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When Archeological Ordinances Fail

Protecting the Resource by Other Means

There can be many reasons why it is not feasible for a community to enact an ordinance narrowly tailored to the needs of its archeological resources. Its political culture may be anti-land use controls, in general, or anti-conservation, in particular. It may be zealously pro-growth/economic development and view such an ordinance as an obstacle to "progress." Its citizens may be concerned about the additional costs and bureaucracy created by the implementation of such a law. Or, the ordinance may become a casualty in a local political power struggle, e.g., when its supporters are voted out of office, or when it becomes attached, in the public's mind, to another, unpopular cause.

When contemplating solutions for your local cultural resource dilemmas, remember that an ordinance is a law, and that the concepts associated with that term tend to be negative, e.g., coercion, control, punishment. Moreover, the archeological ordinance, as a legal entity, is a comparative newcomer to the arena of land use law. Unlike zoning and conventional historic preservation legislation, it has yet to be extensively tested in court and is therefore more risky to enact.

In 1993-94, I researched the cultural resource management (CRM) practices of 10 local southwestern governments.[1] All but one (Colorado Springs, Colorado) were making or had made some attempt to protect their archeological resources. Only two, however (Santa Fe and Santa Fe County, New Mexico), used archeological ordinances to do so.[2] The other governments protected their archeology with varying degrees of success by incorporating survey and mitigation requirements into traditional land use law and development review processes. The rest of this paper briefly describes some of these.

Some local governments incorporated archeological requirements into their traditional, i.e., architectural, historic preservation (HP) ordinances. These requirements are enforced by the local historic preservation review board, which evaluates construction and demolition projects proposed for historic properties. El Paso and Austin, Texas, both used this approach. El Paso's HP ordinance required that at least one of the members of its review board be an archeologist. However, only archeological properties that have already been declared historic (significant) are protected.[3] The scope of Austin's ordinance was enhanced by the interpretation given it by its enforcer, the city Preservation Liaison. She used the power of persuasion and precedent to negotiate archeological requirements in all developments that came to her attention, regardless of whether they were captured by the HP ordinance.[4]

Informants from several local governments recommended rezoning and annexation applications as particularly amenable to the inclusion of CRM requirements. They said that applicants in these types of cases are "asking for something" — often a big and lucrative something, as in large subdivision housing projects — and expect to "give something" in return. A project planner in Durango, Colorado, routinely included survey and mitigation stipulations in her reviews of annexation cases.[5] Tucson and Pima County, Arizona, both embedded archeological requirements in their review process for rezoning requests.[6]

Plans can be effective vehicles for local archeological protection. In many states, they are only advisory documents, not laws, and therefore tend to be more palatable to city councils and landowners. Plans come in three "sizes," or ranks. Rank I plans are the broadest in scope, both geographically and in terms of number of issues addressed. Master and comprehensive plans are Rank I. They tend to be full of glittering generalities and warm fuzzies, e.g., "retain rural character" and "rich cultural heritage," and possess little detail or enforceability. They do, however, serve to legitimize the subjects they address, in terms of inclusion in subordinate plans and implementation in policy and law. It is therefore important to include mention of local cultural resources and the desirability of protecting them in a community's Rank I plan.

Rank II plans concentrate on a geographical or topical aspect of the material contained in their superordinate Rank I plans. The most common Rank II plan is the area plan, which is just what it sounds like, i.e., a plan for a physical piece of the Rank I pie, e.g., the West Mesa Area Plan, the Downtown Districts Area Plan, the South Valley area plan. Tucson uses area and neighborhood plans to accomplish its CRM goals. It began phas-

ing in archeological requirements in area plan revisions in the late 1970s. Today, all such plans contain them. They call for survey and mitigation recommendations in the environmental assessment reports required in rezoning application reviews.[7]

Piper, Schmader, and Chapman[8] mention another kind of Rank II plan as an appropriate vehicle for local cultural resource management. Facility plans implement Rank I plans by subject, rather than by area. Plans for storm drain maintenance, fire station construction, and city park development are examples of facility plans. Piper, et al., suggest that all archeological resources under the jurisdiction of a given Rank I plan be designated a "facility" and planned for accordingly. Preservation plans can function as this kind of plan.

Rank III plans are the smallest in geographic scope and tend to be the most detailed and grassroots-oriented. Neighborhood plans are Rank III, and, as their name implies, serve small areas bound together by such commonalities as class, economic bracket, types of commercial development, and cultural affinity. While this type of plan often becomes a battleground for NIMBY (Not In My Backyard) and LULU (Locally Unacceptable Land Use) wars, it also has potential for local CRM success. Pro-conservation neighborhoods, e.g., historic and aspiring historic districts, may be enthusiastic about adding archeology to their plans and can become role models for other parts of the community.

All plans are revised periodically: about every 10 years for Rank IIIs and every 20 or 25 years for Rank Is and IIs. If attempts to add archeology fail once, remember the adage "try, try again."

To flesh out these examples, let us take a stroll through a typical local development review process and see where archeology can be interjected. The chart summarizes the current review process for a major (five acres or greater) subdivision in the unincorporated parts of Torrance County, New Mexico.[9] Potential points of ingress for archeological requirements are shown in italics. As the diagram attests, these could be incorporated into every step of the process, except the final one, vis, submission of the final plat to the Planning and Zoning Commission. However, the earlier in the process they are incorporated, the better. It is easier to affect protection during the pre-application conference than after the multi-agency review, when the project may have been in the works for several months or a year. And the public hearing, though available to anyone wishing to comment on the project, comes so late in the review process as to make it difficult to affect major changes, especially if they are advocated by only one or a few people.

The pre-application conference is mandated by law and is not unique to Torrance County. It is an informal meeting which regularly occurs in all governments, between the applicant and the offi-

Pre-Application Conference
Informal dialog between applicant and regulator. *Either party may voice archeological concerns and possible resolutions.*

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Submission of Preliminary Plat
Regulator inspects, approves, or returns plat with comments for revision, *including archeological requirements.*

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Multi-Agency Review
Preliminary plat sent to state and local agencies for comment, *including SHPO.*

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Planning and Zoning Review
County Planning and Zoning Commission reviews preliminary plat, taking agency comments into consideration. Approves or stipulates changes, *including archeological requirements.*

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Public Hearing
Public reviews and comments on preliminary plat and P&Z recommendations. *Anyone can voice archeological concerns here.*

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Back to Planning and Zoning
P & Z considers public input; approves preliminary plat or stipulates changes *including archeological requirements.* When preliminary plat approved, final plat drafted.

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Submission of Final Plat to County Commission
County Commission reviews final plat and votes to approve or reject. Last ditch efforts to protect archeological sites are heroic but largely ineffectual at this point.

cial responsible for the review of the preliminary plat, e.g., a current planner, project planner, or, in the case of projects involving historic properties, the historic preservation planner or officer. Virtually all developers of large projects, and many other applicants, take advantage of this opportunity to learn what the government in question expects of them. A savvy regulator will bring up cultural resource concerns here, either those mandated by law, or those which he addresses at his discretion. If he succeeds in establishing a good rapport with the prospective applicant, and if the applicant is willing to comply with his reasonable requests, the parties can reach agreement on the general extent and nature of survey and mitigation measures at this step, even if they are not required by law.

But a planner or zoning commissioner will not include archeology in the review if she does not know that it should be there. Make an appointment with her and tell her (nicely). Become familiar with your local development review processes and with pending projects.

Attend meetings; make your presence and your agenda known. If your schedule permits, serve on a review committee; the archeological mitigation that has taken place in Torrance County occurred because one Planning and Zoning Commissioner was an avocational archeologist.

There are many ways of protecting archeological resources in communities which lack archeological ordinances. This article has endeavored to give a far-from-exhaustive list of alternative methods and to provide an example of a typical review process, which can easily accommodate archeological considerations. This information does not resolve the problems inherent in advocating an archeological agenda in a local bureaucracy, but it will hopefully demystify the process so those who wish to do so can take action.

Notes

1 Aleta J. Lawrence. *Cultural Resources Management at the Local Government Level: Ten Case Studies and Their Implications for Albuquerque.* Albuquerque: University of New Mexico, 1997.

2 Lawrence, p. 22-25.

3 Ibid., p. 26-29.

4 Ibid., p. 29-32.

5 Ibid., p. 17.

6 Ibid., p. 35-36.

7 Ibid., p. 32-35.

8 June-el Piper, Matthew Schmader, and Richard C. Chapman. *Model Archaeological Ordinance for Local Governments in New Mexico.* OCA Project No. 185-209, NMHPD Project No. 36-84-8316.04. Santa Fe: New Mexico State Historic Preservation Division, 1985.

9 Torrance County. *Subdivision Regulations, Ordinance No. 96-7*. County Managers Office, Torrance County Court House, Estancia, New Mexico, 1996.

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CRM

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