

Demolition Delay

A properly drafted ordinance or bylaw can be an invaluable and effective preservation tool

(The following excerpt is taken from "Demolition Delay Protection: A Guide for Local Historical Commissions," by Maria Letunic Hanlon, Esquire, published by the Massachusetts Historical Commission, 1989)

Introduction

As development pressures grow, an increasing number of Massachusetts communities are adopting demolition regulations as legal mechanisms to protect local historic resources.

Demolition delay ordinances or bylaws protect historic buildings that do not stand within local historic districts (pursuant to M.G.L. Chapter 40C). Typically, no other designation or form of protection is available. A demolition delay ordinance or bylaw provides a review procedure requiring a delay in the demolition of historically significant buildings. This allows time to consider preservation alternatives to the proposed demolition.

Demolition delay provisions provide community-wide protection, enabling local historical commissions to protect all the buildings in their community of historical or architectural significance. Furthermore, despite the fact that demolition delay regulations cannot sanction or deny proposed demolitions, they provide an alternative when it is in the public interest to preserve particular buildings.

Typically, an application for a demolition permit for a historic property (pursuant to the State Building Code) triggers the operation of a demolition delay procedure. The local building commissioner is usually responsible for notifying the local historical commission that a property owner applied for a demolition permit. The local historical commission, in turn, determines whether the historic property is significant and should be preserved rather than demolished. The demolition delay ordinance or bylaw enables the local historical commission to delay the granting of the demolition permit for a set period of time, usually up to six months, while viable alternatives to demolition are explored and negotiated.

Since demolition regulations delay rather than prevent demolitions, the effectiveness of the provisions depends on the ability of the local historical commission to negotiate with property owners. Many private property owners are unaware of the historical significance of their property. They may not be familiar with federal rehabilitation tax incentives, or with the economic benefits that can come from preserving historic properties through development projects. Options may include developing adaptive re-uses for the building, locating buyers willing to rehabilitate, preserve or adapt the property, or, as a last resort, moving the building to a new location.

Moreover, demolition delay ordinances or bylaws enable municipalities to consider the impact of proposed demolitions at an early stage of a project's development. Prompt involvement facilitates communication and cooperation and avoids the conflicts that often arise when last-minute compromises are sought.

Finally, the delay period can provide a leverage tool when it seems highly unlikely that delaying a demolition for six months will produce a viable preservation alternative. In such situations, local historical commissions may agree to release the delay period in exchange for design review and approval of the new construction. This option may be particularly useful in commercial development projects where timing considerations are critical.

Legal Basis

Demolition delay ordinances or bylaws are created under the municipal home rule authority granted by the Massachusetts Constitution. The Home Rule Amendment to the Massachusetts Constitution, Article 89, empowers cities and towns to enact legislation on a wide range of subjects not pre-empted by state law.

Consequently, demolition delay provisions are a valid and legal exercise of municipal authority and are afforded the same level of recognition as any other regulations affecting municipal affairs. In *City of Cambridge, et al. vs. Cellucci, Cambridge Building Commissioner*, the court found that various city regulations, including a demolition delay ordinance, are not subordinate to, or in conflict with, the State Building Code. Therefore, the building commissioner must comply and conform with the ordinances. Superior Court, Civil Action No. 87-1522 (1988).

Furthermore, since demolition provisions only delay the granting of a demolition permit, and the property owners still retain final decision-making authority, a demolition delay bylaw offers a minimally intrusive mechanism for furthering preservation objectives, one that does not conflict with the operation of the State Building Code or any other state statute as required by the Home Rule Amendment.

The office of the Attorney General routinely approves demolition delay bylaws enacted by towns, pursuant to the procedural review required in M.G.L. Chapter 40, § 32. These routine approvals are indicative of the acceptance of demolition procedures based on local home rule powers and signal a firm legal procedural ground for such measures.

It should be noted that M.G.L. Chapter 143, § 3A, provides that in the event of a conflict between the State Building Code and a statute, ordinance or bylaw regulating any historic district, the legislation governing exterior architectural features will prevail. Moreover, the State Building Code (780 C.M.R. 3409.0 *et seq.*) affords preferential treatment to historic buildings and structures.

Although not directly related to demolition delay regulations, the favorable treatment of historic properties in connection with the provisions of the Building Code is strong evidence of the legislative deference to historically significant buildings and structures.

Application

Over 60 communities in Massachusetts have demolition delay ordinances or bylaws currently in effect.

Towns and cities have a great deal of flexibility in creating demolition delay procedures and can draft their regulation to respond to local concerns and conditions. Existing ordinances and

bylaws vary greatly in procedural structure and the afforded substantive protection. Delay periods range from a number of days to twelve months for the local historical commission to issue a recommendation. The usual delay measure is six months, which appears to be a balanced compromise between the need for a sufficient and realistic time period to explore preservation-minded solutions and the need to avoid placing overly burdensome restrictions on property rights.

Certain ordinances and bylaws specify that all buildings over a certain age are initially subject to its provisions, while others utilize designations, listings, or determinations as the criteria for applicability. Furthermore, there are variations regarding penalties, time periods for issuing determinations, and public participation.

A properly drafted ordinance or bylaw can be an invaluable and effective preservation tool. Close attention must be paid to choices concerning the substantive aspects of the regulation. An effective and procedurally efficient demolition delay ordinance or bylaw is one that accounts for a community's unique requirements while providing sufficient protection to enable preservation of historically significant resources.

Local historical commissions undertaking demolition delay efforts are initially responsible for assuring that the ordinance or bylaw is adequately drafted. Equally important are its implementation and day-to-day administration. Efforts should include some form of public information (i.e. a brochure or public meeting) and a continuous commitment to cooperate with affected property owners and other local boards and officials. These actions help maintain a positive public image, while effectively protecting local historic resources.

Guidelines for Drafting a Demolition Delay

A demolition delay ordinance or bylaw should include the following provisions:

A. Purpose Statement.

B. Definitions of commonly used terms.

C. Procedures detailing the operation of the demolition delay process, which should include:

- i. Preamble - A statement declaring that no permit for the demolition of a building shall be issued which is not in compliance with the provisions of the ordinance or bylaw.
- ii. Application - Information which must be included in an application for a demolition permit to allow the local historical commission to make a prompt and reasonable determination, and obtain background information to facilitate the process if a delay period is deemed necessary.
- iii. Initial Determination - A detailed outline of the initial process for determining whether the building subject to the application for a demolition permit is significant and requires further review.

- iv. Public Hearing - The public process for making final a determination of whether a historically significant building should be “preferably preserved” and subject to a delay period.
- v. Final Determination - A statement explaining when and how the final decision will take place and what effect it will have.
- vi. Notice Requirements.
- vii. Failure to Act.

D. Responsibility of Owner

A section outlining the duties of the owner of record. For instance, the owner should be responsible for participating in the investigation of options and for facilitating the process by providing any necessary information, allowing access to the property, securing the premises, and actively cooperating in seeking alternatives with the commission and any interested parties.

E. Exceptions

A statement allowing the local building commissioner to issue a demolition permit for a significant building at any time after receipt of (written) notification from the local historical commission that there is no reasonable likelihood of preserving, restoring, rehabilitating or moving the building; or that the owner has made a continuing, bona fide, reasonable effort to formulate a solution for a period of time equal to the delay period, and that such efforts have been unsuccessful.

F. Building Permits

A section declaring that no permit for the erection of a new structure on the existing site of an existing significant building may be issued prior to the issuance of a demolition permit for such existing building.

G. Emergency Demolitions

A statement allowing the local building commissioner to issue a demolition permit at any time in the event of imminent and substantial danger to the health or safety of the public due to deteriorating conditions.

H. Enforcement and Remedies

A provision authorizing the local historic commission or the building inspector to institute any and all proceedings in law or equity necessary to obtain compliance with the requirements of the ordinance or bylaw, or prevent a violation of its terms.

I. Historic Districts Act

A statement declaring that if any of the provisions of the ordinance or bylaw conflict with M.G.L. Chapter 40C, the Historic Districts Act, that act shall prevail.

J. Severability

A statement deeming the provisions of the ordinance or bylaw severable.

Conclusion

A properly drafted and administered demolition delay bylaw or ordinance can be an invaluable preservation tool, enabling communities to protect their historic buildings. Demolition delay regulation provides an effective measure of control over local historic resources. Enactment of a local demolition ordinance or bylaw is the only tool a local historical commission can utilize to assure active participation in the formal process when demolitions of historic properties are proposed. Demolition delay protections constitute an efficient and effective vehicle for furthering the legal mandate of local historical commissions pursuant to M.G.L. Chapter 40, § 8D.

(The following excerpt is taken from "Preservation through Bylaws and Ordinances: Tools and Techniques for Preservation Used by Communities in Massachusetts", published by the Massachusetts Historical Commission, 1999)

Arlington: The demolition delay period in the town of Arlington is 12 months. This provides additional opportunities to save a building from demolition.

Chatham: The Chatham Historical Commission has had some great successes with their demolition delay bylaw. Before the bylaw, no notice of a demolition was required. With the bylaw, the Historical Commission is informed of the demolition before the wrecking ball is on the site. In some cases, just the recognition by the Commission that the building is significant has convinced some owners to save the building and rehabilitate the structure. In another case, an outbuilding was saved when a buyer was found that was willing to move the building.

Falmouth: It took the town of Falmouth three times to pass a demolition delay bylaw - but they did it! Since then, the bylaw can be credited with saving a National Register building which was moved to a new site. Without the bylaw, a buyer willing to move the property may not have been found and the building could have been lost.

Lynn: Preservationists in the City of Lynn attempted passage of a demolition delay ordinance three times. Although it failed each time, after the demolition of the last Stick Style building in Lynn the ordinance passed.

Medfield: When the town of Medfield wanted to pass a demolition delay bylaw, they collected photographs of each building in town that had been demolished over the years and displayed the photos at the annual town day. The presentation dramatized the need for a demolition delay bylaw. In 1999, the town extended their demolition delay period from 6 months to 12 months.

Newton: The city of Newton has used their demolition delay ordinance as a means of encouraging new construction that is better designed.

Reading: The Reading Historical Commission was very pro-active in saving the circa 1710 Foster Emerson House. While the building was initially saved from destruction through the demolition delay bylaw, other means were necessary to ultimately save the building from an eminent demolition. These included publicity in the local newspaper, the creation of a non-profit organization and working with many local town boards. The Foster Emerson House was saved by moving the building to a town owned parcel of land and then selling the property to private

owners that agreed to pay for the restoration of the building. A preservation restriction was attached to the deed to make sure the building will be preserved by the new owners.

For more information on Demolition Delay Bylaws, including sample bylaws from other communities in Massachusetts, contact the Director of Local Government Programs at the Massachusetts Historical Commission by calling 617/727-8470.