




## Zoning Text Amendment 21-06 Exemptions – Density Transfer and Historic Resources

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 Benjamin Berbert, Planner Coordinator, CP&P, [Benjamin.Berbert@montgomeryplanning.org](mailto:Benjamin.Berbert@montgomeryplanning.org), 301.495.4644  
 Rebeccah Ballo, Historic Preservation Supervisor, CP&P, [Rebeccah.Ballo@montgomeryplanning.org](mailto:Rebeccah.Ballo@montgomeryplanning.org), 301.563.3404  
 Jason Sartori, Chief, CP&P, [Jason.Sartori@montgomeryplanning.org](mailto:Jason.Sartori@montgomeryplanning.org), 301.495.2172

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**Completed: 10/22/2021**

### Staff Recommendation

Transmit comments to the County Council in support of Zoning Text Amendment (ZTA) 21-06, which would create a new residential exemption under Section 7.7.1.D, creating special provisions for sites containing a structure or resource of historic significance within a residential zone that has been protected from development through a density transfer.

### Summary

Staff recommends the Planning Board support ZTA 21-06, which has a Public Hearing on November 2, 2021. The ZTA was first introduced by the Council President at the request of the Planning Board and would create a new residential exemption, establishing special provisions including allowing limited commercial uses within existing or new structures on sites that contain a resource of historic significance, if the property is in a residential zone and is otherwise protected from development through a density transfer.

### Background

This ZTA would add provisions into the current Zoning Ordinance that existed in the old Zoning Ordinance which allow for a wider range of adaptive reuses for historic sites and districts. At least one designated Master Plan Historic Site, Locust Grove I/Samuel Wade Magruder House, Master Plan Site #29/016-000A had already taken advantage of the provisions from the old Ordinance. This historic site has been adaptively reused as a bank since 1979 which was allowed after ZTA 75020 (Ordinance 8-22) allowed limited commercial uses to occur on historic sites that were part of a density transfer. The bank expanded further in 1984 after a site plan allowed for an accessory structure to serve as a teller window and drive-thru.

In the old Zoning Ordinance that was in effect until October 29, 2014, these expanded provisions for limited commercial uses were found in Division 59-A-6, Uses Permitted in More Than One Class of Zone, under subsection 59-A-6.2 Historic Sites; historic districts, subsection 6.21 - Density Transfer. This subsection established a process where tracts of land in a residential zone with a site, structure, or area of historic significance suitable for preservation by which the Planning Board may transfer residential density from the historic site to an adjacent residential site. To protect the historic resource with adaptive reuse, subsection (d) Uses Permitted, contained the following language, which permitted limited construction of accessory structures and allowed some commercial uses to maintain viability on the site:

*No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained, except for one or more of the following uses:*

*All those permitted uses set forth in the applicable zones.*

*Gifts and antique shops, offices, professional and business, including banks and financial institutions, in existing structures and accessory facilities; provided, that the Planning Board finds that such uses and facilities are consistent with the purposes of this section.*

The 2014 rewrite of Chapter 59 did not continue these provisions. Staff could find no evidence that excluding this provision from the new code was intentional. Existing uses and structures previously permitted under Section 59-A-6.21 of the old code can and do remain grandfathered, but the site of the Samuel Wade Magruder House has been vacant for some time, which removed the grandfathered status to that property.

ZTA 21-06 amends the current Zoning Ordinance to add certain provisions allowed under the old code into the new code. The introduced ZTA (Attachment A) would create a new exemption section, under Section 7.7.1.D Residential Lots and Parcels. This new subsection (11. Density Transfer and Historic Resources) would once again permit a limited list of commercial retail and professional uses in existing or new structures, with site plan approval by the Planning Board and a favorable recommendation from the Historic Preservation Commission, on parcels that contain a site, structure or area of historic significance in a residential zone protected under a density transfer. In recognizing the original intent of allowing small, low impact commercial uses that were deemed compatible with a historic resource, the ZTA adds one new use ‘Medical and Dental clinics up to 4 medical practitioners’ to the list of permitted uses. Also remaining an option is any allowed residential use in the underlying zone, subject to any remaining density not previously transferred off the site.

The ZTA also would establish three findings the Board and the HPC must make when approving proposed development on such a site:

- i. Any modifications to buildings, structures or the land must be consistent with the intent of protection of the historic resource and consistent with Chapter 24A of the County Code,
- ii. Shall not introduce operational characteristics that would encroach upon or destroy the historical, archaeological, or architectural character or value of the site, and
- iii. The project must be recommended for approval by the Historic Preservation Commission prior to approval of the Site Plan by the Planning Board.

The intent of the ZTA language is to allow sites that meet the subject criteria to have the same allowed uses and access to the same regulatory process for approving them as existed under the old code, while adding some focus to the Board and HPC review through the proposed findings. This ZTA does not include the actual provisions to allow new density transfers to occur, so the scope of properties that would be eligible for the provisions within the ZTA is very limited.

### **Racial Equity and Social Justice Impact**

Bill 44-20 Racial Equity and Social Justice – Impact Statements – Advisory Committee – Amendments was enacted on December 1, 2020 and became fully effective September 1, 2021. This Bill requires that the Office of Legislative Oversight (OLO), in consultation with the Planning Department, produce a racial equity and social justice (RESJ) impact statement for each ZTA that is introduced on or after September 1, 2021. ZTA 21-06 is the first ZTA to be introduced since Bill 44-20 took full effect. OLO completed a

RESJ impact statement on October 19, 2021; that statement can be found in Attachment C. It is staff's intent to summarize the content and findings of the RESJ impact statements in the staff report if the statement is received in time. Otherwise staff will provide an overview during the Board hearing.

The RESJ impact statement from OLO concluded ZTA 21-06 will sustain or exacerbate racial and social inequities in historic preservation and economic development across the county, on the grounds that most privately owned properties of historic significance are not of significance to African Americans therefore the ZTA would more likely benefit White and affluent property owners. Staff disagrees with the findings of this statement from OLO for the following reasons:

- *The scope of the impact analysis was inconsistent with the scope of the ZTA's actual impact.* The OLO statement highlights the distribution of historic properties across the county relative to Equity Focus Areas (EFAs). This does not reflect the set of properties impacted by this ZTA, which only includes historic properties on residentially zoned land for which a density transfer previously occurred. Planning staff explained and emphasized this scoping discrepancy when consulting OLO staff preparing the impact statement. Furthermore, the impact statement's EFA analysis fails to highlight that the one known eligible property is located within an EFA.
- *The analysis fails to demonstrate how the specific changes proposed by the ZTA support the conclusion that the ZTA would widen racial and social inequities.* ZTA 21-06 provides eligible properties with the opportunity to include certain commercial uses, and does not include language to protect any additional sites with a density transfer. Allowing these commercial uses on the aforementioned Magruder House property, which is located in an EFA, would return opportunities for neighborhood serving commercial services to be located close to existing residential uses. The historic site had been successfully adaptively reused for almost forty years as a bank. The additional small-scale uses allowed under this ZTA could also potentially support local businesses within the EFA. Planning staff believe that allowing these limited uses (one of which existed at the Magruder House property for decades) to return to this property would have no demonstrated negative impact on racial or social inequities in Montgomery County. Furthermore, the Magruder House is the only physical reminder of the Magruder plantation—a significant site where generations of African Americans were enslaved and whose descendants now live in the nearby Scotland community and the greater Washington, DC region. Not only would adaptive reuse of this site enliven business activity within the EFA, it would bring attention to this important history.

## **Conclusion**

Staff recommends the Planning Board transmit comments to the County Council in support of ZTA 21-06 to create special provisions for sites containing a structure or resource of historic significance within a residential zone that has been protected from development through a density transfer, and to clarify the analysis performed by OLO in their RESJ impact statement.

## **Attachment:**

- A – ZTA 21-06 introduction packet.
- B – Historic Preservation Commission recommendation
- C – Racial Equity and Social Justice Impact Statement



**Committee:** PHED  
**Committee Review:** At a future date  
**Staff:** Livhu Ndou, Legislative Attorney  
**Purpose:** To introduce agenda item – no vote expected  
**Keywords:** #DensityTransfer, #HistoricResources

## Attachment A

AGENDA ITEM #3A  
September 28, 2021  
**Introduction**

### SUBJECT

Zoning Text Amendment (ZTA) 21-06, Exemptions – Density Transfer and Historic Resources

### EXPECTED ATTENDEES

None

### COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

N/A

### DESCRIPTION/ISSUE

ZTA 21-06 would establish a new residential lot exemption for properties containing a historic resource that was protected from development by a density transfer.

### SUMMARY OF KEY DISCUSSION POINTS

- This exemption would permit a limited list of commercial uses on the site containing the historic resource.
- A recommendation of approval from the Historic Preservation Commission (HPC) and site plan approval by the Planning Board would be required.
- The HPC and the Planning Board would have three new findings to make, intended to ensure the proposed commercial uses protect rather than detract from the historic resource.

#### **This report contains:**

ZTA 21-06

© 1-4

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Zoning Text Amendment No.: 21-06  
Concerning: Exemptions – Density  
Transfer and Historic  
Resources

Draft No. & Date: 1 – 9/20/2021

Introduced:

Public Hearing:

Adopted:

Effective:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

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Lead Sponsor: Council President at the request of the Planning Board

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- Establish a new Residential Lots and Parcels exemption for Density Transfer and Historic Resources

By amending the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

Division 7.7.	“Exemptions and Nonconformities”
Section 7.7.1.	“Exemptions”
Section 7.7.1.D.	“Residential Lots and Parcels”

And adding

Section 7.7.1.D.11. “Density Transfer and Historic Resources”

**EXPLANATION:** ***Boldface** indicates a Heading or a defined term.*

*Underlining indicates text that is added to existing law by the original text amendment.*

*[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.*

*Double underlining indicates text that is added to the text amendment by amendment.*

*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*

*\* \* \* indicates existing law unaffected by the text amendment.*

## **OPINION**

## *ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. ARTICLE 59-7 is amended as follows:**

**DIVISION 7.7 Exemptions and Nonconformities**

**Section 7.7.1. Exemptions**

\* \* \*

**D. Residential Lots and Parcels**

\* \* \*

**11. Density Transfer and Historic Resources**

Where a lot containing a site, structure, or area of historic significance in a Residential zone is protected from development through a density transfer, the following provisions apply:

a. The following uses are allowed:

- i. Any use permitted in the underlying zone;
- ii. Clinic (up to 4 Medical Practitioners);
- iii. Office;
- iv. Retail/Service Establishment;
- v. Rural Antique Shop;
- vi. Drive-Thru as an accessory use to any other allowed principal use; and
- vii. Uses allowed by Conditional Use, subject to the provisions of Section 7.3.1.

b. Site plan approval is required under Section 7.3.4, except for those uses requiring Conditional Use.

c. The Planning Board and the Historic Preservation Commission must make the following findings:

- i. Any modifications to buildings, structures, or the land must protect the intent of the historic resource and be consistent with Chapter 24A of the County Code; and

ii. Any operational characteristics must not encroach upon or destroy the historical, archaeological, or architectural character or value of the site.

d. The project must be recommended for approval by the Historic Preservation Commission prior to approval of the Site Plan by the Planning Board.

**Sec. 2. Effective date.** This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Selena Mendy Singleton, Esq.  
Clerk of the Council



HISTORIC PRESERVATION COMMISSION

**Marc Elrich**  
*County Executive*

**Robert K. Sutton**  
*Chair*

October 19, 2021

Council President Tom Hucker  
Council Office Building  
100 Maryland Avenue - Room 217  
Rockville, MD 20850

RE: ZTA 21-06 Exemptions - Density Transfer and Historic Resources

Dear Council President Hucker and Members of the Council:

I am writing in my capacity as the Chair of the Historic Preservation Commission (HPC) in support of a Zoning Text Amendment that is being brought to the Council on November 2<sup>nd</sup> for consideration. The HPC heard a presentation from Planning Department staff on this item at our October 13<sup>th</sup> public hearing where the Commission moved to send this letter of support for the ZTA. ZTA 21-06 adds a new exemption to Section 7.7.1.D establishing a process for approving certain specified non-residential uses on historic sites protected through a density transfer.

According to the presentation by Planning Staff, this ZTA impacts one historic site known as the Locust Grove /Samuel Wade Magruder House. This property took advantage of a density transfer in the 1970s and was the subject of several text amendments allowing for a bank to adaptively reuse the historic house for its offices and bank branch. When the Zoning Ordinance was rewritten in 2014, the old provision allowing for limited commercial uses in certain historic properties was inadvertently left out; this ZTA would bring those uses back. The ZTA also creates an expanded role for the HPC so that we must approve any new project for the site and must find that the new use is compatible with Chapter 24A: Historic Resources Preservation.

The HPC believes that this ZTA will promote the protection and adaptive reuse of historic properties and we recommend it be adopted. Thank you for your consideration.

Sincerely,

Robert K. Sutton, Chair  
Historic Preservation Commission

Cc: Members, Historic Preservation Commission  
Casey Anderson, Planning Board Chair  
Members of the Planning Board

# Racial Equity and Social Justice (RESJ) Zoning Text Amendment Statement

Office of Legislative Oversight

Attachment C

## ZTA 21-06: EXEMPTIONS – DENSITY TRANSFER AND HISTORIC RESOURCES

### SUMMARY

The Office of Legislative Oversight (OLO) anticipates that Zoning Text Amendment 21-06 will sustain or exacerbate racial and social inequities in historic preservation in Montgomery County. But because this ZTA will likely impact a limited number of properties in the County, OLO anticipates that this ZTA will have a minimal impact in the County.

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### PURPOSE OF RESJ STATEMENT

The purpose of RESJ impact statements for zoning text amendments (ZTAs) is to evaluate the anticipated impact of ZTAs on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs, power, and leadership of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.<sup>1</sup> Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.<sup>2</sup>

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### PURPOSE OF ZTA 21-06

If enacted, ZTA 21-06 will allow eligible property owners to pursue limited commercial uses in existing and new structures on historically preserved sites with site plan approval and a recommendation of support by the Historic Preservation Commission. The proposed limited commercial uses include:

1. Any use permitted in the underlying zone;
2. Medical and dental clinics for up to four practitioners;
3. Professional offices;
4. Retail sales and services;
5. Antique shops;
6. Drive-thru as an accessory use to any other allowed primary use; and
7. Uses allowed by Conditional Use, subject to the provisions of Section 7.3.1.

The primary purpose of ZTA 21-06 is to re-establish provisions to the former Zoning Ordinance that were omitted in the 2014 update. The proposed provisions provide incentives for property owners to renovate historic structures that make the properties economically viable while maintaining the character of historic sites and districts. Thus, in addition to receiving density transfer credits that they can sell to other property owners seeking higher residential densities, eligible historic property owners also benefit from the commercial uses allowed for their properties under ZTA 21-06.

# RESJ Impact Statement

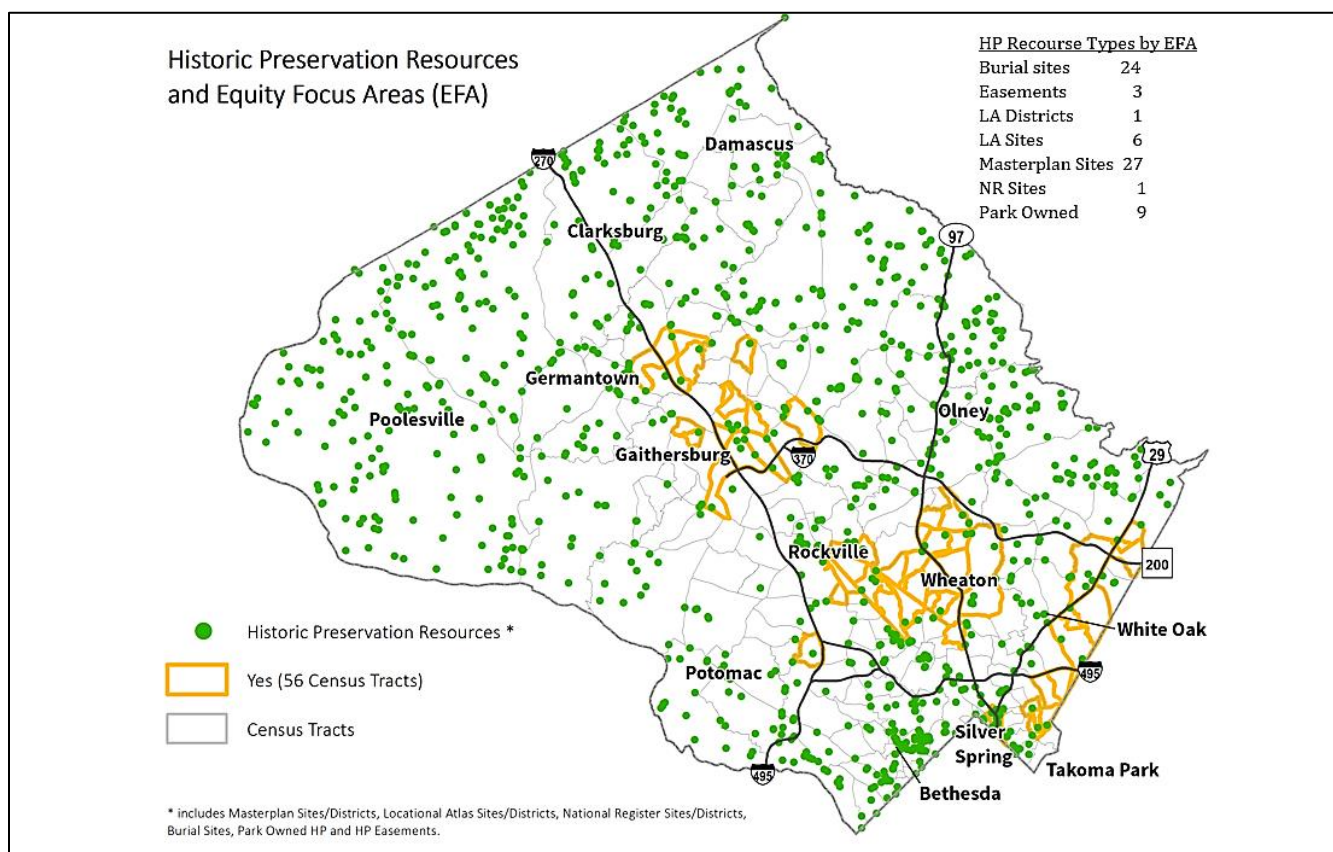
## Zoning Text Amendment 21-06

### HISTORIC PRESERVATION AND RACIAL EQUITY

Historic preservation aims to provide a tangible link to our past. The benefits of preserving historic assets can include deepening community identity, attracting visitors, and ensuring a rich, diverse building stock.<sup>3</sup> Empirical studies have also sought to document the community-wide benefits of historic preservation that offset the economic constraints that limit development and potentially harm property values to individual historic property owners.<sup>4</sup>

Critics of historic preservation often contend that historic preservation too often favors certain historical narratives and assets over others and largely serves high-income and White communities.<sup>5</sup> This includes a recognition among some researchers that “the preservation movement in the U.S. has primarily invested in maintaining White spaces, and for much of American history, little was done to protect Black and other spaces historically significant to people of color.”<sup>6</sup>

**Figure 1: Historic Preservation Resources and Equity Focus Area**



Increasingly, inclusionary planners and preservationists note that the “persistence of certain structures or sites and the effects of decisions over time can perpetuate patterns of segregation and exacerbate injustice.”<sup>7</sup> They note that through decisions about land use, zoning, restrictive covenants, building codes, transportation, affordable housing, and financial lending, the U.S. has a long history of spatially marginalizing people of color, the foreign-born, and/or the poor.<sup>8</sup> As such, there is an increased understanding that legacies of exclusion are entrenched within the build environment and can contribute to inequitable decision-making about what constitutes “historic.”<sup>9</sup>

# RESJ Impact Statement

## Zoning Text Amendment 21-06

Marisa Brown in the June 2020 blog for the National Trust’s Preservation Leadership Forum finds that “federal, state, and local regulations that govern many of the most important preservation mechanisms reflect bias against communities of color.”<sup>10</sup> She further finds that “of the nearly 95,000 entries in the National Register of Historic Places, only 2% (focus) on the experience of Black-Americans” and “of the more than \$100 billion awarded from the Federal Historic Preservation Fund since 1968, the majority has benefited White Americans.”<sup>11</sup> Similarly, researchers with the African American Cultural Heritage Action Fund find that historically African American neighborhoods are underrepresented in historic designation programs.<sup>12</sup>

A review of available local data demonstrates similar racial disparities in historic preservation resources. Of the 1,215 historic preservation resources in the County mapped in Figure 1, about 6.5 percent (79) are located in a quarter of the County’s census tracts (56 out of 215 tracts) where a majority of the County’s low-income residents and people of color reside. These census tracts are referred to as Equity Focus Areas by Montgomery Planning.<sup>13</sup> Further, less than one quarter of one percent of historic preservation sites in the County are designated as sites of historical significance to African Americans (25-26 sites) with many of these being parks owned by the County or state, or facilities owned by community-based groups and institutions rather than by individuals.<sup>14</sup>

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## ANTICIPATED RESJ IMPACTS

Available data on the location of historic properties across the County and the limited number of privately owned properties of historical significance to African Americans suggests the White and affluent historic property owners will disproportionately benefit from changes to the zoning ordinance proposed under ZTA 21-06.

If no eligible historic property owners take advantage of the commercial use options offered by ZTA 21-06, OLO anticipates that current racial and social inequities in historic preservation and economic development across the County will be sustained. However, if eligible historical property owners take advantage of the commercial use options offered by ZTA 21-06, OLO anticipates the racial and social inequities in historic preservation and economic development across the County will widen.

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## CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of zoning text amendments on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement on the proposed zoning text amendment is intended to inform the Council’s decision-making process rather than determine it. Thus, any conclusion made in this statement does not represent OLO’s endorsement of, or objection to, the ZTA under consideration.

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## CONTRIBUTIONS

OLO staffers Elsabett Tesfaye, Performance Management and Data Analyst, and Dr. Elaine Bonner-Tompkins, Senior Legislative Analyst, drafted this racial equity and social justice impact statement.

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<sup>1</sup> See the Government Alliance for Race and Equity’s “Advancing Racial Equity and Transforming Government” for understanding of government role in creating inequities [https://racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource\\_Guide.pdf](https://racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource_Guide.pdf)

<sup>2</sup> Adopted from racial equity definition provided by Racial Equity Tools. <https://www.racialequitytools.org/glossary>

# RESJ Impact Statement

## Zoning Text Amendment 21-06

<sup>3</sup> Ingrid Gould Ellen, Brian Mc Cabe, and Gerard Torratts-Espinoza, **How Can Historic Preservation Be More Inclusive? Learning from New York City's Historic Districts** - <https://www.arch.columbia.edu/books/reader/503-preservation-and-social-inclusion#reader-anchor-3>

<sup>4</sup> Allison Arlotta and Erica Arvami, **Preservation's Engagement in Questions of Inclusion: A Literature Review** - <https://www.arch.columbia.edu/books/reader/503-preservation-and-social-inclusion#reader-anchor-23>

<sup>5</sup> Ingrid Gould Ellen, Brian Mc Cabe, and Gerard Torratts-Espinoza

<sup>6</sup> Kerry Young, **Building a More Inclusive Preservation Movement**, Heritage News, San Francisco Heritage, Volume XLVIII, No 4, October – December 2020 - <https://www.sfheritage.org/wp-content/uploads/2020/10/OctoberHN2020-FINAL.pdf>

<sup>7</sup> See **Issues in Preservation and Policy** edited by Erica Arvrami and her chapter **Preservation's Reckoning** - <https://www.arch.columbia.edu/books/reader/503-preservation-and-social-inclusion> -

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Marisa Brown in the June 2020 blog for the National Trust's Preservation Leadership Forum from "Preservation's Existential Crisis" - <https://forum.savingplaces.org/blogs/marisa-brown1/2020/06/18/preservations-existential-crisis>

<sup>11</sup> Ibid

<sup>12</sup> Brent Leggs, Jenna Dublin, and Michael Powe, **Telling the Full American Story: Insights from African American Cultural Heritage Action Fund** - <https://www.arch.columbia.edu/books/reader/503-preservation-and-social-inclusion#reader-anchor-5>

<sup>13</sup> Montgomery Planning, published and unpublished data

<sup>14</sup> Ibid