

Analysis of Section 9, Creation and Amendment of Historic Districts Ordinance Committee, October 6, 2014

Section 9 requires several changes all of which are shown using Track Changes on the attached document. Most are minor, but one, the use of Standards and Guidelines, is major and requires additional explanation that cannot be compressed into marginal annotations. This analysis is provided below.

The problem with using Standards *and* Guidelines in Section 9(b).

A. Key facts

1. Use of “standards” and “guideline criteria” in today’s ordinance

To understand the language in Section 9 of the draft ordinance, we must understand the language of the *existing* ordinance. It differs significantly from the draft ordinance and it is essential that we know how.

Section 5(c)(3) in today’s ordinance uses the term “standards” but only in a particular instance. Here is the language: “In determining whether to issue a Certificate of Appropriateness for any demolition, the Landmarks Commission shall *consider* and *may give decisive weight to any or all* of the following.” (Italics added.) Seven “standards” are then listed. The italicized words clearly show that all “standards” are optional.

Section 6(d)(2) in today’s ordinance uses the terms “guideline criteria” to denote the qualities sought for historic districts. Here is the language: “Guideline criteria *to be considered* in the development of Historic District plans are as follows.” (Italics added.) Thirteen criteria are then listed. The italicized words clearly show that all “guideline criteria” are *optional*.

Neither “Standards” nor “Guideline Criteria” are defined in Section 2 of today’s ordinance.

Consequently, today’s ordinance invites developers, city staff, and the Landmarks Commission to base their decisions on a mix of highly subjective factors.

2. Use of “standards” and “guidelines” in the proposed draft ordinance

The draft ordinance *departs* from this subjectively by requiring a mix of *mandatory* standards and *voluntary* guidelines. More specifically, the Commission selected, defined, and created usage rules for “standards” and “guidelines.”

a. Definitions provided in the draft ordinance:

Standard means a rule that is required. Under this ordinance, all Standards adopted in an historic district must be complied with in every instance of development in the district.

Guideline means a principle put forward to help determine course of action. Under this ordinance, Guidelines adopted in an historic district shall serve as a collective set of principles to promote architectural compatibility of new construction and exterior alterations in an historic district.

Several key qualities about these new definitions are immediately apparent. Standards are “required” rules whereas guidelines are optional “principles.”

b. Key usage rules:

(1) Section 9 (b) says that *all* historic districts “*shall* include specific Standards *and* Guidelines.” (Italics added.)

(2) Section 9(b) clearly states that “specific Standards and Guidelines shall be used for two purposes:

(a) to create and amend historic districts; and

(b) to “ensure that construction and exterior alterations are done in a manner sensitive to the character of a historic district.”

B. Problems with Standards *and* Guidelines

The draft ordinance requires all historic districts to have both Standards and Guidelines, that is, mandatory and optional qualities. This fact dooms the ordinance to unnecessary and undesirable subjectivity—one of the most frequently heard criticisms of today’s ordinance. Why would want the new ordinance to commit the same sins as the old? We believe the Ad Hoc Committee should recognize this problem and take the following steps:

1. Legal precision requires the consistent and sole use of Standards

Over the years the City Attorney has always interpreted the term “criteria” as used in today’s ordinance as “standards,” that is, as mandatory factors. However, representatives of the Plan Department have argued that factors used to determine compliance of a project within a district be “flexible.” Their goal was to prevent the presence of a single factor such as gross volume to kill a project. Unfortunately, the price of such “flexibility” is vagueness and subjectivity. The legally precise alternative is to rely exclusively on Standards throughout the ordinance. This is why in working with the Landmarks Commission to prepare the draft ordinance, John Strange used the term Standards for all five historic districts.

2. Because Guidelines add unnecessary and undesirable vagueness and subjectivity to the ordinance, the term should be deleted from the ordinance.

The fact is, Guidelines, are neither necessary nor desirable. Therefore, the term should be deleted from the ordinance. The ordinance would function better without this confusing concept.

To require Guidelines to be selected for all historic districts during Phase 1 and then to delay the selection of specific Guidelines until Phase 2, creates a Trojan horse, that is, a predictable process for weakening and confusing the Standards for each historic district. Good public policy requires that Guidelines be deleted from the ordinance.