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December 17, 2013

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**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.[1]

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

[1] 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 [Unites 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"); *Homich 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 properly 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.[2] 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.[3] 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*

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[2] 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).

[3] *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.[4] 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.[5]

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

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[4] *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. Breckweg 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).

[5] *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."[6] 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.[7] 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."[8] 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.[9]

### 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-

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[6] *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 (Ct.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 (5th 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).

[7] *Homich v. Lake County School Board*, 779 So.2d 567 (Fla.Ct.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 (Ct.App.Dist.Col. 1982); *Block House Municipal Utility District v. City of Leander*, 291 S.W.3d 537 (Ct.App.Tex. 2009); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Ct.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 (5th 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 (Ct.App.N.M. 1994)(record was devoid of expert testimony respecting the impact of noise, visibility, or dust and exhaust caused by proposed highway).

[8] *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).

[9] *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 (Ct.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 (Ct.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.[10]

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*.[11]

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 *B.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.[12] *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

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[10] 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.

[11] *State v. Strauser*, 63 N.W.2d 345, 347 (1954).

[12] *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."[13]

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.[14]

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.[15] 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.[16] Authorities from other states have consistently examined alternative uses for which a property is adaptable, such as reconfiguring or

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[13] *Webster's* New Collegiate Dictionary (7th Ed.)

[14] 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.

[15] AGO 89-41; *Allen Realty*, 790 P.2d at 956.

[16] 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,[17] 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,[18] or selling the property to a buyer willing to preserve an historic structure.[19]

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.[20] 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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[17] *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 façade, 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).

[18] *Connecticut Historical Commission v. Wallingford,* 2011 WL 1087088 (Conn.Super.).

[19] *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 (5th 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).

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

economically imprudent.[21] 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."[22]

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.[23] 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.[24] A project would be imprudent only if denial of a permit, in light of the

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[21] *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); *Homich 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).

[22] *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.); *Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993)(preservation of protected resource the paramount consideration).

[23] 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 (Ct.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").

[24] *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.[25]

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,[26] or community donations.[27] 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.[28] 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.[29] *Citizens Committee to Save Rhodes Tavern v. District of Columbia*, 432 A.2d 710 (Ct.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

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[25] *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 (5th Cir. 1975).

[26] 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).

[27] *Benton Franklin Riverfront Trailway v. Lewis*, 701 F.2d 784 (9th Cir. 1983)(available federal funds should have been considered); *Lawrence Preservation Alliance v. Allen Realty, Inc.*, 819 P.2d 138 (Ct.App.Kan. 1992); *Historic Preservation Alliance, Inc. v. City of Wichita*, 892 P.2d 518 (Ct.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.Ct.App.5 2001)(demolition allowed where community donations to save school were not forthcoming).

[28] *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 (5th 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.

[29] SDCL 1-19A-11.1; *National Trust for Historic Preservation v. City of Albuquerque*, 874 P.2d 798 (Ct.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.[30]

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.[31] 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.[32]

"The ultimate determination [of whether to issue a permit] remains in the hands of the city."[33] 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

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[30] This practice, colloquially referred to as a "facadectomy," 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).

[31] *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).

[32] *Donovan v. City of Deadwood*, 538 N.W.2d 790 (S.D. 1995).

[33] AGO 89-41.

standards for historic preservation" promulgated by the state's Office of History.[34] 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.

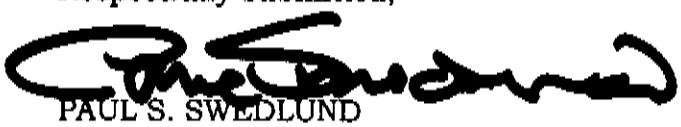
**7. Fact-Finding By Individual Commissioners**

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

[34] SDCL 1-19B-62.