

Code Enforcement and Historic Preservation—The Same But Different.

By David Wesner

In terms of properties or structures within our communities, code enforcement is the tool we use to ensure that those properties or structures do not fall into such a state of disrepair that they become a serious negative drain on the surrounding properties or neighborhood. If a violation occurs, we tell the owner that the codes require that the violation be corrected, which may include repair or replacement of portions of the structure. In most circumstances, the codes do not place any more specific requirements on the owner with respect to completing the repair or replacement. However, if the property or structure is in a Historic Preservation District, additional requirements may be placed on the owner depending on the nature and extent of the violation or condition to be corrected in order to meet the goal of historic preservation (which is beyond the general goal of traditional code enforcement).

The purpose of historic preservation may be summed up by the language in one section of my municipality's ordinance: "Protecting, enhancing, and perpetuating the distinctive historical and/or architectural characteristics of the City, which represent elements of the City's cultural, social, economic, political and architectural history". With that purpose in mind, the historic preservation ordinance places certain restrictions and requirements on work that may be necessary on a structure within a designated historic district. My municipality's ordinance (which I believe is typical of these ordinances) provides: "A Certificate of Appropriateness issued by the Commission shall be required before a landmark, or any building(s), structure(s), site, object(s) or improvement(s) within an historic preservation district is: changed or modified; reconstructed; erected, wholly or in part; moved; or, demolished, wholly or in part."

Two things about those provisions jump to the fore: the commission; and, the certificate of appropriateness. These two items could have a significant impact on accomplishing any repairs, replacement, or work to be done on a structure in a historic preservation district. The commission is made up of a certain number of citizens of the community, with some of those members to have particular backgrounds (my ordinance provides for a seven-member commission). The commission is tasked with establishing design criteria which will be applied to work that will be done on structures. The design criteria are reviewed in conjunction with the work to be done. A certificate of appropriateness will only be issued once the work falls within the parameters of the design criteria. The extent of the design criteria could impact the overall cost of making any repairs or alterations to a structure. And, that cost could impede getting any repairs or alterations, which may be required through code enforcement, completed. If the repairs or alterations don't get completed, the goal of code enforcement is not being met (which also means that the "preservation" piece of "historic preservation" is not being met as well). The certificate of appropriateness is significant from the standpoint that an owner cannot look at the design standards and complete work that he believes to be consistent with those standards without commission involvement. The owner must gain commission approval first before any work can be started or completed (oddly enough, one has to get a certificate of appropriateness to demolish a structure .. what happens if the condition of the structure warrants demolition but the commission won't issue the certificate?) And, since the requirement applies to any building, structure or improvement on the property, the requirement is not limited to just the house or main structure. The requirement for a certificate would also apply to garages.

As we are all familiar with the sensibilities of individuals, an owner could very easily run into a buzz-saw with the commission due to those sensibilities. We all know that traditional code enforcement can be difficult when it is just an inspector and the property owner dealing with general requirements to make a repair or improvement. Adding the Historic Preservation Commission, as well as more specific standards concerning repairs or improvements, on top of that could make it even more difficult to accomplish our overall goals for structures and neighborhoods.

As we seek to enforce any codes or requirements, reasonableness and fairness should lead to accomplishing the goals behind the enforcement of those codes or requirements. With that in mind, the pieces of historic preservation that would be put in place (design standards, parameters and the process for obtaining a certificate) should not be so onerous or burdensome as to ultimately defeat the purpose (as well as defeat the purpose of traditional code enforcement) by making any changes, ad-

Continued on page 31



David B. Wesner

David began his career with the law firm of Acton & Snyder, where he first performed work for the City of Danville. In 1996, he was appointed Danville's first full-time City Attorney. He became Danville's Corporation Counsel in 2008 and continues to serve in that capacity. David has many civic interests. He is the Past President of the Danville Family YMCA Board of Directors and has been involved with the Kiwanis and Knights of Columbus. He is also a Board Member of First Illinois Credit Union in Danville. David is a graduate of the University of Illinois and has a J.D. from Ohio Northern University Law School.

Second Look *Cont'd from page 18*

nal damages, usually this will be insufficient to support an award of attorney's fees under 42 U.S.C. § 1988.

> Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment). Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 461 U.S., at 430, n. 3, or multiplying "the number of hours reasonably expended ... by a reasonable hourly rate," id., at 433.[7]

But Watch Out. *Farrar* leaves open the possibility that in some instances an award of nominal damages *might* support an attorney's fee award under 42 U.S.C. § 1988. Possible examples of such situations could include a successful suit for injunctive relief in which the plaintiff obtained only nominal damages or a suit for a small amount of damages, so that a one-dollar award could be characterized as a "prevailing."[8]

In addition, while courts hesitate to award punitive damages in civil rights cases against governments or public officials, they have done so in egregious cases.[9] When that happens, the proper measure of compensatory damages often fades into relative unimportance.

Notes

1. One example, among many, of what I believe to be an incorrect approach to damages calculation that gives property owners a windfall is *Superior Savings Association v. City of Cleveland*, 501 F. Supp. 1244, 1250 (N.D. Ohio 1980) (mortgage holder gets difference between value of collateral before and after demolition).
2. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).
3. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).
4. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).
5. *Carey v. Piphus*, 435 U.S. 247, 260 (1978) (citations and footnotes omitted).
6. *See* text accompanying n. 5.
7. *Farrar v. Hobby*, 506 U.S. 103, at 114-15.
8. *See Boraks v. Wilson*, 383 F. Supp. 195, 197 (D.D.C. 1974), for how a court might handle a jurisdictional minimum requirement in the context of a civil rights claim for a small amount of compensatory damages. For a recent in-depth discussion of calculating damages in civil rights cases, *see generally,* Michael L. Wells, *Civil Recourse, Damages-as-redress, And Constitutional Torts*, 46 Ga. L. Rev. 1003 (2012).
9. *See Smith v. Wade*, 461 U.S. 30 (1983). ML

Code Enforcement *Cont'd from page 20*

ditions, or alterations cost prohibitive or otherwise impossible to meet.

Noting the possible difficulties in dealing with historic preservation above, the goal of code enforcement and historic preservation are the same and are positive ones for any community. They both seek compliance and the continued viability of our structures and neighborhoods through the proper maintenance and care for properties and structures. Therefore, both are important to the enhancement and sustainability of our communities. What we see as traditional code enforcement and historic preservation can, and should, work together. While some municipalities may think that historic preservation doesn't fit their community, I think every community should take a good look and truly determine if any particular area is worthy of keeping a level of historic significance to that area. While the design standards add an additional layer of compliance to code enforcement, preserving a community's history is a positive goal and could lead to other positive impacts, such as tourism or simply other owners making improvements in order to keep their property looking as good as their neighbor's.

I didn't appreciate history until I was well out of college. And, our current younger generation seems to be lost in their i-pods, i-phones, x-boxes, facebook, and twitter. While they may not appreciate it now, we should always consider preserving history for future generations. ML

ListServ *Cont'd from page 19*

our capabilities and our capacities and to be mindful that there are still real world consequences to our actions. The books might be virtual, the messages might be instant, but the impact on our cities and ourselves as people changes things in a real way and those changes play out over time.

It is an old story being retold in a new and different context, I suppose. Paul Bunyan was replaced by the chain saw, John Henry lost out to the steam hammer, and Casey Jones pushed the locomotive a little too hard.

While more information can be helpful, it may not lead us to better results or more long-lasting solutions. While the forest is bigger, the path is no wider or straighter than it ever was. It is still people who help us find our way and it is still people that we serve. ML

Supreme Court *Cont'd from page 27*

unimproved portion of the same waterway did not constitute a discharge of pollutants under the CWA. Furthermore, the Ninth Circuit's result did not square with the definitions in the CWA itself, which defines "discharge of pollutant" to mean "any *addition* of any pollutant." The case was reversed and remanded. *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, No. 11-460 (Jan. 08, 2013).

IMLA participated in an amicus brief in support of petitioner Los Angeles County Flood Control District. ML

IMLA's 78th Annual Conference
San Francisco, California
September 29-October 2, 2013

