appeal

to the Zoning Board of Adjustment within 30 days of the denial, as authorized by Sec. 17.54.010 B.3.

F. Design Review Procedures in Non-Historic Downtown District Locations. The Common Council hereby appoints the Director of Community Planning and Development Services or his/her designee (the “Director”) to administer these procedures. Any alteration to a building or new construction that is within the Downtown Development District but not identified as a Historic Property or within the environs of a Historic Property shall be subject to these design review procedures (except as provided below for signs and exempt projects in paragraphs 1a and 1b). No permit can be issued by the City unless the applicant has completed the approval process and the Director has first authorized the issuance of a permit, as provided here:

1. *Determination of required design review.* The Director shall determine whether the proposed project is located within a designated non-historic location but within the Downtown Development District. A permit for alteration of a property within such locations shall first obtain a Design Review Compliance Certificate, except as follows:
  - a. A sign permit has been authorized by the Design Review Board as provided in Section 17.50.080, paragraph Q, or
  - b. A project is specifically made exempt from design review, as provided under paragraph G of this Section 17.62.010 below, any person applying for Pre-application conference.
2. *Pre-application conference.* The applicant for a Design Review Compliance Certificate shall first confer with the Director regarding design review procedures and conformance with the Downtown Development District design guidelines.
3. *Submission of Application for Design Review Compliance Certificate.* Following the pre-application conference, the applicant shall submit a complete application for a Design Review Compliance Certificate to the Director. The application may vary from case to case but must clearly depict the proposed project and its impacts on surrounding properties through the use of such means as building elevations, construction plans, drawings, illustrations, photographs, or other means necessary to allow the City to adequately assess the conformity of the proposed project with the Downtown Development District design guidelines. The Director shall advise the

applicant of required submissions and determine the completeness of an application. If an application is subject to Design Review Board action, the Board may request additional application information.

4. *Administrative reviews of minor projects in non-historic locations.* In cases of minor projects that have minimal or no impacts on the urban design character and economic vitality of the Downtown Development District, the Board may authorize administrative action by the Director. The Director may issue an administrative approval when the project is clearly consistent with the Downtown Development District design guidelines or defer action on any project to the Board for final action. Where a project conflicts with Board design guidelines and has a clearly detrimental impact on the urban design character and economic vitality of the Downtown Development District, the Director may deny a project or defer it to the Board for final action.
5. *Appeals.* An administrative appeal of any final action may be made to the Zoning Board of Adjustment, as authorized by Sec. 17.54.010 B.3.

G. Exemptions from Historic Preservation and Design Review. The following projects shall be exempt from historic preservation and design review:

- a. Projects which do not require a building permit or other construction permit required by the City, including, but not limited to, landscaping, fencing, and painting.
- b. Projects which affect only a building interior;
- c. The routine maintenance and repairs of an exterior feature of a building, which does not involve a substantive change, as determined by the Director, in its design, material, or outer appearance;
- d. The installation, replacement, and repairs and routine maintenance and repairs of public infrastructure, except for buildings, such as, traffic control devices, utilities, street lights, sidewalks, streets, alleys, public parking areas, driveways, drainage structures, and the like. Infrequent, large scale infrastructure improvements, however, that are exempt from these zoning provisions for historic preservation review may be subject to SHPO review in accordance with the requirements of SDCL § 1-19A-11.1; and
- e. In any case where the Building Official determines that there are emergency conditions dangerous to life, health, or property, the Building Official shall order the remedying of these conditions without review approval.

- H. Prevention of Demolition by Neglect. Any owner of a property within a Design Review District shall not permit the deterioration of the property by intentional neglect, such that a building on the property may be threatened with demolition because of this deterioration. Where appropriate, the Design Review Board governing the location of the neglected property may request a meeting with the owner in order to discuss the condition of the property and the means to restore its condition. Such neglect shall constitute a violation of this Ordinance and be subject to Section 17.54.070 Penalties.
- I. Conformity with the Approvals Given. All work performed pursuant to these historic preservation and design review approval procedures of this Section shall conform to the provisions of the approval.

**17.62.020 DD Downtown Development Overlay Zoning District.**

- A. District Intent. This overlay Design Review District encompasses Downtown Rapid City, the historic center of business, retail trade, banking, governmental services, entertainment, recreation, cultural facilities and community institutions serving the region. These Design Review District regulations are designed to supplement the underlying Zoning District use regulations and development standards by helping to preserve and enhance Downtown's unique historical and architectural integrity, thereby fostering its continuing vitality as the regional center of Rapid City.
- B. District Boundaries. The boundaries of the DD Downtown Development District shall follow the boundaries of the Business Improvement District for Downtown Rapid City, except for that portion which lies within the limits of the West Boulevard Historic District. The district boundaries shall be depicted on the official Rapid City Zoning Map.
- C. Downtown Development District Design Review Board. The Board, created by Section 17.54.010 E. Design Review Boards, shall oversee these Design Review District provisions and be responsible for advancing the District Intent of this Downtown Development District.
- D. Required Historic Preservation Review. The Board shall perform historic preservation review in accordance with the procedures set forth in Section 17.65.010 E. Historic Preservation Review and Permitting Procedures.
- E. Required Design Review in Non-Historic Locations. The Design Review Board for the Downtown Development District shall undertake measures to protect and enhance the urban design character and economic vitality of non-historic Downtown Development District locations. These are locations within the



Downtown Development District that are not subject to required Historic Preservation Review described in paragraph B. above. To achieve the Board's goal and further advance the District Intent of the Downtown Development District, the Board is hereby authorized to perform design review of applicable projects and alterations that affect the exterior public view of a building, in accordance with the procedures set forth in Section 17.65.010 F. Design Review Procedures in Non-Historic Downtown District Locations.

**17.62.030 WB West Boulevard Neighborhood Conservation Overlay Zoning District**

- A. District Intent. The intent of the West Boulevard Neighborhood Conservation District is to conserve the historic residential character of Rapid City's original housing settlement. These overlay district regulations are designed to supplement the underlying Zoning District use regulations and development standards. These provisions are designed to encourage attentiveness and concern by property owners and residents to the integrity of neighborhood design, the neighborhood investment value for historic rehabilitation, and the conservation of homes and the neighborhood for future generations.
  - B. District Boundaries. The boundaries of the WB West Boulevard Neighborhood Conservation District shall follow the limits of the West Boulevard Historic District. The district boundaries shall be depicted on the official Rapid City Zoning Map.
  - C. West Boulevard District Design Review Board. The Board, created by Section 17.54.010 E. Design Review Boards, shall oversee these Design Review Overlay District provisions and be responsible for advancing the District Intent of the West Boulevard Neighborhood Conservation District.
  - D. Required Historic Preservation Review. The Board shall perform historic preservation review in accordance with the procedures set forth in Section 17.65.010 E. Historic Preservation Review and Permitting Procedures.
- VI. *Establish a Design Review Board and Historic Preservation Commission to conduct historic preservation activities and perform design review of exterior changes to development projects within each of the Design Review Districts by adding a new part E to section 17.54.010 Organization of the Rapid City Zoning Ordinance to read as follows:*

**17.54.010 Organization.**

- E. Design Review Boards.

1. *Created.*

Separate Design Review Boards for each of the Design Review Districts are hereby created. These Boards are authorized to perform design review of alterations to and demolitions of buildings and serve as the Historic Preservation Commissions, as authorized by SDCL § 1-19B-2, for the Downtown Historic District and West Boulevard Historic District listings on the National Register of Historic Places. All properties within the Downtown Historic District are assigned to the Design Review Board of the Downtown Development District, and all properties within the West Boulevard Historic District are assigned to the Design Review Board of the West Boulevard Neighborhood Conservation District. Historic Properties that are individually listed on the National Register shall be assigned to the Design Review Board for the District listed on the following table:

**Table of Individually-Listed Historic Properties**

<b>Address</b>	<b>Property Name</b>	<b>Assigned to Downtown Development District</b>	<b>Assigned to West Boulevard Neighborhood Conservation District</b>
918 5th Street	Church of the Immaculate Conception	x	
717 Quincy Street	Emmanuel Episcopal Church	x	
715 Kansas City Street	First Congregational Church of Christ	x	
604 Kansas City Street	Rapid City Carnegie Library	x	
320 7th Street	Rapid City Fruit Company	x	
306 7th Street	Milwaukee Road Freight House	x	

Address	Property Name	Assigned to Downtown Development District	Assigned to West Boulevard Neighborhood Conservation District
329 Main Street	Midwest Tire (Dean Motor Company)	x	
4121 Canyon Lake Road	Cassidy House		x
827-829 Main Street	Rapid City Garage	x	
728 6th Street	Michael Quinn House	x	
312 Main Street	Rapid City Laundry	x	
402 Saint Joseph Street	Motor Service Company	x	
822 Main Street	Gambrill Storage Building	x	
515 West Boulevard	Rapid City Historical Museum	x	
328 E New York Street	Feigel House	x	
818 Saint James Street	Zack Holmes House (Barney House)		x
101 E Quincy Street	Maurice Nelson House		x
2101 West Boulevard	Black Hills Model Home (Wilkins House)		x
940 Skyline Drive	Dinosaur Park	x	
832 Saint Joseph Street	Nichols Funeral Home	x	

Address	Property Name	Assigned to Downtown Development District	Assigned to West Boulevard Neighborhood Conservation District
803 West Street	Glenn W. Shaw House		x
415 Main Street	Casper Supply Company of SD	x	
601 12th Street	Swander Bakery Building	x	
307 Saint Joseph Street	Pennington County Courthouse	x	
201 Main Street	Fairmont Creamery Company Building	x	
615 Columbus Street	Dakota Middle School (Rapid City High School)	x	
222 New York Street	Pap Madison Cabin	x	
3788 Chapel Lane	Chapel in the Hills	x	

2. *Number of Members; Qualifications; Compensation.*

- a. *Regular Members.* Each Design Review Board shall be composed of five (5) members, all of whom shall be legal residents of the city and who shall serve without pay. At least one of the members on each of the Design Review Boards shall be professionally-qualified as a licensed architect within the State of South Dakota and meet the additional Secretary of Interior’s Professional Qualifications Standards in Historic Architecture or be professionally-qualified in Architectural History in accordance with the

Secretary's Professional Qualifications Standards. At least one of the members of the Design Review Board for the Downtown Development District shall be a representative of the sign industry. Moreover, it is preferred that members appointed to the Design Review Board for the Downtown Development District be stakeholders in Downtown Rapid City, that is, property owners, merchants, business owners, developers, investors, active members of a downtown organization, such as Destination Rapid City, and others with a direct stake in the vitality of Downtown Rapid City. Similarly, it is preferred that individual members appointed to the Design Review Board for the West Boulevard Neighborhood Conservation District be resident owners of homes within the neighborhood or stakeholders in the neighborhood, such as active members of the West Boulevard Neighborhood Association, neighborhood property owners, and others with a direct stake in the conservation of this historic neighborhood. In addition to the preferred qualifications described above, due regard should be given to proper representation of the remaining members from fields such as history, architecture, architectural history, urban planning, archaeology, paleontology and law.

- b. *Alternate Members.* There shall also be appointed at least one alternate member to each Design Review Board. The alternate members shall be appointed in the same manner as the regular members and shall have the same preferred qualifications. The alternate members may attend every meeting as though they were regular members. An alternate member, however, can only participate and vote at the meeting when there is an absence at the meeting that results in less than five (5) members being present. If a regular member should leave during a meeting and the alternate member is present but not already participating, then the alternate may fill the seat in the same manner as previously described.

3. *Member Appointments and Terms.*

Design Review Board members shall be recommended by the Planning Commission for appointment by the City Council. Members shall serve until expiration of their terms or until the members shall have resigned or been removed for cause. Each member shall be appointed for a term of three (3) years; provided that, upon the initial organization of each Board, three (3) members and one (1) alternate shall be appointed for a three (3) year term and two (2) members shall be appointed for a two (2) year term. Nevertheless, the Planning Commission may recommend appointments for shorter terms for the

purpose of establishing a rotational pattern whereby the terms of one or more members expire on January 1 of each year.

4. *Vacancies.*

In case of any vacancy in membership of a Design Review Board due to death, resignation, or otherwise, a successor shall be appointed to fill the unexpired portion of the term of the member he or she replaces. The Mayor, with the confirmation of the City Council shall, after a public hearing, have authority to remove any member of a Board for cause which cause shall be stated in writing and made a part of the record of the hearing. Any member who is continuously absent from meetings without acceptable justification, may be removed by majority vote of the other Board members with the confirmation of the City Council.

5. *Officers.*

Each Design Review Board shall, at its first organizational meeting and at each first meeting in January of subsequent years, elect from its membership the officers it may deem necessary.

6. *By-Laws and Rules of Procedures.*

Each Design Review Board may adopt its own by-laws and rules of procedures, consistent with this Ordinance and the laws of the State of South Dakota.

7. *Historic Preservation Commission powers and duties of the Boards.*

Each Design Review Board when acting in its capacity as the Historic Preservation Commission shall take actions necessary and appropriate in order to accomplish a comprehensive program of historic preservation that promotes the use and conservation of Historic Properties for the education, inspiration, pleasure, and enrichment of citizens of Rapid City and the state, consistent with SDCL § 1-19B-1. These actions include, but are not limited to, the following responsibilities:

- i. To conduct surveys of local Historic Properties;
- ii. To participate in planning and land-use processes undertaken by the City;
- iii. To cooperate with the federal, state and county governments in the pursuance of the objectives of historic preservation;

- iv. To contract, with the approval of the City Council, with the state or the federal governments;
- v. To promote and conduct an educational and interpretive program on Historic Properties and issues within the City;
- vi. To recommend ordinances and provide information for the purposes of historic preservation to the City Council;
- vii. To notify the Director of Equalization of the designation of any Historic Property by the City or by the U.S. Department of the Interior;
- viii. To adopt and maintain written design guidelines for making exterior changes to Historic Property;
- ix. To open discussions with owners of Historic Property and other interested persons when the Historic Property may be demolished, materially altered, remodeled, relocated or put to a different use;
- x. To assist the Historic District Study Committee when it investigates and reports on proposed Historic Districts or updates to existing Historic Districts;
- xi. To assist owners of Historic Property and buildings and structures in Historic Districts in preserving their buildings;
- xii. To assist in the review of projects on which review by the State Historic Preservation Office is required under SDCL § 1-19A-11.1; and
- xiii. To attend informational and educational programs covering the duties of the Commission and current developments in historic preservation.

8. *State Review of Proposed Development Projects affecting Historic Properties.*

The State Office of History, State Historic Preservation Officer (SHPO), shall review proposed development projects that could have an adverse effect on Historic Properties, in compliance with the requirements of SDCL § 1-19A-11.1. The Secretary of Interior's Standards for the Treatment of Historic Property, revised 1990, shall be applied to historic design review. All such proposals must first be submitted to the City for a Case Report of findings to the SHPO. The SHPO will determine whether a project has no potential adverse effect or could have a potential adverse effect. Where a potential adverse effect has been determined, the SHPO may recommend feasible and prudent alternatives to mitigate the adverse effect.

9. *Meetings.*

Each Design Review Board shall meet at least once a month at a regular time and place to be set by the Board.

10. *Reporting requirements.*

Each Design Review Board shall make an annual report to the City Council on or before July 1 of each year, and at such other times as the Council may direct.

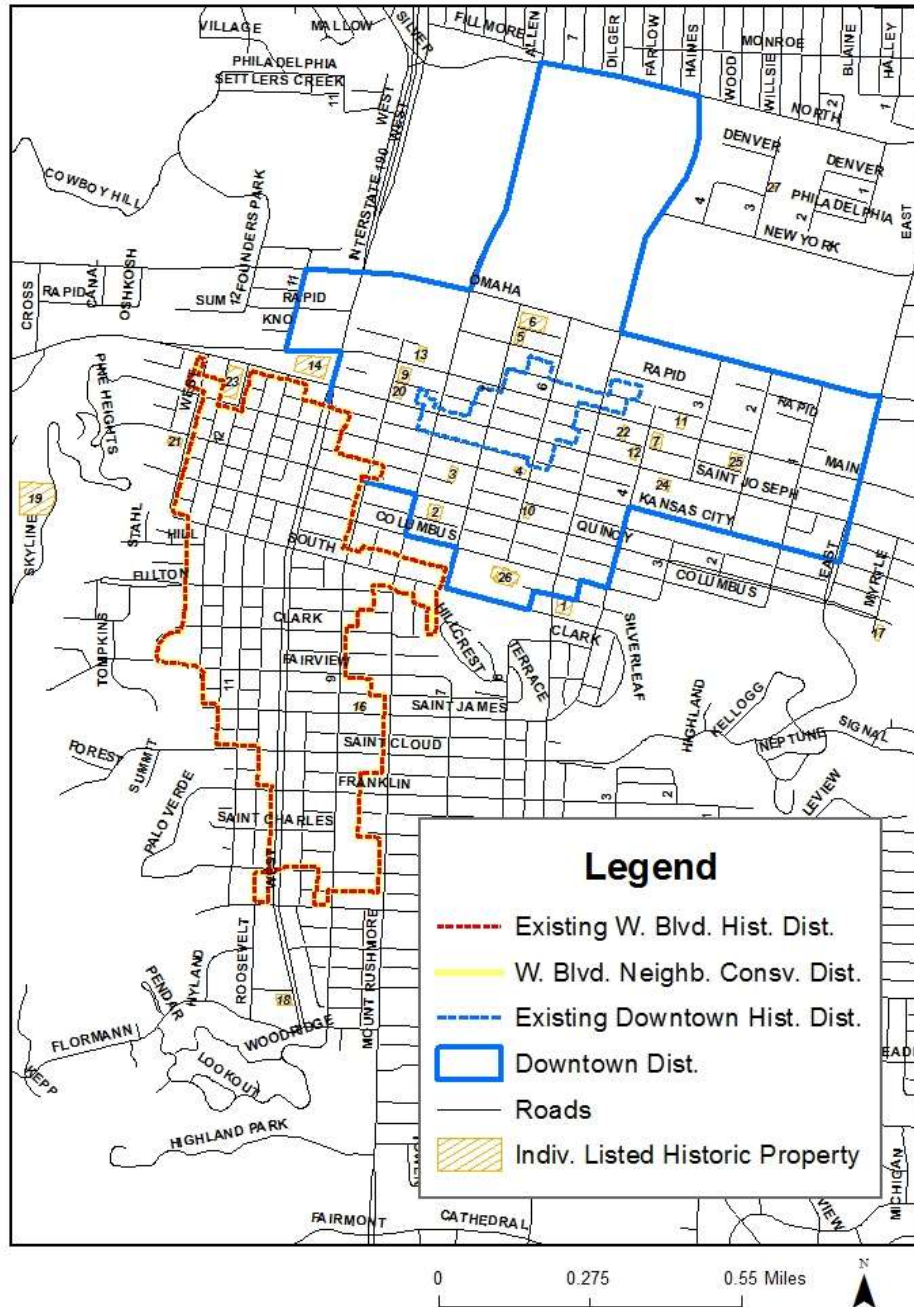
VII. *Amend the Rapid City Zoning Map by delineating the extents of the design review overlay districts, as described as follows:*

- A. **DD Downtown Development District.** The boundaries of the DD Downtown Development District shall follow the boundaries of the Business Improvement District for Downtown Rapid City, except for that portion which lies within the limits of the West Boulevard Historic District, as shown on Exhibit A, which is attached hereto and made a part of this Ordinance. Changes to the boundaries of the Business Improvement District and that portion of the West Boulevard Historic District that lies within the Business Improvement District on the effective date of this Ordinance will necessitate a Zoning Map amendment to the Downtown Development District boundaries.
  
- B. **WB West Boulevard Neighborhood Conservation District.** The boundaries of the WB West Boulevard Neighborhood Conservation District shall follow the limits of the West Boulevard Historic District, as shown on Exhibit A – Map of Design Review Districts, which is attached hereto and made a part of this Ordinance. Changes to the boundaries of the West Boulevard Historic District on the effective date of this Ordinance will necessitate a Zoning Map amendment to the West Boulevard Neighborhood District
  
- C. **District Designations of Individually-Listed Historic Properties.** Additional historic properties that are individually listed on the National Register of Historic Places shall be assigned to the Design Review Districts listed below in Exhibit B – Table of Individually-Listed Historic Properties. Historic properties that are essentially residential in character and design shall be assigned to the West Boulevard Neighborhood Conservation District, and all remaining Historic Properties that are non-residential shall be assigned to the Downtown Development District, as listed in Exhibit B and shown on Exhibit C – Map of Individually-Listed Historic Properties, which are attached hereto and made a part of this Ordinance. Changes to the listing of individual Historic Properties on the effective date of this Ordinance will necessitate a Zoning Map amendment to the respective Design Review District



# Exhibit A - Map of Design Review Districts

## Rapid City Design Review Districts



**Exhibit B - Table of Individually-Listed Historic Properties**

<b>Exhibit C Map Key Number</b>	<b>Address</b>	<b>Property Name</b>	<b>Assigned to Downtown Development District</b>	<b>Assigned to West Boulevard Neighborhood Conservation District</b>
1	918 5th Street	Church of the Immaculate Conception	x	
2	717 Quincy Street	Emmanuel Episcopal Church	x	
3	715 Kansas City Street	First Congregational Church of Christ	x	
4	604 Kansas City Street	Rapid City Carnegie Library	x	
5	320 7th Street	Rapid City Fruit Company	x	
6	306 7th Street	Milwaukee Road Freight House	x	
7	329 Main Street	Midwest Tire (Dean Motor Company)	x	
8	4121 Canyon Lake Road	Cassidy House		x
9	827-829 Main Street	Rapid City Garage	x	
10	728 6th Street	Michael Quinn House	x	
11	312 Main Street	Rapid City Laundry	x	
12	402 Saint Joseph Street	Motor Service Company	x	
13	822 Main Street	Gambrill Storage Building	x	

<b>Exhibit C Map Key Number</b>	<b>Address</b>	<b>Property Name</b>	<b>Assigned to Downtown Development District</b>	<b>Assigned to West Boulevard Neighborhood Conservation District</b>
14	515 West Boulevard	Rapid City Historical Museum	x	
15	328 E New York Street	Feigel House	x	
16	818 Saint James Street	Zack Holmes House (Barney House)		x
17	101 E Quincy Street	Maurice Nelson House		x
18	2101 West Boulevard	Black Hills Model Home (Wilkins House)		x
19	940 Skyline Drive	Dinosaur Park	x	
20	832 Saint Joseph Street	Nichols Funeral Home	x	
21	803 West Street	Glenn W. Shaw House		x
22	415 Main Street	Casper Supply Company of SD	x	
23	601 12th Street	Swander Bakery Building	x	
24	307 Saint Joseph Street	Pennington County Courthouse	x	
25	201 Main Street	Fairmont Creamery Company Building	x	
26	615 Columbus Street	Dakota Middle School (Rapid City High School)	x	

<b>Exhibit C Map Key Number</b>	<b>Address</b>	<b>Property Name</b>	<b>Assigned to Downtown Development District</b>	<b>Assigned to West Boulevard Neighborhood Conservation District</b>
27	222 New York Street	Pap Madison Cabin	x	
28	3788 Chapel Lane	Chapel in the Hills	x	

**Exhibit C - Map of Individually-Listed Historic Properties**

