

Goal 5 Alignment Amendments to the Historic Resource Code Project Recommended Draft

Prepared October 4, 2021, updated Oct. 26, 2021

Members of the Portland Coalition for Historic Resources

Contents

Preamble.....	1
Proposed Amendment 1 – To Correct Criteria for De-designation of Historic Resources	2
Proposed Amendment 2 – To Correct Definition of Demolition Applicable to Resources Listed on the National Register of Historic Places	3
Proposed Amendment 3 – To Align the Criteria to Consider for Approval of a Demolition in a Demolition Review with Goal 5 Rules	6
Proposed Amendment 4 – To Recognize Goal 5 Rules for Evaluating the Significance of a Resource for Addition to the “Resource List”	7

Preamble

Oregon city and county land use ordinances are required to comply with rules published by the Oregon Land Conservation and Development Commission to implement Oregon’s 18 nation-leading Land Use Goals. While the Goals themselves are aspirational, the rules laid down by LCDC are not – they are prescriptive.

A key motivation for the launch of HRCP and a multi-year effort by the Bureau of Planning and Sustainability and the Bureau of Development Services was the need to craft new Code language to comply with Land Use Goal 5 Rules for Historic Preservation that had been approved by LCDC in January, 2017. LCDC had conducted a 6-month-long review of the Goal 5 Rules starting in 2016 at the request of the Governor with the objective of bringing Oregon’s 20-year-old rules into alignment with national best practices and recent Oregon Supreme Court decisions. The LCDC’s Regulatory Advisory Committee (RAC) completed its work in December, 2016, and, with adjustments by LCDC and the DLCD staff, the final rules were published in January of 2017.

The Portland Coalition for Historic Resources appreciates the great work by BPS and BDS in crafting HRCP as it is being presented to City Council in November, 2021, but we are greatly troubled by the incomplete alignment of HRCP code language with the requirements of the new Goal 5 Rules. These Rules are not “advisory” or “recommendations”. They are requirements imposed on all jurisdictions, large and small, throughout the State of Oregon. Failure to adopt code language in HRCP that complies fully with the Goal 5 Rules, would open

the City of Portland to legal challenges and expose the City's property owners to uncertainty about the stability of the regulations in HRCP. Neither consequence is desirable.

To address these concerns, we have drafted a set of 4 Goal 5 Alignment Amendments for consideration by City Council during the approval phase of HRCP. Each of these addresses one deviation from compliance with the Goal 5 Rules.

[Proposed Amendment 1 – To Correct Criteria for De-designation of Historic Resources](#)

Section 33.846.040 Historic Designation Removal Review departs substantially from what Goal 5 allows for consideration in such reviews. Goal 5 allows complete removal of City designation only in the case of defective owner consent processes or where it can be shown that there was professional error in defining the resource as "historic" or where physical disaster has destroyed all of the resource's historic significance. The HRCP draft further allows, contrary to Goal 5 Rules that "The goals and policies of the Comprehensive Plan are equally or better met... if the resource is listed in the National Register of Historic Places, by removing the City designation." We concur that the City may raise or lower the level of historic protection with a regulatory process, but Goal 5 does not allow this to occur except for the specific reasons enumerated in the Rule. Further, we argue, that while the Goal 5 Rule does not directly address changing levels of protection for existing resources, the message in the Rule is plain: reductions in protection and designation require rigorous justification rooted in the historic character of the resource and any changes that may have occurred since the original designation.

Given the substantial investments made by property owners contingent on the current status of their property in a historic district, we argue that complete de-designation of a historic district of any kind is a major action requiring broad inputs and justification that meets Goal 5 Rules. Accordingly, we propose that such de-designation be assessed first by the Historic Landmarks Commission, and if supported by that body, their finding is reviewed by the Planning and Sustainability Commission and finally by City Council in a legislative procedure.

Accordingly, we propose the following **Amendment 1**:

- 1) Replace 33.846.040.C.2 with the following language: "Change in level of protection for individual resources from Historic Landmark to Conservation Landmark or from Conservation Landmark to Historic Landmark is shown to better meet the historic designation review criteria in Sections 33.846.030.D.1 and D.2."
- 2) Add new paragraph 33.846.040.C.3 reading: "Change in level of protection for districts from Historic District to Conservation District or from Conservation District to Historic District fulfills the requirement that re-inventory and evaluation of all contributing resources in the District shows that sufficiently many contributing resources have gained or lost historic significance since the original designation, such that the review body determines application of Sections 33.846.030.D.1 and 33.846.030.D.2 dictates a change in level of protection."

- 3) Add new paragraph 33.846.040.C.4 reading: “Complete removal of protection from a Historic District designation or a Conservation District designation is supported by a finding by the Historic Landmarks Commission in a land use process that a sufficient number of the district’s contributing resources no longer meet the criteria for historic designation review in Sections 33.846.030.D.1 and D.2, with the result that the historic value of the district has been lost and that no alteration of the boundaries of the district or change in levels of protection can remedy the defect.”
- 4) Change 33.846.040.B.2 to read "All other historic resource designation removal reviews, including changes in level of protection between Historic and Conservation levels, except for de-designation of complete districts, are processed through a Type III procedure reviewed by the Historic Landmarks with appeal to City Council."
- 5) Add a new paragraph 33.846.040.B.3 which says: “Complete removal of a Historic District designation or a Conservation District designation, such that no City designation remains, is a legislative procedure. Criteria for initiating such a removal process are defined in 33.846.040.C.4 resulting in a finding by the Historic Landmarks Commission. Such finding will be considered by the Planning and Sustainability Commission and the City Council on its merits in a legislative procedure.”

Proposed Amendment 2 – To Correct Definition of Demolition Applicable to Resources Listed on the National Register of Historic Places

Goal 5 Rules require that all jurisdictions, state-wide, protect resources listed on the National Register of Historic Places with a demolition review process. While jurisdictions are granted latitude in levels of protection accorded to resources having only local historic designation, no latitude whatever is allowed for National Register-listed resources, either in the definition of demolition nor in the criteria allowed to be used by the jurisdiction’s legislative body in approving a proposed demolition.

The Goal 5 definition of “demolition” in 660.023.0200.1.a reads:

“Demolition” means any act that destroys, removes, or relocates, in whole or part, a significant historic resource such that its historic, cultural, or architectural character and significance is lost. This definition applies directly to local land use decisions regarding a National Register Resource.

We acknowledge that applying this definition of “demolition” requires expertise such as is found in the Portland Historic Landmarks Commission or in BDS’ historic resource review staff, and will require the City to develop a process (covered in our proposed amendment) for engaging their expertise in making the determination that a “demolition” is being proposed.

As a result of this specifically prescribed definition, which Goal 5 Rules do **not** give Portland the option to alter, we propose the following **Amendment 2**:

- 1) 33.445.100.E Demolition of a Historic Landmark has the following appended: “Historic Landmarks which are also individually listed on the National Register of Historic Places are subject to 33.445.120.E instead of this section. Historic Landmarks which are not individually listed on the National Register of Historic Places but are contributing resources in National Register Historic Districts are subject to 33.445.120.E instead of this section.”
- 2) 33.445.110.E Demolition of a Conservation Landmark has the following appended: “Conservation Landmarks which are also individually listed on the National Register of Historic Places are subject to 33.445.120.E instead of this section. Conservation Landmarks which are not individually listed on the National Register of Historic Places but are contributing resources in National Register Historic Districts are subject to 33.445.120.E instead of this section.”
- 3) 33.445.120.E Demolition of a National Register Landmark has the following appended: “All National Register Landmarks are subject to this provision relative to demolition, regardless of any other designation applied by the City, including Historic Landmark and Conservation Landmark.”
- 4) 33.445.120.E.1 is modified by the following changes to 33.445.120.E.1.e and the addition of item f:
 - “e. For structure that are not buildings, an alteration that results in the removal of 50 percent or more of the structure; or
 - f. For structures or resources of any type, an alteration which, in the determination of the Historic Landmarks Commission, destroys, or removes, in whole or part, a significant historic resource such that its historic, cultural, or architectural character and significance is lost; “
- 5) 33.445.120.E is modified by the addition of the following:
 - “2. Any application for a building permit for modifications to a National Register Landmark such that the estimated cost of modifications exceeds a “demolition threshold value” the modification will be considered a potential demolition and will be subject to a Demolition Assessment Review. When the cost of modifications exceed \$200,000, that Review will be a Type II procedure, and above \$500,000, will be a Type III procedure. The demolition threshold value will be adjusted for inflation annually by the Bureau of Development Services.
 - a. The Demolition Assessment Review will be performed to determine if the proposed alterations meet the definition of Demolition as set forth in 33.445.120.E.1.f. The findings of the review entity must be one of three results: 1) The modifications constitute a demolition under the definition, 2) The modifications do not constitute a demolition under the definition, or 3) The modifications constitute a demolition under the definition, but an alteration of the proposal could result in determination that a demolition would not occur.

b. If the Demolition Assessment Review finds that the modifications constitute a demolition, a Demolition Review will be required unless exempt under 33.445.120.E.2.”

- 6) 33.445.200.E Demolition of resources in a Historic District is modified by substituting the following language: “Conservation Landmarks in a Historic District that are not identified as contributing to the historic significance of the Historic District are subject to the regulations of Section 33.445.110.E. Significant Resources in a Historic District that are not identified as contributing to the historic significance of the Historic District are subject to the regulations of Section 33.445.330. National Register Landmarks in the Historic District are subject to 33.445.120.E. Contributing resources in a National Register Historic District contained in the Historic District are subject to 33.445.220.E. Demolition of contributing resources within a Historic District requires demolition review to ensure their historic value is considered and that there is an opportunity for the owner and community to consider alternatives to demolition.” Note that the key change in this paragraph is that all resources that are either National Register Landmarks or are contributing resources in a National Register Historic District are processed under the provisions for National Register resources, regardless of their City designation.
- 7) 33.445.210.E Demolition of resources in a Conservation District is modified by substituting the following language: “Historic Landmarks in a Conservation District are subject to the regulations of Section 33.445.100.E. Conservation Landmarks in a Conservation District that are not identified as contributing to the historic significance of the Conservation District are subject to the regulations of Section 33.445.110.E. National Register Landmarks in a Conservation District are subject to the regulations of Section 33.445.120.E. Resources that are also contributing resources in a National Register Historic District are subject to the regulations of Section 33.445.220.E. Significant Resources in a Conservation District that are not identified as contributing to the historic significance of the Conservation District are subject to the regulations of Section 33.445.330. Demolition of contributing resources in a Conservation District requires demolition review to ensure the resource’s historic value is considered and that there is an opportunity for the owner and community to consider alternatives to demolition.” The effect here is that all resource listed in the National Register of Historic Places are processed the same for demolition review purposes, regardless of any City designation that might have been applied.
- 8) 33.445.220.E is modified by removing the sentence: “National Register Landmarks in a National Register District that are not identified as contributing to the historic significance of the National Register District are subject to the regulations of Section 33.445.120.E.” with the sentence: “National Register Landmarks in a National Register District are subject to the regulations of Section 33.445.120.E, regardless of their contributing status in the National Register District.”
- 9) 33.445.220.E.1 is modified by the following changes to 33.445.220.E.1.e and the addition of item f:

“e. For structures that are not buildings, an alteration that results in the removal of 50 percent or more of the structure; or

f. For structures or resources of any type, an alteration which, in the determination of the Historic Landmarks Commission, destroys, or removes, in whole or part, a significant historic resource such that its historic, cultural, or architectural character and significance is lost; “

10) 33.445.220.E is modified by the addition of the following:

“2. Any application for a building permit for modifications to a contributing resource in a National Register District such that the estimated cost of modifications exceeds a ‘demolition threshold value’ the modification will be considered a potential demolition and will be subject to a Demolition Assessment Review. When the cost of modifications exceeds \$200,000, that Review will be a Type II procedure, and above \$500,000, will be a Type III procedure. The demolition threshold value will be adjusted for inflation annually by the Bureau of Development Services.”

Proposed Amendment 3 – To Align the Criteria to Consider for Approval of a Demolition in a Demolition Review with Goal 5 Rules

Goal 5 Rules which set forth the criteria by which a jurisdiction may allow demolition of a National Register-listed resources read:

“review of demolition... considers the following factors: condition, historic integrity, age, historic significance, value to the community, economic consequences, design or construction rarity, and consistency with and consideration of other policy objectives in the acknowledged comprehensive plan”.

By contrast, for “significant historic resources” not listed on the National Register of Historic Places individually or in districts, Goal 5 merely says that local jurisdiction must simply “protect” them. The definition of “Protect” is spelled out thus: “‘Protect’ means to require local government review of applications for demolition, relocation, or major exterior alteration of a historic resource, or to delay approval of, or deny, permits for these actions in order to provide opportunities for continued preservation.” No further restrictions are placed by Goal 5 on how a jurisdiction might make the decisions to apply “protection”.

The City of Portland has long had demolition review of resources listed as Historic Landmarks or as contributing in a Historic District – either those specifically designated by the City or automatically designated prior to January, 2017, by Code which automatically added these properties to the “zoning map” for historic resource protection.

Both the current (pre-HRCP) code language and the proposed language in HRCP relating to demolition review fail to comply with the Goal 5 Rules and the criteria defined there for National Register-listed resources. We feel strongly that a single unified set of criteria should be adopted for all protected historic resources, with the exception of allowing mitigation

options to be considered for some protected resources not listed on the National Register of Historic Places.

As a result of the mis-alignment between Goal 5 requirements across the spectrum of resources covered by HRCPP, we propose the following **Amendment 3**:

1) 33.846.080.D is replaced entirely with the following language:

“D. Approval criteria.

- 1) *For National Register Landmarks, contributing resources in National Register Districts, Historic Landmarks, contributing resources in Historic Districts, Conservation Landmarks, and contributing resources in Conservation Districts the proposal for demolition will be approved if, after consideration of the following factors, the review body determines that the benefits of demolishing the resource outweigh the benefits of preserving the resource:*
 - a) *The condition, historic integrity, age, historic significance, and design or construction, rarity of the resource as defined by its nomination to the National Register of Historic Places;*
 - b) *The value to the community and economic consequences of the demolition or refusal to grant such;*
 - c) *Consistency of allowing the demolition with and in consideration of other policy objectives in the Comprehensive Plan and applicable area plans, taking particular note of the provisions of the Comprehensive Plan providing goals and policies for Historic Preservation and Housing Affordability*
- 2) *Demolition reviews under 33.846.080.D.1 for Conservation Landmarks and contributing resources in Conservation Districts, not also listed on the National Register of Historic places, may also consider the possibility for mitigation of the loss of the resource.*
- 3) *If the demolition is approved wholly or in part on the basis of 33.846.080.D.1.c, the review body must provide complete explanation of the elements of the Comprehensive Plan or applicable area plans which were found to apply and what weighting was applied to them in making the decision.”*

Proposed Amendment 4 – To Recognize Goal 5 Rules for Evaluating the Significance of a Resource for Addition to the “Resource List”.

Under Goal 5 Rules, after January, 2017, “The evaluation of significance should be based on the National Register Criteria for Evaluation, historic context statement, and historic preservation plan.” Notably this provision says “should be” not “must be”, however the City’s participation in the State of Oregon’s Certified Local Government program dictates that the City appoint a

Historic Landmarks Commission with the necessary expertise to evaluate proposals for designating significance.

Moreover, Goal 5 Rules say that “Historic protection ordinances should be consistent with standards and guidelines recommended in the Standards and Guidelines for Archeology and Historic Preservation published by the U.S. Secretary of the Interior, produced by the National Park Service.” The latter says categorically in Vol 48, No. 190 of the Federal Register, dated September, 29, 1983: “Evaluation must be performed by persons qualified by education, training, and experience in the application of the criteria. Where feasible, evaluation should be performed in consultation with other individuals experienced in applying the relevant criteria in the geographical area under consideration...”

Between these two provisions, it is clear that Goal 5 Rules intend that if a jurisdiction has a Historic Landmarks Commission, that Commission should have the primary role in evaluating the qualifications of resources being considered for historic designation. This is true both of individual resources and for collections of resources being considered for district designation.

The writers of the HRCP proposal have assured us that the term “legislative procedure” dictates that one and only one Commission conduct a hearing on the matter and that one Commission must make a singular recommendation to City Council. However, 33.740.020.B.4 makes it clear that the drafters of 33.740.020, which defines legislative procedures, anticipated the possibility of more than one Commission engaging in a legislative procedure and a mechanism is provided for multiple hearings by more than one Commission.

Accordingly, in light of the Goal 5 requirement that evaluation of new designation proposals be evaluated by entities with the appropriate expertise we propose the following Amendment 4:

- 1) 33.445.200.A.2 (Designation of a Historic District) is modified by the addition of an item ‘c’ which reads:
“c. For purposes of 33.445.200.A.2.a, legislative designation shall follow the process defined in 33.740.020 except that the Historic Landmarks Commission shall conduct a hearing and make a formal recommendation to Council regarding evaluation of the resource as meeting all applicable criteria for historic significance and fulfillment of applicable goals and policies of the Comprehensive Plan relating to Historic Preservation; and the Planning and Sustainability Commission shall conduct a hearing and make a formal recommendation to Council regarding evaluation of how designation of the resource would affect the overall achievement of the goals and policies of the Comprehensive Plan. The two Commissions may in addition elect to conduct a joint hearing to arrive at a single recommendation to Council, but nothing in this section requires that.”
- 2) 33.445.210.A.2 (Designation of a Conservation District) is modified by the addition of an item ‘1.a’ which reads:
“a. For purposes of 33.445.210.A.2.a, legislative designation shall follow the process defined in 33.740.020 except that the Historic Landmarks Commission shall conduct a hearing and

make a formal recommendation to Council regarding evaluation of the resource as meeting all applicable criteria for historic significance and fulfillment of applicable goals and policies of the Comprehensive Plan relating to Historic Preservation; and the Planning and Sustainability Commission shall conduct a hearing and make a formal recommendation to Council regarding evaluation of how designation of the resource would affect the overall achievement of the goals and policies of the Comprehensive Plan. The two Commissions may in addition elect to conduct a joint hearing to arrive at a single recommendation to Council, but nothing in this section requires that.”

To those who object to the possibility of City Council receiving two conflicting recommendations, one from the Landmarks Commission and one from the Planning and Sustainability Commission, we can only respond that the job of political leadership is to arrive at consensus and compromise when public sentiment, practical considerations, and City goals are in conflict.