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**House of the Setting Sun: New Orleans, Katrina, and The Role of Historic  
Preservation Laws in Emergency Circumstances**

Historic Preservation Law

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TABLE OF CONTENTS

INTRODUCTION ..... 2

I. THE NEW ORLEANS EXPERIENCE..... 4

    A. THE LOCAL PRESERVATION LAWS ..... 4

    B. THE HOLY CROSS HISTORIC DISTRICT ..... 8

    C. HURRICANE KATRINA AND THE AFTERMATH..... 10

        1. Damage in Historic Districts Generally ..... 11

        2. Damage in Holy Cross ..... 12

        3. Response from the City..... 13

II. OTHER DISASTERS AND THE RESPONSE OF HISTORIC PRESERVATION ..... 14

    A. EXAMPLE OF FAILURE: EARTHQUAKE IN SANTA CRUZ, CALIFORNIA..... 15

    B. EXAMPLE OF SUCCESS: HURRICANE IN CHARLESTON, SOUTH CAROLINA ..... 17

III. A NEW PROPOSAL: DESIGNING THE APPROPRIATE RESPONSE..... 20

    A. THE MODELS ALREADY IN PLACE..... 21

        1. Section 106..... 22

        2. Model Recovery and Reconstruction Ordinance ..... 22

    B. PROPOSED ADDITION TO LOCAL HISTORIC PRESERVATION STATUTES ..... 23

        1. Triggering events ..... 24

        2. Modified procedure..... 25

    C. JUSTIFICATION FOR THE MODIFIED PROCEDURE ..... 29

CONCLUSION..... 30

BIBLIOGRAPHY ..... 31

INTRODUCTION

In the aftermath of Hurricane Katrina, while various government bodies scrambled to address the myriad tragedies and emergencies that arose from the disaster,

one critical question went largely unanswered and ignored: What was to become of the historic homes damaged in the storm and ensuing flood?

Obviously this question was of secondary concern at the time—where human life and safety are imperiled, the primary focus of government officials should be on restoring order and ensuring their constituents are protected. Precisely because of the existence of more pressing issues in a time of emergency, therefore, it is important to have a prepared plan addressing how best to incorporate historic preservation law into recovery and rebuilding efforts. In many areas, and in New Orleans in particular, historic architecture and ambience play a large role in forming the identity of the community; if a community is rebuilt without its identity in mind, its residents will not truly be able to return home.

In this paper I will discuss in more detail why a system for addressing historic preservation concerns in a time of emergency is necessary and what that system should entail. Part I includes a description of New Orleans, how the New Orleans historic preservation statute functions, and what the results were in historic districts affected by Hurricane Katrina. Part II is a brief description of other areas that have experienced large-scale disasters, with an exploration into how the various responses affected the goals of historic preservation. Part III details a proposed solution—that emergency provisions be written into local historic preservation statutes to govern how the statute will function in a time of emergency, and what those provisions should look like.

Although the typical procedure put in place by the historic preservation ordinance may not be feasible in a time of emergency, a modified or alternative version of that process would best protect the interests of preservation while allowing local government to sufficiently respond to the needs of the community.

## I. THE NEW ORLEANS EXPERIENCE

New Orleans, Louisiana is a city beloved for its many and varied attributes. It has a rich, diverse history, a product of its being settled by the French, German, and Spanish, and later the Americans following the Louisiana Purchase.<sup>1</sup> This unusual pedigree has created a unique cultural amalgamation that is reflected in the city's music, food, lifestyle, and architecture. Each of these categories serves as a draw for the city's second largest source of income—tourism.<sup>2</sup> Architectural tourism is so popular in New Orleans, in fact, that the city's official tourism site advertises thirteen different tours with a focus on architecture.<sup>3</sup> The focus of those tours, of course, is the historic buildings, homes, and plantations of the area, particularly in the French Quarter and the Garden District.<sup>4</sup>

### A. THE LOCAL PRESERVATION LAWS

The New Orleans historic preservation statute encompasses the regulation of properties in the historic districts, the formation of the New Orleans Historic District

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<sup>1</sup> See LYLE SAXON, *FABULOUS NEW ORLEANS* 74, 94, 140–41, 160 (1947).

<sup>2</sup> See Press Release, New Orleans Tourism Marketing Corporation, *Why is New Orleans Important to America?* (Feb. 20, 2006), *available at* [http://www.neworleansonline.com/pr/pressreleases/pr\\_whyNOisimportant.pdf](http://www.neworleansonline.com/pr/pressreleases/pr_whyNOisimportant.pdf).

<sup>3</sup> See New Orleans Online, *Things to See and Do, Tours*, <http://www.neworleansonline.com/neworleans/tours/tours.html> (last visited Apr. 19, 2005).

<sup>4</sup> See *id.*

Landmark Commission, and provisions for enforcement of its terms.<sup>5</sup> New Orleans was among the first cities in the United States to recognize its duty to protect its historical architecture by enacting preservation legislation.<sup>6</sup> The first step was the creation of a historic district in the Vieux Carré, the oldest part of the French Quarter, in 1937.<sup>7</sup> The city enacted a more general statute applicable to the entire municipality in 1976.<sup>8</sup> The statute functions similarly to many local historic preservation ordinances:<sup>9</sup> within a historic district, no building may be “erected, altered, restored, moved or demolished” without a Certificate of Appropriateness, issued by the New Orleans Historic District Landmarks Commission.<sup>10</sup>

The statute specifies what criteria the Commission must take into account in issuing Certificates of Appropriateness.<sup>11</sup> For new structures, the criteria include visual compatibility and harmony with the “tout ensemble” of the neighborhood and quality and

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<sup>5</sup> See generally New Orleans, La. Ordinance No. 5992 M.C.S. (Feb. 19, 1976, revised Aug. 21, 1980).

<sup>6</sup> See KAROLIN FRANK & PATRICIA PETERSEN, *HISTORIC PRESERVATION IN THE USA* 139 (2002).

<sup>7</sup> See JACOB H. MORRISON, *HISTORIC PRESERVATION LAW* 12 (1974). The Vieux Carré was created by Ordinance No. 14,538 C.C.S., which was enacted after an amendment to the Louisiana constitution enabled its establishment. See LA. CONST. art. XIV, § 22A (1921); *City of New Orleans v. Bd. of Dirs. of La. State Museum*, 739 So.2d 748, 752 n.6 (La. 1999) (indicating that this amendment was retained by LA. CONST. art. VI, § 17 of the 1974 constitution).

<sup>8</sup> See No. 5992 M.C.S.

<sup>9</sup> See, e.g., Pittsburgh, PA Code of Ordinances Tit. 11, § 1101.05 (2006) (requiring a Certificate of Appropriateness for construction, alternation, removal, or demolition in a historic district); San Francisco, CA Art. 10, § 1006 (2006) (same); Washington, D.C. Law 2-144 (2006) (requiring permits for alteration, subdivision, new construction, and demolition for properties in historic districts, issued by the Mayor on recommendation by the Historic Preservation Review Board).

<sup>10</sup> No. 5992 M.C.S., § VI(A).

<sup>11</sup> *Id.* § VIII.

excellence of design.<sup>12</sup> For alterations, the considerations are compatibility with the surrounding buildings, the original design, the architectural character, and the historical quality of the building.<sup>13</sup> For demolition, criteria include the building's historical or architectural significance, its importance to the "tout ensemble," its special character and aesthetic interest, difficulty of reproduction, and the future use of the site.<sup>14</sup>

The ordinance calls for the creation of the New Orleans Historic District Landmarks Commission, which is charged with, among other things, issuing the Certificates of Appropriateness.<sup>15</sup> The Commission has no more than fifteen members, and it differs from many other local historic preservation statutes in that there are relatively few requirements for its membership.<sup>16</sup> The members are appointed by the Mayor and approved by a majority of the City Council, and each historic district in the city must be represented by at least one of its residents or property owners.<sup>17</sup> The Commission operates by holding hearings to gather information on requested Certificates of Appropriateness and then voting on their issuance.<sup>18</sup>

All historic preservation laws are only as good as the strength of their enforcement. Under the New Orleans ordinance, the Commission has the right to order

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<sup>12</sup> *Id.* § VIII(A).

<sup>13</sup> *Id.* § VIII(B).

<sup>14</sup> *Id.* § VIII(D).

<sup>15</sup> *Id.* § II, VI(A).

<sup>16</sup> Many local historic preservation ordinances include requirements that their review board members of specified professions, including architects, art historians, and professional preservationists. See, e.g., Minneapolis, MN Code of Ordinances Tit. 23, Ch. 599-120(c) (2006); Pittsburgh, PA Code of Ordinances Tit. 11, § 1101.07 (2006).

<sup>17</sup> *Id.* § II. There are nine local historic districts in New Orleans. See City of New Orleans, New Orleans Historic Districts,

<http://cityofno.com/portal.aspx?portal=99&tabid=25>.

<sup>18</sup> *Id.* § VII.

inspections of protected property.<sup>19</sup> If violations are found, the Commission is required to give the owner notice of the violation.<sup>20</sup> If the violation continues, the Commission may prosecute, with the required punishment being a fine between fifty and one hundred dollars for each day the violation continues.<sup>21</sup> The Commission may also request stop work orders.<sup>22</sup>

The one mention of emergency conditions in the New Orleans ordinance is a section governing condemnation of property.<sup>23</sup> The ordinance provides the following:

Nothing contained herein shall prevent the making of any temporary construction, reconstruction, demolition or other repairs on a landmark, landmark site, or building in a district pursuant to the order of any governmental agency or court for the purpose of remedying emergency conditions determined to be dangerous to life, health or property.<sup>24</sup>

The purpose of this section is to provide a simple solution to individual cases where a property is in such poor condition that it poses a threat to the community. Although this provision could be used during a natural disaster or other emergency to suspend the requirements of the ordinance, it is starkly limited and offers no guidance to government officials on how to proceed.

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<sup>19</sup> *Id.* § XIII.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> Minneapolis has a similar, though slightly more extensive and specific provision. *See* Minneapolis, MN Code of Ordinances Tit. 23, Ch. 599-50(b); *see also* Miami Code 23-6(d) (2006) (allowing suspensions of the usual requirements, but only to the extent “reasonably necessary to correct the emergency condition); Providence, RI Code of Ordinances Ch. 27, § 501.11 (2006) (instructing the Historic District Commission to hold a special meeting with forty-eight hour notice to review emergency applications for demolition).

<sup>24</sup> New Orleans, La. Ordinance No. 5992 M.C.S. § 7(H).

## B. THE HOLY CROSS HISTORIC DISTRICT

The historic district of Holy Cross is probably not the first area of New Orleans that comes to mind when outsiders think of the city's historic homes. Quite different from the stately homes of St. Charles Avenue or the emblematic wrought iron balconies in the French Quarter, Holy Cross is a more humble example of residential, working class life in New Orleans.<sup>25</sup> The area began as a collection of sugar plantations, which evolved into small farms that supplied produce locally.<sup>26</sup> The population of Holy Cross grew in the late 1800s, as working-class African-Americans and immigrants moved in looking for affordable housing.<sup>27</sup> The neighborhood received its name when, in 1859, the Brothers of the Holy Cross established a school, now called Holy Cross High School, which remains the only private high school in the area.<sup>28</sup>

Holy Cross is an excellent example of the common New Orleans experience in which homes of a variety of size and expense are grouped together in one neighborhood.<sup>29</sup> The majority of the structures are in the "shotgun" style, so named because a bullet shot from the front door would pass through each lined-up door and out

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<sup>25</sup> See, e.g., John Kessler, *Hurricane Katrina: The Aftermath: Sites and Sounds; Preservationists Fear Bulldozing of Neighborhoods*, ATLANTA J.-CONST., Sept. 12, 2005, at 1E.

<sup>26</sup> See Greater New Orleans Community Data Center, Holy Cross Neighborhood Snapshot, <http://www.gnocdc.org/orleans/8/20/snapshot.html> [hereinafter GNOCCDC].

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*



the back.<sup>30</sup> Shotguns are small, one-story homes where the rooms are arranged in single file, with no hallways.<sup>31</sup>

The style was adopted to accommodate the scarcity of land in New Orleans, where lots were typically thirty-five feet wide.<sup>32</sup> Though the modest wooden structures were built for typically low to middle income families,<sup>33</sup> they are often high in style, with ornamented facades and porches utilizing columns and the popular local jigsaw brackets.<sup>34</sup> The shotgun in particular is designed with the New Orleans climate in mind. They are set two to three feet off the ground on brick pillars and have high ceilings and large windows to encourage air circulation, preventing mold growth.<sup>35</sup>

Other styles represented in Holy Cross are Creole cottages,<sup>36</sup> bungalows, and brick Italianate homes.<sup>37</sup> The neighborhood also contains more grand architectural examples—the Jackson Barracks, built in 1834-35, now used as the headquarters of the Louisiana National Guard,<sup>38</sup> and the two Doullut Steamboat Houses, fanciful homes inspired by steamboats and the Japanese exhibit at the 1904 World’s Fair in St. Louis.<sup>39</sup>

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<sup>30</sup> See Bywater Neighborhood Association, Shotgun House, <http://bywater.org/Arch/shotgun.htm>.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See S. Frederick Starr, *The New Orleans Shotgun: Down but not Out*, N.Y. TIMES, Sept. 22, 2005, at F7.

<sup>35</sup> See *id.*; Bywater Neighborhood Association *supra* 30.

<sup>36</sup> See, e.g., Bywater Neighborhood Association, Creole Cottage, <http://bywater.org/Arch/Creole.htm>. The Creole cottage has a roof ridge parallel to the street, as opposed to the perpendicular line of the shotgun. Rooms are arranged in the four-square pattern—two rooms in the front, two in the rear. *Id.*

<sup>37</sup> See GNOCDC, *supra* note 26.

<sup>38</sup> See *id.*

<sup>39</sup> See CITY PLANNING COMMISSION, NEW ORLEANS LAND USE PLAN 195 (1999), available at

It is the more modest homes, however, that are the essence of the community and that housed some of its more famous inhabitants, including notable jazz musicians.<sup>40</sup>

In the mid-twentieth century, Holy Cross began to see the poverty and crime common to many inner city neighborhoods.<sup>41</sup> In recent years, however, Holy Cross has seen resurgence. The Preservation Resource Center of New Orleans (PRC) designated the area a “target neighborhood” in 2002 and has been working to restore its historic homes since that time.<sup>42</sup> The PRC began a program of purchasing blighted homes, renovating them, and selling them to first-time homebuyers.<sup>43</sup> Holy Cross also has a strong neighborhood association, founded in 1981 “to make the neighborhood a safer, cleaner, and more enjoyable place to live and rear a family.”<sup>44</sup> Although it may once have been ignored, Holy Cross was entering the twenty-first century with newfound appreciation and upward momentum.

### C. HURRICANE KATRINA AND THE AFTERMATH

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[https://secure.cityofno.com/Portals/cpc/Land%20Use%20Plan/Land%20Use%20Plan%20\(text%20only\).pdf](https://secure.cityofno.com/Portals/cpc/Land%20Use%20Plan/Land%20Use%20Plan%20(text%20only).pdf).

<sup>40</sup> See, e.g., Ceci Connolly, *9<sup>th</sup> Ward: History, Yes, but a Future?*, WASH. POST, Oct. 3, 2005, at A1.

<sup>41</sup> See, e.g., GNOCDC, *supra* note 26. Some cite the damage caused by Hurricane Betsy in 1965 as the beginning of the decline. *Id.*

<sup>42</sup> See Preservation Resource Center, Historic Holy Cross, [http://prcno.org/holy\\_cross.html](http://prcno.org/holy_cross.html).

<sup>43</sup> See *id.*

<sup>44</sup> GNOCDC, *supra* note 26.

Just after 6:00 a.m. on August 29, 2005, Hurricane Katrina struck the Louisiana coast.<sup>45</sup> Classified as Category Four,<sup>46</sup> the storm was initially thought to have spared New Orleans the vast amount of predicted damage.<sup>47</sup> The next day, however, two levees broke and water swept through the city, causing an immensely greater amount of damage than the storm itself.<sup>48</sup> Bridges and highways became submerged, trapping those who remained in several feet of infested water and without electricity or means of communication.<sup>49</sup>

The ineptness of the ensuing government response, well documented as it captured the attention of the nation,<sup>50</sup> took many off guard. Americans were shocked that their government was so unable to adequately protect its citizens and maintain order. Perhaps this bitter backlash against the government was in part the reason that city and federal officials were so eager to begin the recovery and rebuilding process.

## 1. Damage in Historic Districts Generally

The nine New Orleans historic districts contain 16,000 homes, and of those only 172, or one percent, were deemed destroyed or in imminent danger of collapse after

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<sup>45</sup> See Joseph B. Treaster & Kate Zernike, *Hurricane Katrina: The Overview*, N.Y. TIMES, Aug. 30, 2006, at A1.

<sup>46</sup> The storm was originally classified as Category Five, the most dangerous level. See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See Joseph B. Treaster & N.R. Kleinfield, *Hurricane Katrina: The Overview*, N.Y. TIMES, Aug. 31, 2006, at A1.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Shaila Dewan et al, *Evacuees' Lives Still Upended Seven Months After Hurricane*, N.Y. TIMES, March 22, 2006, at A1.

Katrina struck.<sup>51</sup> Another eighty-two were considered damaged but repairable.<sup>52</sup>

Although the damage was widespread, some of the oldest parts of the city, including the French Quarter and the Garden District, were relatively spared from the overwhelming flooding.<sup>53</sup> Other areas, however, were not as lucky.

## 2. Damage in Holy Cross

One of the worst hit areas was the Lower Ninth Ward, including the Holy Cross historic district.<sup>54</sup> Six months after the storm, the area still did not have potable water, reliable electrical or gas service, or residents—the neighborhood was placed on “look and leave” status by the city, restricting residents from staying overnight.<sup>55</sup> Homes in the neighborhood saw up to five feet of flooding, although many of them had some

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<sup>51</sup> Deon Roberts, *Few Homes/Buildings in New Orleans historic districts destroyed by Hurricane Katrina*, NEW ORLEANS CITYBUSINESS, Jan. 16, 2006.

<sup>52</sup> *Id.* There are a number of historic homes in general in New Orleans, those on the National Register but outside city-designated historic districts, that were destroyed or seriously damaged—the city designated 5,500 buildings to be demolished, and it is unknown how many are National Register buildings. See Deon Roberts, *Modern Homes could Replace New Orleans’ Historic Ones*, NEW ORLEANS CITYBUSINESS, Jan. 16, 2006. Although these buildings are of obvious importance to the culture and character of New Orleans, they are outside the scope of this paper, which focuses only on the New Orleans historic districts.

<sup>53</sup> See, e.g., Catherine Lucey, *Normalcy, Not Nudity, is Real Point this Year*, PHILA. DAILY NEWS, Feb. 27, 2006.

<sup>54</sup> The Lower Ninth Ward is one of New Orleans’s lowest neighborhoods and is situated near the Industrial Canal, part of the levee system that was unable to hold the water from the storm. See David Klement, *Life After Katrina: Destroyed*, BRADENTON HERALD (Florida), March 6, 2006. One report referred to the area as “ground zero” for the levee break. Robert Behre, *After the Storm: 4 Months Later, a City Dries Out, Not Up*, POST & COURIER (Charleston, SC), at A1.

<sup>55</sup> See Karen Turni Bazile, *Renovations to shotgun homes in Holy Cross, a historic Lower 9<sup>th</sup> Ward neighborhood, are a source of hope and inspiration*, TIMES-PICAYUNE (New Orleans), March 26, 2006, at 1.

protection from the water because they were raised from the ground.<sup>56</sup> Although some of the historic homes were swept off their foundation by the flood<sup>57</sup> and “dried mud cake[d] everything,”<sup>58</sup> most had little structural damage.<sup>59</sup> The wooden shotgun shacks and Creole cottages of Holy Cross were constructed mainly with cypress and cedar, which resist water and rot, and were often made with barge boards—dismantled river barges that are durable and impermeable to water.<sup>60</sup>

### 3. Response from the City

Under the usual procedure, the Historic District Landmarks Commission (HDLC) has to approve demolition of buildings in historic districts, even if the city classifies them as destroyed. If it does so, the owner may request a demolition permit from the city.<sup>61</sup> In the chaotic aftermath of Hurricane Katrina, however, these normal procedures were in danger of being suspended. Six weeks after the flooding, Mayor Ray Nagin issued an unsigned proclamation suspending the oversight powers of HDLC.<sup>62</sup> The proclamation, which would have to be filed in court and with the state to take force, gave the Mayor the ability “to suspend the provisions of any regulatory ordinance prescribing the procedures

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<sup>56</sup> *Id.*

<sup>57</sup> Blair Kamin, *A Housing Crisis; The Cultural Stakes Could Not be Higher*, CHI. TRIB., Nov. 25, 2005, at C1.

<sup>58</sup> *Recovery Should Preserve History*, THE ADVOCATE (Baton Rouge), Oct. 4, 2005, at B6.

<sup>59</sup> Bazile, *supra* note 55.

<sup>60</sup> See Kessler, *supra* note 25; Starr, *supra* note 34.

<sup>61</sup> See Roberts, *supra* note 51.

<sup>62</sup> Bruce Egglar & Gordon Russell, *N.O. Considers Bypassing Historic Preservation Law; Mayor’s Proposal Draws Criticism*, TIMES-PICAYUNE (New Orleans), Oct. 13, 2005, at Metro 1.

for conduct of local business or the orders, rules, or regulation of any local agency” if those laws caused delays.<sup>63</sup>

The release of the proclamation followed the announcement that Mayor Nagin’s vision for the rebirth of the city was modeled after a “pseudo-suburban” housing development called River Garden located in the Garden District.<sup>64</sup> The combination of these two actions led many to assume that entire neighborhoods would be razed to make room for the new, planned developments.<sup>65</sup> In particular, many feared that the government would take the opportunity to clear out areas like the Ninth Ward, labeled as blighted and dangerous, and replace them with a New Urban plan devoid of relevance to the city and its history.

The result of these alarming reports, combined with the rumors and speculation they engendered, was uncertainty and confusion. As one National Trust preservationist put it, “There’s a lot of misinformation. There’s a lot of no information. There’s a lot of confusion or conflicting information going on. At this point, there’s just a lot of lack of knowledge.”<sup>66</sup>

## II. OTHER DISASTERS AND THE RESPONSE OF HISTORIC PRESERVATION

Of course, New Orleans is not the first city with historic buildings to face large-scale disaster. An examination of the experiences in other communities shows that,

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<sup>63</sup> *Id.*

<sup>64</sup> See Nicolai Ouroussoff, *Katrina’s Legacy: Theme Park or Cookie Cutter?*, N.Y. TIMES, Oct. 18, 2005, at E1.

<sup>65</sup> *See id.*

<sup>66</sup> Behre, *supra* note 54.

without a pre-determined plan for how to respond to such a crisis, the resulting effects on historic districts are left largely up to chance. Some cities, like Santa Cruz, California,<sup>67</sup> are unprepared for disaster and unable to save their historic districts. Others, like Charleston, South Carolina,<sup>68</sup> possess a unique culture allowing for extensive protection of historic buildings. In neither of those cities, however, was the result dictated by a planned response built into the local historic preservation statute.

#### A. EXAMPLE OF FAILURE: EARTHQUAKE IN SANTA CRUZ, CALIFORNIA

The October 17, 1989, Loma Prieta Earthquake garnered much attention for the damage it caused in the San Francisco Bay area, but the city of Santa Cruz, closest to the epicenter of the earthquake, was the one of the most devastated by the disaster.<sup>69</sup> Before the earthquake, downtown Santa Cruz was described as a “trendy university town” that was “a mecca for tourists and free spirits.”<sup>70</sup> The biggest draw was the Pacific Garden Mall, an area with shops, restaurants, and a collection of Victorian buildings built

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<sup>67</sup> See *infra* section IIA.

<sup>68</sup> See *infra* section IIB.

<sup>69</sup> See, e.g., JIM SCHWAB, PLANNING FOR POST-DISASTER RECOVERY AND RECONSTRUCTION 281 (1998); Miles Corwin, *Year After Quake, Rural Areas Still Feel Impact; Disaster: Santa Cruz and Watsonville Struggle to Find Housing for Thousands and to Rebuild Businesses*, L.A. TIMES, Oct. 14, 1990, at A1. Santa Cruz County, in which the city is located, sustained more damage and destruction to its buildings than anywhere else affected by the earthquake—loss of life was the only statistic in which Santa Cruz County was not the leader. See SCHWAB, *supra* at 283.

<sup>70</sup> Tracey Kaplan & Miles Corwin, *Santa Cruz Takes Stock of a City Changed Forever*, L.A. TIMES, Oct. 21, 1989, at A1.

between 1850 and 1910 that served as a gathering place for residents of the city.<sup>71</sup> The historic district was added to the National Register of Historic Places in 1987, with thirty-six of the fifty-four buildings designated as contributing.<sup>72</sup> Pacific Avenue was described as “lined with gorgeous trees and ornate buildings of Romanesque Revival and Mediterranean styles.”<sup>73</sup>

The 1989 earthquake changed downtown Santa Cruz dramatically. Most of the Pacific Garden Mall was reduced to rubble, with one report citing eight of the buildings as “teetering on the brink of collapse” and six others as having major structural damage.<sup>74</sup> Although Santa Cruz had a general emergency management plan, it did not include provisions to govern recovery.<sup>75</sup> Forty-eight hours after the earthquake, in a rush to address the immediate needs of the city, the city manager, along with a group of architects, made the decision to demolish the Cooper House, one of the major landmarks described as “a cornerstone to the city’s district.”<sup>76</sup> In addition, the St. George Hotel, “another anchor for the historic district,” was torn down after the city’s inaction and a “mysterious fire” made restoration impossible.<sup>77</sup> Many of Santa Cruz’s residents and preservationists were devastated at the loss—as one observer remembered,

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<sup>71</sup> See, e.g., Kaplan & Corwin, *supra* note 70; Corwin, *supra* note 69; Daniel B. Wood, *Santa Cruz Rebounds from Earthquake with Fresh Purpose*, CHRISTIAN SCI. MONITOR, Sept. 29, 1993, at 10.

<sup>72</sup> See Christopher Elliott, *Part of Town’s History Tumbled in Quake; Architecture: Quaint Santa Cruz Shopping District may Lose its Designation in the National Register of Historic Places*, L.A. TIMES, Feb. 22, 1991, at A3.

<sup>73</sup> Steve Berg, *Solidly on Shaky Ground: Santa Cruz, California has Rebounded from an Earthquake that Changed its Looks but not its Effervescent Personality*, STAR TRIB. (Minneapolis), Feb. 25, 1996, at 1G.

<sup>74</sup> Kaplan & Corwin, *supra* note 70.

<sup>75</sup> See *id.* at 281.

<sup>76</sup> Elliott, *supra* note 72.

<sup>77</sup> *Id.*; see also SCHWAB, *supra* note 69 at 296.



When the Cooper House was torn down, I cried . . . I went to see because I couldn't believe they would do it. When the demolition ball hit the first few times, it bounced off the building. Everyone cheered. I kept hoping the building would win against the wrecker's ball, but they kept chipping away at it for days, smashing the beautiful sculptures on it, until it was gone.<sup>78</sup>

In 1992, Santa Cruz's historic district was removed from the National Register of Historic Places at the recommendation of the State Historical Resources Commission.<sup>79</sup> Only nineteen of the thirty-six listed buildings had survived the earthquake.<sup>80</sup> Although Santa Cruz has recovered in the seventeen years since the disaster,<sup>81</sup> the rebuilding process was slow and difficult. The local economy suffered from the drop in tourism, partly attributed to the loss of its historic district.<sup>82</sup> Many residents look back on the experience with sadness and regret. One member of the Santa Cruz preservation council was quoted as saying that they could have saved more if they "had the will."<sup>83</sup>

#### B. EXAMPLE OF SUCCESS: HURRICANE IN CHARLESTON, SOUTH CAROLINA

One month before the Loma Prieta Earthquake, another natural disaster struck a historic American city, although the lasting results were quite different. On September

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<sup>78</sup> See Berg, *supra* note 73.

<sup>79</sup> See *Santa Cruz District Loses Historic Status*, S.F. CHRON., Feb. 8, 1992, at A16.

<sup>80</sup> *Id.*

<sup>81</sup> See Berg, *supra* note 73.

<sup>82</sup> See Wood, *supra* note 71.

<sup>83</sup> Berg, *supra* note 73.

21, 1989, Hurricane Hugo hit the historic southern city of Charleston, South Carolina.<sup>84</sup> With 130 mile-an-hour winds and twenty-foot tidal waves, the storm battered the coast for three days, inflicting both wind damage and flooding on the city.<sup>85</sup> When the weather cleared, the city was left with over two billion dollars in damage.<sup>86</sup>

Charleston contains one of the country's oldest and largest historic districts.<sup>87</sup> Established in 1931,<sup>88</sup> the district now contains 4,800 historic buildings.<sup>89</sup> The contributing structures were built between 1712 and 1945.<sup>90</sup> Though a wide range of architectural styles is represented,<sup>91</sup> the quintessential Charleston home is the "single house," a one-room-wide structure with a wide "piazza," or porch, on the side to offer shade and sleeping quarters in hot weather.<sup>92</sup> Many credit Charleston's large stock of

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<sup>84</sup> See, e.g., Nancy L. Ross, *Rebuilding in Charleston; After the Hurricane*, WASH. POST, June 14, 1990, at T20.

<sup>85</sup> See H. Jane Lehman, *In Charleston, a Rebuilding Boom*, CHI. TRIB., Aug. 4, 1991, at N1.

<sup>86</sup> See William A. Davis, *Charleston, S.C.—Flowery and Fine Despite Hurricane Hugo*, BOSTON GLOBE, May 6, 1990, at B1. After sixteen years, the estimate of total cost to the city soared to seven billion. See Tom McGhee, *Smaller, Stronger City May Rise from the Much—Vast Undertaking: What Will the New New Orleans Look and Feel Like? The City's rebirth is Already Beginning*, DENVER POST, Sept. 15, 2005, at A-27.

<sup>87</sup> See, e.g., FRANK & PETERSON, *supra* note 6, at 146.

<sup>88</sup> See *id.* at 147. The Society of the Preservation of Old Dwellings began in Charleston in 1920 and was later renamed the Preservation Society of Charleston. See *id.* at 146.

<sup>89</sup> See Preservation Society of Charleston, *Founding and Preservation Society History*, [http://www.preservationsociety.org/who\\_history.asp](http://www.preservationsociety.org/who_history.asp).

<sup>90</sup> See Preservation Society of Charleston, *Preservation Process in Charleston*, [http://www.preservationsociety.org/program\\_process.asp](http://www.preservationsociety.org/program_process.asp).

<sup>91</sup> See *id.*

<sup>92</sup> See Davis, *supra* note 86. The single house was developed to adapt to the narrow house lots, so laid out because of the lack of space in Charleston's original design as a fortress city. See *id.*

historic buildings as a result of economic depression in the city in the late 1880s when much of the remodeling would have occurred.<sup>93</sup>

Hurricane Hugo caused the collapse of fifty historic buildings and left another 238 with “severe damage.”<sup>94</sup> In the rush to begin rebuilding and debris removal, out-of-town contractors flooded the city looking for work, many of whom had questionable skill and training.<sup>95</sup> Instead of blindly allowing homeowners to begin repairs as quickly and inexpensively as possible, the city’s administration held firm. First, the police set up a process to deal with the incoming contractors—they were required to register, pay a license fee, and get fingerprinted to obtain permits.<sup>96</sup>

Next, Mayor Joseph Riley refused to waive permits for demolition and repairs, holding instead to the standards in place before the storm.<sup>97</sup> The Board of Architectural Review, which reviews request for alterations and demolition of properties in historic districts,<sup>98</sup> met weekly to study every proposed repair and refused requests to use twentieth century replacements.<sup>99</sup> In addition, civic groups like the Historic Charleston Foundation and the Preservation Society of Charleston engaged in massive fundraising<sup>100</sup> and formed groups of volunteers, including architecture and historic preservation faculty and students, to walk the streets salvaging architectural components from the debris.<sup>101</sup>

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<sup>93</sup> See Claire Frankel, *All Hands to the Pump in Historic Charleston—Claire Frankel visits a City Devastated by Hurricane Hugo Six Years Ago*, FIN. TIMES (London), Aug. 12, 1995, at Travel, VIII.

<sup>94</sup> See Lehman, *supra* note 85.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See Frankel, *supra* note 93.

<sup>98</sup> See Preservation Society of Charleston, *supra* note 90.

<sup>99</sup> See Lehman, *supra* note 93.

<sup>100</sup> See Ross, *supra* note 84.

<sup>101</sup> See Lehman, *supra* note 93.

Today, many credit Charleston’s almost complete recovery to the resolve of its leaders and citizens to adhere to preservation ideals instead of settling for a fast solution.<sup>102</sup> Although residents admit that the process was painful, with critical repairs put on hold while workers waited for historically appropriate materials,<sup>103</sup> commentators note that the adherence to strict preservation laws resulted in saving many buildings.<sup>104</sup> Some even cite benefits stemming from the hurricane—a better understanding of structural integrity in the historic buildings<sup>105</sup> and restoration efforts that would not have been previously undertaken.<sup>106</sup> The determination by both city leaders and residents<sup>107</sup> not to turn Charleston into “Anyplace, USA,”<sup>108</sup> led to the restoration of a city that is now “just as nice as what they had.”<sup>109</sup>

### III. A NEW PROPOSAL: DESIGNING THE APPROPRIATE RESPONSE

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<sup>102</sup> See, e.g., Larry Copeland, *The Town that Vanished*, USA TODAY, Sept. 15, 2005, at 1A; Davis, *supra* note 86.

<sup>103</sup> See Tara Young, *Veterans of Hugo: Drop that crowbar; Group says homes often worth saving*, TIMES-PICAYUNE (New Orleans), Oct. 28, 2005, at Metro 1.

<sup>104</sup> See FRANK & PETERSON, *supra* note 6, at 149.

<sup>105</sup> See Lehman, *supra* note 93.

<sup>106</sup> See McGhee, *supra* note 86. For example, the city began a restoration project on Market Hall, an 1841 building that was damaged not only by Hurricane Hugo, but also by years of neglect. See Robert Behre, *Market Hall May be the New Standard for Preservation*, POST & COURIER (Charleston), Oct. 13, 2003, at 1B. The restoration became so extensive, including structural work done to historic specifications that are not even visible, that the National Trust gave the city its National Preservation Honor Award, citing the “high standards” and “painstaking attention to detail.” *Id.*

<sup>107</sup> One homeowner went to the lengths of contacting the British National Trust to track down the right shade of slate for his eighteenth century roof, and another whose historic home was severely damaged was quoted as saying, “I’d get out on the street with a tin cup before I sold.” See Ross, *supra* note 84.

<sup>108</sup> See Copeland, *supra* note 102.

<sup>109</sup> *Id.*

These examples show the importance of developing a plan for addressing the needs of historic districts in a time of emergency—such issues should not be left to chance. Because local governments both bear the brunt of responding in the event of a disaster<sup>110</sup> and are the primary regulator of historic preservation,<sup>111</sup> the local governments are themselves in the best position to develop and enact such a plan. It is critical that the plan be pre-existing, enacted during times of normal operations, so that the community’s needs can be addressed rationally and without rash impulses.

The following is intended as a guide for a municipality in developing and adding an Emergency Response provision to their existing historic preservation statute, including delineation of what law already exists in the area, what considerations local governments should take into account, and why such a plan is a necessity to every community with historic districts.

#### A. THE MODELS ALREADY IN PLACE

Because, as stated above, historic preservation law is left largely to local municipalities,<sup>112</sup> federal law offers little guidance as to the function of historic preservation statutes in emergency conditions. Below is a description of the tangentially relevant portion of the National Historic Preservation Act; in addition, I have included a

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<sup>110</sup> See, e.g., Raymond J. Burby, *Introduction*, in *COOPERATING WITH NATURE: CONFRONTING NATURAL HAZARDS WITH LAND-USE PLANNING FOR SUSTAINABLE COMMUNITIES* 1, 14–19 (Raymond J. Burby ed., 1998).

<sup>111</sup> See, e.g., Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It’s Been, Where It’s Going*, in *A HANDBOOK ON HISTORIC PRESERVATION LAW* 1, 25–26 (Christopher J. Duerksen ed., 1983).

<sup>112</sup> See *id.*

brief discussion of the Model Recovery and Reconstruction Ordinance, which includes a small piece on historic preservation.

## 1. Section 106

Section 106 of the National Historic Preservation Act requires any federal agency, before approving funds for any undertaking, to take into account what effect the undertaking will have on any site included in or eligible for inclusion in the National Register.<sup>113</sup> In the case of an emergency or disaster, the result is that agencies like FEMA must assess the impact of their actions on historic properties before they can act. Although this provision does offer some protection against hasty action that would damage historic buildings, section 106 controls only federal action and has no effect on state or local response.

## 2. Model Recovery and Reconstruction Ordinance

Prepared by the American Planning Association for inclusion in a Planning Advisory Service Report for FEMA, the Model Recovery and Reconstruction Ordinance is an extensive, comprehensive plan of emergency response to be enacted by local

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<sup>113</sup> See 16 U.S.C. § 470(f) (2000). This section is commonly referred to by its original public law designation, § 106. The Secretary of the Interior has the authority under 16 U.S.C. § 470(h)-2(2)(j) (2000) to promulgate regulations governing the functioning of the NHPA “in the event of a natural disaster or imminent threat to the national security.” The Secretary has done so in 36 C.F.R. § 78 (2006), which in effect suspends the NHPA upon a finding by a federal agency that the appropriate circumstances exist, but even this suspension is tempered by § 106. See 36 C.F.R. § 78.1, .3 (2006).

governments.<sup>114</sup> The Ordinance reaches all aspects of pre- and post-event governmental action, with a focus on long-term planning options. It includes a short section on historic buildings,<sup>115</sup> but the Ordinance is limited because it only addresses demolition of buildings that “represent an imminent hazard to public health and safety” or that “pose an imminent threat to the public right of way.”<sup>116</sup>

The procedure of the Ordinance relies on the supporting structure set up by other sections, including implementation by a “Director” appointed to run the recovery plan. The Ordinance also applies to all buildings, with no special procedure or formulation for those in historic districts. By including a historic preservation section in the Model Ordinance, the American Planning Association acknowledges the importance of making these kinds of determinations in advance of a crisis. Although the steps introduced here are laudable in taking the interests of historic preservation into account, they vest too much authority to make determinations on demolition in one person, and they are insufficient to adequately protect historic property.

#### B. PROPOSED ADDITION TO LOCAL HISTORIC PRESERVATION STATUTES

The experiences of communities that have weathered disasters show that without a formal procedure in place, the fate of historic districts is left largely to chance. Because so much authority shifts to the executive branch in times of emergency, the mayor or other governing official’s personal commitment to preservationist goals becomes the

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<sup>114</sup> See SCHWAB, *supra* note 69, at 147–149.

<sup>115</sup> See *id.* at 163.

<sup>116</sup> *Id.*

determining factor of how many of the city's historic buildings are saved and how much effort is put into restoring instead of demolishing.

Historic preservation is about more than aesthetics—it is about preserving the history of a community, providing and maintaining a sense of place for community members, and giving people the means to identify with their surroundings and therefore keep community concerns in mind.<sup>117</sup> Such concerns are too important to be left to the discretion of a small group of government officials.

It is important, therefore, to establish a procedure, legitimized by the legislative democratic process, for the demolition of buildings in historic districts during times of emergency. Such procedure should take into account the time and resource demands that exist in disaster situations and should therefore be only a truncated or modified version of the normal process. By establishing this procedure in advance, community leaders can save the valuable time and effort that goes into arguing about how to proceed, and the citizens will be assured that their interests are properly planned for and accounted for by the government.

#### 1. Triggering events

The provision should include a specific designation of what events are required to trigger the truncated procedure. A practical option is an official declaration of a state of emergency by the body with the authority to do so, often the mayor of the city or governor of the state, depending on state law. The modified procedures could be in place

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<sup>117</sup> See generally Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).



during the duration of the state of emergency, with the normal procedures returning at its end. The benefits of this option are two-fold: such declarations are designed to be easily and quickly made by the executive to ensure a flexible and efficient response to emergency, and the declaration is a clear, definitive government action to use as a marker. Contrast this option to the emergency provision in the New Orleans statute, which comes into affect under “emergency conditions determined to be dangerous to life, health or property.”<sup>118</sup> Such vague and imprecise language creates uncertainty—what is the measure of such conditions? Who does the measuring? By relying instead on an official declaration of a state of emergency, which already has established rules and procedures,<sup>119</sup> such uncertainty is avoided.

## 2. Modified procedure

Most historic preservation statutes include a thorough, detailed process by which to determine whether to allow demolition of a building in a historic district.<sup>120</sup> Although under normal circumstances these procedures are valuable in protecting historic buildings against rash or uninformed destruction, they are too cumbersome, expensive, and time-consuming to use during a time of emergency. Multiple levels of inspection, review, and hearings are often required, which use scarce manpower and other resources.

Applications for demolition are voted on by entire review boards, which may be difficult to assemble in emergency conditions.

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<sup>118</sup> New Orleans, La. Ordinance No. 5992 M.C.S. § 7(H).

<sup>119</sup> *See, e.g.*, La. Rev. Stat. 29:727 (2006).

<sup>120</sup> *See supra* notes 9, 14.

For these reasons, an expedited process would better serve the needs of a community facing disaster recovery. Once the emergency provision of the local historic preservation statute is triggered, a series of modified steps should govern applications for demolition. First, anyone in the community should have the ability to file the application. This loosening of the restrictions on filing present in many municipalities<sup>121</sup> will ensure that in situations where the area has been evacuated, as in New Orleans, and the owners are not present and are often not even aware of the state of their property, other government agencies such as city inspectors, FEMA, or the Army Corps of Engineers have the ability to file the application. If the application is in fact filed by someone other than the owner of the property, that fact will be taken into consideration in the ultimate decision of whether to approve the application, but allowing others to file will enable government officials to take immediate action in demolishing buildings that are threatening public health and safety.

Second, the requirements for who reviews the application should be less restrictive. Instead of the usual process, in which the entire review board is to hold a public hearing and vote on the application,<sup>122</sup> the demolition application should be reviewed and approved or disapproved by a select group with the experience, information, and foresight to appropriately make the determination. This group would be

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<sup>121</sup> *See, e.g.*, New Orleans, La. Ordinance No. 5992 M.C.S., §V(B); Providence, RI Code of Ordinances Ch. 27, § 502.1(D)(1).

<sup>122</sup> *See supra* notes 9, 15.

smaller in number than the typical review board<sup>123</sup> and would be composed of a predetermined selection of representatives from different professions.

Included in the Emergency Review Board should be an architect, who will be knowledgeable about both the artistic and historic importance of the building as well as its construction, a structural engineer, who will be able to assess the damage done to the building and estimate its stability, an art historian, who could ensure that the pressing concerns for recovery do not overshadow the importance of restoring historic buildings when possible, an agent appointed by the mayor's office, who will be able to represent the interests and concerns of the executive in organizing the recovery efforts, and a member-at-large, preferably a resident in the community, who will be able to reflect the views of the people affected most by the disaster. These individuals need not come from the normal review board but instead can be chosen by the mayor's office to reflect the reality that review board members may not be available during times of emergency. The reduced size and membership requirements of this board will allow it to be formed and to meet with more ease than the normal procedures allow, but the requirements for occupational slots ensure that historic preservation interests will be properly considered and addressed.

Third, the conditions during a disaster response scenario will probably provide that a public hearing on the application will not be possible. Instead, the Emergency Review Board will meet on an ad hoc basis, preferably but not necessarily in a public setting. The Board will need this flexibility to be able to respond quickly and efficiently

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<sup>123</sup> See, e.g., Houston, Tx. Code of Ordinances Ch. 33-211(a) (2006) (eleven members); Miami, Fl. Code Ch. 62-187(a) (2006) (nine members and one alternate); San Francisco, Ca. Planning Code art. 10, § 1003 (2006) (nine members).

to demands from others in the recovery effort. Although this process will not be as transparent as a public hearing, the presence of a community member on the Board will ensure that the voice of the public is heard. To additionally address this concern, the application will require unanimous approval of the Board. A unanimous requirement could possibly slow up the process, as it may be difficult for all of the Board members to agree, but the small number and lack of visibility of the Board makes such a voting structure preferable. To solve the potential problem of deadlock, the Board's decision should be appealable to an appointed representative in the Mayor's office.<sup>124</sup>

Finally, the criteria the Board should consider in voting on the demolition application should be modified somewhat to include the concerns created by the extraordinary conditions. In addition to the criteria included in the ordinary historic preservation statute,<sup>125</sup> which already address the historic and aesthetic value of the building, additional criteria should be allowed to weigh in on the Board's decision. Initially, the Board should consider the danger to public health and safety posed by the building, including danger of collapse, as well as unsanitary conditions the building may be causing. This consideration would ensure that buildings in danger of crumbling near areas where relief or recovery efforts are underway can be torn down when necessary—although the Board, under the guidance of the structural engineer, should also thoroughly examine whether the building could be temporarily braced until more extensive repairs can be made, so that demolition is not necessary.

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<sup>124</sup> This type of arrangement where a historic preservation board's decision can be appealed to an appointed member of the local executive is not without precedent. In Washington, D.C., for example, all Historic Preservation Review Board decisions are subject to review by the Mayor's Agent. *See, e.g.,* Washington, D.C. Law 2-144 § 5 (2006)

<sup>125</sup> *See, e.g., supra* text accompanying note 14.

Second, for communities that have been evacuated, the Board should consider whether a denial of demolition would impede the repopulation of the area. One of the main sources of concern following Hurricane Katrina was the displaced populace and the need for residents to return to their homes and begin rebuilding their lives.<sup>126</sup> Keeping repopulation in mind as a high-priority goal, the Board should decide whether allowing the building to stand would delay this process.

In addition, the Board should consider whether the building can be restored or temporarily braced given the realities of the emergent circumstances. No doubt, as was true in New Orleans, resources and manpower will be scarce and severely limited—if making a building temporarily stable is theoretically feasible but practically impossible, demolition might be the preferred option. Here the agent appointed by the mayor will be valuable, as they will likely have access to information about the availability of supplies and workers.

#### C. JUSTIFICATION FOR THE MODIFIED PROCEDURE

Scarcity of time and resources is the primary hindrance to the normal functioning of historic preservation statutes in times of emergency. The proposed procedure addresses both of these concerns: filing requirements for applications for demolition are relaxed, fewer people are required to review the applications, and the criteria by which they judge the application is expanded to include the unique considerations resulting from a disaster. Although this procedure represents a large departure from the process that

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<sup>126</sup> See, e.g., *A Crippled City Votes*, BOSTON GLOBE, Apr. 19, 2006, at A10.

operates under normal conditions and accordingly offers less protection to historic structures, it is preferable to the complete elimination of all procedure that is possible under statutes like the one in New Orleans. By conceding on some restrictions to reflect the strained conditions present, preservationists will be better able to ensure that the recovery process results in a community that has not lost one of its most valuable assets—the buildings that form its identity and give its residents a sense of place.

## CONCLUSION

This type of provision, dictating what protection buildings in historic districts should receive in times of emergency, should be written into every community's historic preservation law. By devoting time and resources to make these decisions during normal, peaceful times, communities can avoid the kind of confusion, frustration, and waste of valuable resources during an emergency like what was seen in New Orleans after Hurricane Katrina. The provision is also necessary in every community, not just those having higher probability of natural disasters like hurricanes, floods, or earthquakes. Disaster can strike at any time and can come in any form—from Mother Nature, from an accident, or from attack. Addressing these concerns before the fact will ensure that historic buildings receive the reasoned, thorough, and transparent treatment and consideration that they deserve.

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