

PRACTICAL PRESERVATION

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Notice to Proceed: What Does It Mean?

Under Michigan's Local Historic Districts Act, Public Act 169 of 1970, as amended (PA 169), historic district commissions (HDC) are given the authority to issue one of three findings for projects under their purview: a Certificate of Appropriateness (COA), Denial, or Notice to Proceed (NTP). While both the COA—used for projects that are appropriate—and Denial—used for projects that are inappropriate—are generally well understood, the NTP is a bit trickier and can sometimes trip up an HDC.

Over time, some HDCs tend to default to using the NTP to deal with projects that aren't clearly appropriate or inappropriate—those pesky projects where the proposed solution isn't either the best preservation solution or the worst, and it isn't entirely clear if it meets the Standards and local guidelines. However, under state law, the NTP **should not** and **cannot** be used to simply proceed with projects that may not clearly meet the Standards.

Per PA 169, the NTP has a very specific use. Put simply, the NTP is for the HDC to allow work that doesn't meet the Standards **ONLY IF** the HDC finds that at least one of the following conditions exists **AND** the proposed work is necessary to substantially improve or correct the condition:

- The resource constitutes a hazard to the safety of the public or to the structure's occupants
- The resource is a deterrent to a major improvement program that will be of **substantial** benefit to the community **AND** the applicant has obtained **all** necessary planning and zoning approvals, financing, and environmental clearances
- Retaining the resource will cause undue financial hardship to the owner when a **governmental action**, an **act of God**, or **other events beyond the owner's control** created the hardship, **AND** all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the district, have been attempted and exhausted by the property owner
- Retaining the resource is not in the interest of the **majority** of the community

HDC Design Review Responsibilities

SHPO's "HDC Best Practices" series is intended to encourage informed decision-making and promote best practices in historic preservation in consideration of the "Secretary of the Interior's Standards for Rehabilitation" (Standards). All content is provided for informational purposes only.

In accordance with Public Act 169 of 1970, as amended, the local historic district commission should evaluate the merits of each proposed project in its jurisdiction in consideration of the particulars of the project, the local context, potential impacts to historic resources and the overall district, the Standards, and local historic district design guidelines, if applicable.

If the HDC Can't Use the NTP for "Iffy" Projects, What Should It Do?

For projects that do not meet the very specific requirements of the NTP, the HDC can only issue a COA or a Denial under PA 169. Using the NTP when it isn't appropriate to do so dilutes the purpose of that tool.

For projects that may be questionable, the HDC should carefully consider the project details, the reasons the property is significant, the essential features that are critical to understanding the property's character and relationship to the district, current conditions, the location of proposed changes, and the surrounding context to evaluate potential impacts. The HDC also has the option to work with the property owner on an economically feasible plan for a project to maximize conformance to the guidelines in a responsive way.

Through this workflow, if the HDC can comfortably agree that the project would not adversely impact the district and it generally meets the spirit and intent of the Standards and applicable guidelines, a COA may be appropriate. If not, a Denial will be in order.

Notice to Proceed Criteria: Best Practices in Informed Decision-Making

Because the NTP is only supposed to be used in certain situations and because the actions that result from a NTP tend to have an irreversible impact on historic resources—generally speaking, most uses of the NTP are associated with partial or complete demolition—HDCs must make careful and purposeful use of the tool. Equally important, as with all decisions, HDCs need to make sure that their decision-making around the use of the NTP is transparent, consistent, defensible, and well documented. If not, the HDC runs the risk of undermining its purpose and compromising public perception and understanding of the HDC's role.

Consider the following best practices as a starting point for making informed and defensible decisions under the NTP criteria identified in §399.205(6) of PA 169.

Public Safety Hazard

As a best practice, use of this criteria should be based, at minimum, on a thorough, unbiased structural assessment report prepared by a licensed engineer. Reports should be prepared by engineers experienced in historic preservation as historic building systems are often quite different from their modern counterparts.

In documenting its decision, the HDC should reference specific evidence to support its conclusions and show that the burden of proof has been met rather than broadly stating the “report is satisfactory” or something similar. Also keep in mind that HDCs have the ability to retain an on-call historical architect or preservation specialist that can provide advisory support to the HDC in such situations. This option is particularly useful in communities where the HDC does not include a commissioner with professional preservation experience.

Deterrent to a Major Improvement Program

This criteria requires that additional considerations be met by the applicant. Specifically, the applicant must have obtained all necessary planning and zoning approvals, financing, and environmental clearances. These steps are important as the intent of this criteria is to minimize instances where action is taken on a hypothetical project that is still very much dependent on future actions that may or may not happen. If the project is contingent on actions still to be taken, it cannot be processed under this criteria. The other key consideration is that, per PA

169, for a NTP to be issued, the proposed work has to be necessary to substantially improve or correct the condition. Being broadly associated with a proposed development site isn't enough. The continued existence of the historic resource in its original location must in and of itself be a contributing deterrent.

In documenting use of the NTP, the HDC should explicitly identify the substantial community benefit, including known and anticipated positive impacts and the sources of information upon which they are based, and enumerate all steps completed by the applicant.

Undue Financial Hardship

PA 169 sets a high bar for demonstrating undue financial hardship. Specifically, the hardship must be due to an issue beyond the owner's control and the owner must have exhausted all feasible alternatives to eliminate the hardship before this criteria can be met.

Communities can identify specific documentation that must be submitted as part of a request under a financial hardship claim. Such documentation commonly includes appraisals, tax records, property income records, documentation of efforts to sell the property, and more. HDCs that have not yet done so are encouraged to establish such documentation standards as a best practice since this helps to ensure that decisions are based on a thorough understanding of the financial situation and efforts taken to eliminate the hardship.

Majority Community Interest

While this criteria can be broadly interpreted, it should be carefully considered. It should not be looked at as a “catch all” out for a NTP or used lightly to benefit an individual developer or development company. The fact is that historic preservation in and of itself has been determined to be a public purpose under state and federal law. As such, any effort to demonstrate that retaining a historic resource is not in the interest of the community at large must be well founded and documented. Isolated editorials representing one person's opinion or off-the-cuff remarks at a meeting or on social media do not by default represent majority community interest. The burden of proof lies with the applicant—not the HDC—to explicitly demonstrate why it is not in the interest of the majority of the community to retain the resource and how that majority interest was determined.



APPLICATION MATERIALS

HDCs have the authority to request different application materials for different types of projects. As a best practice, HDCs are encouraged to evaluate their application materials and make sure they are satisfied with information requested from applicants. If not, consider revising your application and providing more explicit guidance. Examples of different types of applications can be provided by SHPO upon request.



WHAT SHOULD THE HDC DO IF IT DOESN'T HAVE ENOUGH INFO TO KNOW IF A NTP IS APPROPRIATE?

Ask for more information! HDCs should make sure that they have sufficient, relevant, consistent, and—perhaps most importantly—credible information. HDCs should not feel pressured to make a decision that will have an irreversible impact on a resource without complete data. In all instances, burden of proof lies solely with the project applicant.