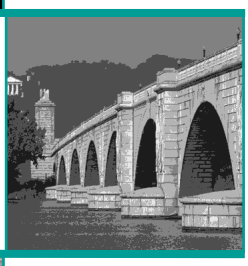
Cultural Resources
PARTNERSHIP NOTES

Technical assistance in historic preservation planning, related planning/land use topics, and preservation strategies for Federal agencies, Indian tribes, States, and local governments



LAW AND THE HISTORIC PRESERVATION COMMISSION: WHAT EVERY MEMBER NEEDS TO KNOW

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A VIBRANT REPRESENTATIVE DEMOCRACY DEPENDS UPON THE active involvement of its citizens in a variety of ways, from simply voting to running for elective office. One important type of governmental involvement is that of service on boards and commissions established by state or local law to provide input and direction regarding state or local public policy. The historic preservation board or commission is one of these important service opportunities for citizens at the local level. Those appointed to serve on preservation commissions want and need to know what is expected of them and what legal issues they may encounter. Serving can be a rewarding experience and commissioners should not fear the law—or lawyers!

No commission member wants to have his or her actions challenged. But it happens. When it comes to protecting what they perceive to be their "property rights," Americans can be very territorial! A 1998 survey by the National Alliance of Preservation Commissions, for example, found that 15% of responding commissions had been sued. However, many of those challenges were unsuccessful.

The primary purpose of this primer is to provide readers with an introduction to basic legal concepts and issues they may encounter as preservation commissioners. The authors hope this brief publication will help answer basic questions and point readers to other useful sources. Our overall goal is to demystify the law governing historic preservation and give commissioners the information they need to make sound and legally defensible decisions.

BASIC CONCEPTS

Commission Authority

The first issue facing any local historic preservation commission is whether it has the legal authority to act. If it doesn't, its actions will be determined to be null and void when challenged, and every commission member will have wasted his or her time. So where does a historic preservation commission get its authority to make decisions affecting the property of other individuals and organizations in the community?

The Tenth Amendment of the United States Constitution provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." One of those powers **not** held by the Federal government, but reserved to the states is known as the *police power*. Based on the Latin maxim *sic utere tuo ut alienum non laedas* (so use your own property as not to injure another's), the concept is of Anglo-Saxon origin and was adopted by the American colonies from British common law. Basically, it can be described as the power of a government to provide for the public health, safety, morals, and general welfare of its citizens. As Justice Douglas stated in the famous Supreme Court decision of *Berman v. Parker*, 348 U.S. 26 (1954), in probably the most eloquent defense of the police power ever written:

> *The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.*[1]

States exercise the police power by passing laws and adopting regulations affecting such matters as public health, environmental protection, building safety, and zoning. Historic preservation, too, falls within the scope of the police power.

Every state has enacted some form of historic preservation legislation, and many state courts have upheld the regulation of individual properties and areas having special historic, architectural, or cultural significance.

The U.S. Supreme Court explicitly recognized preservation as a legitimate government purpose within the scope of the police power in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). In that case the Court upheld the constitutionality of

What Does That Mean?

In reading this publication or cases cited here, you may encounter unfamiliar legal terminology. Legal dictionaries are available in your public library and there are several searchable Internet sources for legal definitions. Two sites that are simple to use are:

Lawyers.com — based on Merriam-Webster's Dictionary of Law 2001: www.lawyers.com/legal_topics/glossary/index.php

Law.com — with three different search methods for finding words: http://dictionary.law.com

References to cases and statutes mentioned in the text are in the technical language of legal citation. Professor Peter W. Martin of Cornell University has produced a useful online guide to help you decipher these strange "hieroglyphics:" www.law.cornell.edu/citation/

the New York City landmarks ordinance and the city's denial of the railroad's request to build a 55-story office tower above historic Grand Central Terminal. The Court's majority observed that it is "not in dispute" that "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." [2]

But how does local government get into the business of exercising the police power? It comes as a surprise to many people to learn that the United States Constitution makes no mention of cities, counties, school districts, or any other forms of local government. Rather, the form, number, powers, and other matters pertaining to local government structure and administration are left up the individual states themselves. As so-called "creatures" of the states, local governments owe their very existence to the state governments of which they are a part (whether they like it or not!).

In interpreting the powers that have been given to local governments by the states, the courts initially adopted a very restrictive view. This bias against local government power was essentially codified in an 1868 Iowa case, *Merriam v. Moody's Executors*, 25 Iowa 163 (1868). Written by Judge John Dillon, a recognized expert on local government law, his pronouncement came to be known as *Dillon's Rule*:

> *[A] municipal corporation [i.e., city] possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.*[3]

Although Dillon's Rule is couched in terms of "municipal corporations," the concept—and bias—has applied historically to counties and other forms of local governments (townships, boroughs, etc.) as well.

This restrictive view toward local government power was the prevailing sentiment in most state legislatures for generations, but, as the needs of urban residents grew more extensive and complex over time, the idea took hold and grew that matters of "local concern" could and should be delegated down to the local governments themselves.

The course of this path differed from state to state, but the overall trend throughout the twentieth century was toward more local control. In many cases, this new approach involved changes in the state's constitution. Some states adopted very broad and generous provisions delegating significant powers to local governments over revenue-raising, form of government, and other key factors, while others took modest or even confused steps.

Many state legislatures were willing to entertain seriously the notion of a true partnership with local governments, one in which the powers and responsibilities of governance were shared in a significant and meaningful way. Others continued to apply a strict standard of limited local government powers.

In terms of historic preservation commissions, what this legal backdrop means is that not only local law but also state law must be consulted to determine the extent to which commissions have been empowered to regulate historic property. If there is doubt about the existence of this power, the courts may rule against the commission. Commission members should

be certain of the scope of their authority and that all systems are "go" for a vigorous pursuit of historic preservation objectives. As commissions move forward in designating and regulating historic properties and districts they should be certain their actions are consistent with state law. The local government's legal office should be able to provide this documentation; commission members are not expected to be legal researchers!

Individual Rights

While government clearly has the constitutional authority to protect historic resources as part of its inherent police power, both law and tradition circumscribe that power. The motto of the State of New Hampshire provides an apt starting point for a discussion of the limitations of historic preservation law– "Live Free or Die!" This statement reflects the attitude most Americans share. We begin with a presumption of freedom on the part of the American citizen.

This foundational premise is bolstered by several provisions of the Bill of Rights of the United States Constitution, as well as by similar provisions in the respective state constitutions.

- **The First Amendment** of the United States Constitution proclaims, *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.* This most esteemed provision of the Bill of Rights drops a protective cloak around United States citizens and keeps the federal government at bay concerning these most basic human rights.
- **The Fifth Amendment** of the Constitution provides that *No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* This provision protects the citizens of the United States from encroachment by the federal government upon their property, and ensures them that the property will be paid for if the encroachment goes beyond a certain point. If the encroachment goes too far, it becomes an unconstitutional taking.
- **The Fourteenth Amendment** of the Constitution provides, that *No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.* This provision assures Americans that their rights are protected against state encroachment as well as that of the federal government, so that nothing the state does can deprive them of the right to use their property, nor may it treat them in an arbitrary or capricious manner. And this protection extends to local government action as well, since all local governments are creations of the states.

While these rights guaranteed in the United States Constitution and in the respective state constitutions must be honored, the government may establish reasonable laws, rules, and regulations to promote the *common weal* or general welfare.

Litigation involving preservation commissions often involves situations where the governmental interest in promoting the general welfare clashes with the desires of the individual citizens. The good news for preservationists is that the citizens espousing private property rights do not often win these legal battles, nor should they. In the United States, property rights

have never been unlimited. If we want to live in a society that respects both the built and the natural environments that were passed down to us, then there must be reasonable restrictions on private property. The stewardship of the cultural and historic, as well as the natural, resources of the planet demand as much.

So what can historic preservation commissions do to minimize their chances of being brought into court, without relinquishing their rightful role as the guardian of historic and prehistoric resources? In order to better answer this question, let us look at the kinds of problems that have arisen in the past, and see how they have been resolved. We will begin our examination of individual rights with three key phrases found in the Fifth and Fourteenth Amendments to the Constitution, quoted above: *takings*, *due process*, and *equal protection*.

Takings

> *...nor shall private property be taken for public use without just compensation.*

This sounds straightforward enough, but in the context of private land use control and historic preservation, how does a taking occur?

There are two primary ways—*physical takings* and *regulatory takings*.

The first way is the most obvious—the government *condemns* the land and buys it outright. This is known as the power of *eminent domain*, and it is part of state government's inherent power as a sovereign entity. When a road is widened or a new government building is needed, the government pays the owner(s) of the land to be acquired for this improvement an amount equal to its value, termed *just compensation*. Usually this compensation represents *fair market value*, or what a willing seller and willing buyer agree is a fair price. What constitutes just compensation is not always clear, however, so the resolution of this issue sometimes leads to litigation by the parties.

For preservationists, eminent domain is a two-edged sword. Local governments have used it to protect historic properties by acquiring them for museums or other public functions, or, as a last resort, by preventing their demolition through the action or inaction of their owners. On the other hand, the power also has been used to acquire land for redevelopment, even if the area contained structures that were still usable. In many of these situations, land acquired from one private owner by eminent domain was transferred to another private owner for future economic development. This raised the question whether the resulting development was a *public use*, as required by the Fifth Amendment.

A challenge from citizens of New London, Connecticut who lost their properties in a redevelopment project reached the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). The court broadly interpreted public use as *public purpose* and confirmed its longstanding policy of deferring to the judgment of legislative bodies as to what public needs justify using the takings power. It held that the requirements of the Constitution could be met by the general benefits a community would receive from increased jobs and other economic opportunities created by redevelopment.

This decision outraged many people who felt that state and local governments should not use the power of eminent domain in this way. As a result, many state legislatures have amended their general laws or constitutions to restrict eminent domain in situations involving transfer of property from one private owner to another or for economic development purposes. In many cases local

governments retain the power to acquire *blighted* properties, though the new legislation has tightened the definition of blight. As a result of these developments, preservation commissions should review their state legislation and consult with legal counsel when potential eminent domain situations arise.

The second type of taking is less obvious. In fact, it was not until the early twentieth century that this type was even recognized legally. This type is known as a *regulatory taking* or *inverse condemnation*. Courts have found this kind of taking in situations where a general governmental regulation has the unintended effect of denying the owner a reasonable economic use of a property. The effect on the owner, then, is much the same as in the first kind of taking, except the owner retains physical possession of the property. In this situation, one of two things happens—either the regulation is nullified, or the property owner is compensated for his or her loss.

One of the first and most important regulatory takings cases is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In this seminal case, the United States Supreme Court overturned a Pennsylvania law that had prohibited the mining of coal in cities to prevent the subsidence of nearby structures caused by a myriad of honeycomb mining shafts beneath populated areas. This law offered no compensation to the mining companies who had retained the mining rights at the time they sold the surface, and as a result of the new law, could no longer mine all the coal. The mining companies sued, alleging a taking of their sub-surface property without compensation in violation of the takings clause of the Fifth Amendment of the U.S. Constitution.

In *Pennsylvania Coal*, Justice Oliver Wendell Holmes made the following oft-quoted pronouncement

> *The general rule at least is, that while property may be regulated to a certain extent,* ***if regulation goes too far it will be recognized as a taking****.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.* [4]

Nevertheless, the Court also recognized that, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[5] Government regulation can be constitutional even if it reduces property value.

So when does regulation go too far and become a taking? The U.S. Supreme Court has indicated that decisions on takings should be made on a case-by-case basis, and established criteria for lower courts to use in making this determination. These criteria provide useful guidance to local governments and commissions.

There has been no more important case for modern takings jurisprudence—particularly for preservation commissions—than the *Penn Central* case, cited above. The decision set out a *three-part inquiry* for analyzing a broad range of regulatory takings claims.[6] Under this inquiry, courts must examine:

- the economic impact of the regulation on the property owner,
- the effect of the regulation on the owner's distinct investment-backed expectations, and
- the character of the governmental action.

The opinion also established a rule requiring that reviewing courts look at the effect on the *entire* property interest (*parcel as a whole*), not just the part affected by the regulation

in question.[7] Owners were not entitled, according to the court, to the so-called *highest and best* use, but rather to a reasonable and beneficial use of the property. The idea that a property owner could "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[8]

Fifteen years after *Penn Central*, the Supreme Court gave a partial answer to the question of when does a regulation go too far, declaring in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that a categorical taking occurs if *all* economically beneficial use of property is denied.[9] If some viable use remains, then the three-part inquiry of *Penn Central* must be applied. Although a number of years have elapsed since the decision, as recently as 2001, Justice O'Connor of the U.S. Supreme Court referred to *Penn Central* as the "polestar" for analyzing takings claims in a land use case, *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).[10]

Many state courts have also addressed the takings issue. These decisions are binding on the respective states, and perhaps are persuasive on court decisions in some states, but may have no effect on cases in other states. Two relatively recent cases are included in the Appendix. On the legislative front, in 2004, Oregon voters approved a regulatory takings initiative known as Measure 37 (ORS 197.352). This legislation allows landowners to claim compensation for any decrease in property value resulting from land use, environmental, or other government regulations. Local governments must either pay the property owners for this loss or waive the regulation.

Property rights organizations seized the opportunity presented by Proposition 37 to introduce legislation or ballot initiatives in a number of other states and capitalized on citizen anger over the *Kelo* decision to add takings measures to unrelated eminent domain legislation. Although only one takings initiative modeled on Proposition 37 was successful in the 2006 elections, proponents continue to advocate legislative or constitutional changes.

This development could effectively undermine historic preservation ordinances and other land use regulations throughout the country that have been upheld in court challenges such as *Mahon* and *Penn Central*. Preservation commissions should review the situation in their state with counsel and closely monitor proposed regulatory takings legislation or initiatives that might invalidate protection for historic resources.

Due Process and Equal Protection

> *...nor shall any state deprive any person of life, liberty, or property, without due process of law.*

If constitutional protections had to be prioritized, due process and equal protection might well be at the top. Nothing in our system of government is more important in terms of protecting the citizens from arbitrary and capricious government behavior. Supreme Court Justice Felix Frankfurter captured this reverence for fundamental fairness in his opinion in *McNabb v. United States*, 318 U.S. 332 (1943): "The history of liberty has largely been the history of observance of procedural safeguards."[11]

Due process has two distinct dimensions—*procedural* and *substantive*. These dual doctrines often appear together and are related to one another.

Procedural due process relates to the manner in which actions are taken, and is intended to protect citizens against unfair governmental action. If a property interest is involved,

then that interest cannot be adversely affected without proper notice and an opportunity to be heard by a competent tribunal. Proper procedures must be followed. These procedures are set by law and are usually very specific. For example, notice may require publication once per week for three consecutive weeks in the official organ of the county, etc.

What this means in practical terms is that commissioners should know the procedural requirements in their enabling legislation, local ordinance, bylaws, rules, and regulations and follow those procedures to the letter. It does not mean that the commission must reach a result based on the information provided by an applicant. One court put it this way: "[T]he procedural requirements we have identified serve not to protect the public from unwise decisions but from uninformed decisions. …Although the board was not bound to listen to plaintiff's concerns, it was bound to hear them before making its decision."[12] If the procedures are not working, don't ignore them; change them or request a change from your legislative body. Some tips for putting due process to work are found in the accompanying box, but ask your local government legal department for further guidance on proper procedure.

Putting Due Process Principles to Work

If your commission wants to avoid running afoul of due process and equal protections problems, you should ask whether every action the commission takes passes legal muster—is it orderly, fundamentally fair, and impartial?

Adequate Notice

- Have you followed the notice requirements of state law (including sunshine laws) and the local ordinance in all details, including specified methods and deadlines?
- Have you given appropriate notice to affected applicants, property owners, neighbors, and the general public?

Opportunity to Be Heard

- Have you given all parties a reasonable opportunity to present their arguments and evidence?
- Are time restrictions reasonable and equitable?

Impartiality

- Are all commissioners free from conflict of interest and bias on every issue in which they participate—both financial and personal? If you are not sure, talk to your local government attorney or ethics officer for guidance.
- Have you avoided ex parte contacts—having discussions with interested parties outside the official process and the public eye—and revealed any inadvertent contacts for the record?

Informed Decision Making

- Are you prepared for each decision on which you vote, having read the application, visited the site, and been present for all of the proceedings?
- Do you understand all the issues; have you listened carefully and asked questions?
- Have you treated all similarly situated properties or projects similarly or given reasons for any different treatment?
- Is your decision supported by reasons and findings of fact and based on the criteria in your ordinance and any applicable design guidelines?

Prompt Decision Making

- Have you made decisions within the time limits allowed by law and within a reasonable time given the circumstances of the case?

Preparing for Challenges

- Have you prepared an adequate record—written, audio, video—of each case and the proceedings that can support your decisions if challenged?
- Does the record document and make clear that you have passed all of the "smell tests" above?

Substantive due process is not as clear-cut as procedural due process in that the substantive aspect of due process relates to the basic fairness or *equity* of a decision. If the court believes that some fundamental principle of fairness has been violated, then it can take action to correct it. Of course, fairness, like beauty, is very much in the eye of the beholder, so courts are less likely to overturn a decision on these grounds than they are on procedural due process grounds.

For example, an Illinois court overturned a zoning decision of a local government board because the board failed to provide for cross-examination—a procedural defect. Plaintiffs had also challenged the action on substantive due process grounds. On those grounds, the court refused to substitute its judgment for that of the board in an area where the board had been given discretion by the legislature. The court put it this way: "If the board's decision is unwise but does not violate substantive due process [that is, basic fairness], the plaintiff's remedy lies in the political arena; simply put, if unhappy, the plaintiffs may campaign to throw the rascals out."[13]

Equal protection under the Fourteenth Amendment states:

> *...nor shall any state deny to any person within its jurisdiction equal protection of the laws.*

The constitutional protection provided by the equal protection clause of both the Fifth and Fourteenth Amendments is a fundamental aspect of due process; that is why the two terms appear together so often. Equal protection in practice means freedom from improperly differential treatment and from arbitrary and capricious treatment by the government. In other words, everyone is entitled to fair treatment under the law; treatment is not based on bias, prejudice, or cronyism. Similar situations should produce similar outcomes, no matter who the parties might be.

What equal protection does not mean is that the government can never treat any person or property differently than anyone else. The government does have the right to make classifications of people, and it does so all the time. People who make higher incomes pay a higher percentage of their salaries in taxes, for example. People who own property in residential areas are not permitted to erect a gas station on their lot if a zoning ordinance prohibiting this use is in effect. These are perfectly valid distinctions.

What the government must be able to show is that any classification that it makes has a rational basis. If it can show a rational basis, then the classification will be upheld. In the case of classifications which the courts consider suspect (such as race or national origin), the government will have to meet a higher standard of proof. In those types of cases, the government will have to show that the classification was necessary to promote a *compelling* state interest. This is a high standard to meet.

Because every situation is different, and because every landowner thinks that his or her property or case is special, the courts are full of equal protection challenges. Several cases relating to historic preservation issues are discussed in the Appendix. One general principle to keep in mind is to treat similarly situated properties similarly. If you have a legitimate reason for treating them differently, make sure your basis for doing so is clearly entered into the record.

Religious Freedom

During the past two decades there has been a vigorous debate on the role of religion in American society and an increasing number of challenges by churches and other religious organizations to laws and regulations. Land-use regulations affecting religious institutions have come under particular scrutiny. Prior to this time, the

relatively few cases involving religious organizations that reached the courts were often decided as taking claims under the Fifth and Fourteenth Amendments rather than as religious freedom claims. Instead of applying an economic return test used for commercial properties, the courts examined whether the regulations either "physically or financially prevented or seriously interfered with" carrying out an organization's charitable or religious purpose. Cases taking this approach include *Trustees of Sailors' Snug Harbor v. Platt*, 288 N.Y.S.2d 314 (App. Div. 1968) and *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980).

More recently, challenges and decisions have focused squarely on First Amendment protections. The First Amendment's *establishment clause* requires that government be neutral toward religion. Laws must have a secular purpose. They must not advance or inhibit religion, give preference to one religion over another, or foster "an excessive entanglement" with religion.[14] The *free exercise clause*, on the other hand, prohibits government from interfering with the free exercise of religion or coercing individuals into violating their religion.

In applying these guarantees, Federal courts have held that government may not "substantially burden" the free exercise of religion unless there is a "compelling governmental interest" and the government employs the "least restrictive means" of furthering that interest.

In 1990, the U.S. Supreme Court recognized an exception to that rule in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). The Court held that "neutral laws of general applicability" do not require a showing of compelling state interest, even though they might substantially burden the exercise of religion. Preservation ordinances may generally be considered as neutral laws of general applicability where they seek to preserve all historic properties without regard their secular or religious nature or the owner's religious orientation.

Religious groups reacted strongly against the "neutral law" exception, and Congress sought to nullify it by passing the Religious Freedom Restoration Act (RFRA) in 1993, 42 U.S.C. §2000bb, *et. seq.*

Four years later, the Supreme Court struck down RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a case involving the application of a local preservation ordinance to a Roman Catholic church in Texas. The church, which was located in a local historic district, had applied for a permit to enlarge its building. When the permit was denied, the church brought suit under RFRA. The Court held that there was no showing of a widespread pattern of religious discrimination in the country that would justify such a sweeping approach by Congress and that the act contradicted the principles necessary to maintain separation of powers and the federal-state balance. Incidentally, the church ended up using a "compromise" plan that was initially negotiated with preservationists before the years of court battles.

In the decade after *Boerne*, at least 13 states passed their own religious protection laws: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas.

The U.S. Supreme Court has yet to rule directly on these state laws. These "little RFRA's" are based on the widely recognized principle that states may afford a higher degree of protection of individual rights under their own constitutions than that guaranteed by the U.S. Constitution. Therefore, states are free to apply the higher "compelling state interest" test when deciding religious freedom cases within their own jurisdiction.

The Washington State Supreme Court took this

approach in *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (1992), based on interpretation of the state constitution, and not a "little RFRA." There, the landmark designation of a church building in Seattle was held a violation of both federal and state constitutional free exercise protections. On appeal, the U.S. Supreme Court sent the decision back to the Washington Court to reconsider in light of *Smith*. In its subsequent opinion, the Washington Court based its decision in favor of the church solely on the "greater protection for individual rights" contained in the Washington Constitution.

Congress also responded to the *Boerne* decision by enacting in 2000 the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc, *et seq*. Crafted to overcome the constitutional problems of the earlier law, RLUIPA focused narrowly on laws regulating land use and institutionalized persons, which were laws alleged to pose specific threats to religious practices. RLUIPA provides that a land use regulation may not substantially burden the religious exercise of a person or institution unless the government can demonstrate a compelling interest for doing so, and the regulation is the least restrictive means of furthering that governmental interest.

Whether the new law passes Constitutional muster has yet to be decided by the U.S. Supreme Court, but a number of challenges are working their way up through the federal courts. Regarding institutionalized persons, RLUIPA, section 3 has been held valid by a unanimous court in *Cutter v. Wilkinson* 544 U.S. 709 (2005).[15]

While most cases to reach the courts focus on discriminatory zoning and land use issues other than historic preservation, many religious organizations have used RLUIPA's existence to argue for exemptions before preservation commissions and local governing bodies. To avoid intimidation and misunderstanding, it is important for commissions to know what the law does and does not do. Some clarity of purpose may be found in a joint statement issued at the time of the law's passage by the sponsors in the United States Senate. The main points of the statement are included in the Appendix.

A key to proving a RLUIPA violation is a showing that the preservation ordinance is considered a "substantial burden on religious exercise". This may be difficult to prove. The U. S. Court of Appeals in *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert denied, 499 U.S. 905 (1991), has held that financial burdens alone do not rise to a constitutionally significant level. In that case the church had been denied a permit to demolish its historic community house in order to build a new office tower to generate revenue for its charitable and religious activities.

The Seventh Circuit Court of Appeals in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a case involving Chicago's zoning ordinance, has also held that, "in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." The court went on to say that to hold otherwise would render the word "substantial" meaningless.

Preservation ordinances are designed to protect the appearance of designated religious buildings and surrounding historic districts, and such protections would generally not render impractical their use for religious exercise.

Once a substantial burden is established, however, commis-

sions may find it difficult to argue that historic preservation is a *compelling* government interest. While *Penn Central* held preservation to be a legitimate government interest, no court has yet found it to be compelling. In fact, the Washington State Supreme Court held specifically in *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992), that the city's interest in preserving historic structures was not compelling.

This area of the law is developing rapidly and commissions facing religious freedom challenges should seek legal advice as soon as the issue arises. It is important, however, to remember that churches are not exempt from local land-use laws, as many argue. They must follow the same certificate of appropriateness and variance processes as secular property owners.

Freedom of Speech

While few cases address freedom of speech directly in a preservation context, there is a substantial body of state and federal law on sign regulation. Many local preservation ordinances regulate signs on landmark properties and within historic districts.

The seminal case of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), set down the parameters for local government control of signs and billboards. First, the U.S. Supreme Court recognized aesthetic reasons alone as sufficient support for this exercise of the police power. Secondly, the opinion would permit reasonable "time, place, and manner" restrictions such as the regulation of sign color, size, shape, height, number, placement, and lighting as long as the ordinance does not control content. The court also agreed that off-premises signs (such as billboards) could be banned entirely.

In the case of signs, the law distinguishes between *commercial speech* (as in advertisements for goods and services) and *non-commercial speech* (such as political or religious signs). Non-commercial speech is generally accorded a higher degree of protection. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), contains a four-part test on constitutionality of controls on advertising. A similar test for non-commercial signs can be found in *United States v. O'Brien*, 391 U.S. 367 (1968).

In the case of *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the U.S. Supreme Court struck down a city ban on most non-commercial signs enacted in response to a resident's yard sign reading "Say No to War in the Persian Gulf, Call Congress Now."

Commissions should be careful to establish how the regulation of signs directly advances preservation goals and go no further than necessary. Communities should never try to prohibit whole categories of speech such as controversial political statements.

In three Eleventh Circuit cases, the Federal Appeals Court withstood challenges to restrictions on expression in historic districts. Ordinances restricting the use of tables to sell message-bearing t-shirts (*One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999)), limiting restaurant advertising by "off premises canvassers" (*Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996)), and prohibiting street performances in an historic district (*Horton v. City of St. Augustine*, 272 F.3d 1318 (11th Cir. 2001)) were upheld as appropriate "time, place, and manner" restrictions on speech that did not discriminate based on content, and were considered narrowly-drawn means of addressing congestion and unruly conduct in historic districts.

Like signs, a proliferation of newsboxes can negatively impact the appearance of historic districts. Since these boxes are the means of distributing speech, they enjoy the same

First Amendment protection as signs; nevertheless they are subject to regulation. Guidelines for their appearance and location would be appropriate.

The First Circuit Court of Appeals even approved an effective ban on all sidewalk newsboxes in Boston's Beacon Hill historic district. The opinion in *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F. 3d 175 (1st Cir. 1996), found the regulation was content neutral, the aesthetic concern was a significant government interest, and alternative means existed in the district for distributing newspapers; therefore, there was no violation of the freedom of speech.

ISSUES THAT CAN TAKE A COMMISSION TO COURT

Enforcement and Liability

While Americans believe strongly in the due process and equal protection guarantees of the 5th and 14th Amendments, they also believe strongly in justice. And justice sometimes calls for sanctions and punishment for actions that violate the law. The following case discusses one of these kinds of situations.

City of Toledo v. Finn, No. L-92-168, 1993 WL 18809 (Ohio Ct. App. Jan. 29, 1993), demonstrates the scope of historic preservation commissions' authority to bring about criminal sanctions that punish the noncompliance of those under their jurisdiction. In this case, a property owner of a building located within a historic district sought a certificate of appropriateness for planned changes to a building. The local historic commission objected to the owner's plans to enclose five windows and ordered him to keep the windows' original configuration. The property owner disregarded the commission's instructions and enclosed the entire wall where the five windows had been positioned.

The city issued three stop work orders, which the owner also disregarded. The property owner appealed his misdemeanor conviction for failure to comply with the stop work orders, claiming alternatively no viola-

Seeking Legal Advice

The watchwords for members of historic preservation commissions when dealing with legal issues should be vigilance, caution, and education. It is easy to get into trouble in this field, especially for the layperson. However, don't let yourself be intimidated by bogus claims of takings, RLUIPA violations, etc. Do not hesitate to ask your local government attorney or some other person with legal knowledge and understanding to explain or clarify a point. If you think there's going to be trouble at a preservation commission meeting, definitely ask your attorney to attend. It could save time, money, and reputation for all concerned. Other possible sources of help and advice include the following:

- National Alliance of Preservation Commissions: www.uga.edu/napc
- Law Department of the National Trust for Historic Preservation: www.nationaltrust.org/law/index.html
- Your state's Certified Local Government (CLG) contact http://grants.cr.nps.gov/CLGs/CLG_Search.cfm
- National Park Service Certified Local Government Program: www.nps.gov/history/hps/clg/index.htm

tion of the orders, no intention to violate the orders, and most significantly, that the stop work orders were unconstitutional and unreasonable exercises of the city's police power.

The court affirmed the validity of aesthetic regulation as an exercise of police power, including historic district regulations such as certificates of appropriateness. The commission, as an entity of the city government, had the right to enjoin the owner from altering the original window configuration of his building as an application of the city's police power. The owner's failure to comply with the commission's orders regarding his plans was "'illegal' and/or 'contrary to the public welfare'" and properly countered with a stop work order.[16]

Demolition by Neglect

Demolition by neglect describes a situation in which an owner intentionally allows a property to deteriorate, sometimes beyond the point of repair. In some cases, the owner passively defers maintenance beyond a reasonable point or abandons the property. More often it is an active strategy to redevelop the property in the face of preservation and zoning laws that would preserve historic character and/or current use. Communities need an affirmative maintenance provision in their local code to prevent owners from neglecting their properties and then arguing that restoration or repair is an economic hardship.

Also to be effective, preservation commissions must coordinate with their code inspection and enforcement office. There can be conflict when a code enforcement officer orders a designated building be demolished as a fire or safety hazard without coordinating with the preservation commission or staff. Good working relationships with other local government officials and resolution of ordinance conflicts are keys to success.

Courts generally have been supportive of ordinances prohibiting demolition by neglect. Several cases are described in more detail in the Appendix.

Economic Hardship

It is important for communities to address economic hardship for several reasons.

First, it helps make preservation ordinances more acceptable to the community by assuring property owners of relief where strict application of the ordinance or guidelines would have an unusually harsh result.

Second, it allows communities to develop and implement a range of approaches to relieve the burden on all property owners, including tax relief, loans, grants, public acquisition, or zoning variances.

Third, hardship provisions can head off litigation by providing an administrative process for resolving differences that is less formal and costly than going to court, and communities can strengthen their positions if they do go to court.

Courts generally defer to preservation commissions where there is a reasonable basis in the record for their decision. Further, by lightening the economic burden on the property owner, the commission can help defeat a takings argument. Several cases on economic hardship are discussed in the Appendix.

Open Meetings and Open Records

Most states have strict requirements regarding open meetings and open records, including the requirements for notice of meetings. These must be followed closely and carefully, or the commission runs the risk of having its decisions nullified later. In some states, courts can award court costs and attorney fees to those improperly denied access.

The open meetings laws, often referred to as *sunshine laws*, typically provide a definition of what constitutes a public meeting, specify the actions

TIPS FROM THE EXPERTS # 1

Effectively Addressing DEMOLITION BY NEGLECT in Local Ordinances and Procedures

- Require compliance with all codes, laws, and regulations regarding the maintenance of property.
- Require that all structures be preserved from decay and deterioration and be free from structural defects.
- Identify specific problems that will constitute demolition by neglect, such as
  - Deteriorated or inadequate foundations, walls, floors, ceilings, rafters and other supports;
  - Ineffective waterproofing of roofs, walls, and foundation including deteriorated paint, brick, mortar, and stucco, along with broken doors and windows;
  - Holes and other signs of rot and decay; the deterioration of any feature so as to create a hazardous condition;
  - Lack of maintenance of the surrounding environment (such as accessory structures, fences walls, sidewalks, and other landscape features).
- Specify how the provisions of the ordinance will be enforced. Identify how stop work orders and citations are to be made, the time frame for problem correction, and an appeals procedure.
- Mandate coordination between the preservation commission and staff, and the local government's inspection and code enforcement office. A good working relationship with code officials is critical to ensuring effective problem identification and correction.
- Specify the penalties for failure to comply with citations. While fines and equitable remedies are typical, an additional and more effective alternative (if allowed by state law) may be to authorize the government to make the repairs directly and charge the owner by putting a lien on the property.
- Authorize acquisition of the property by local government, by eminent domain if necessary.
- Provide economic incentives to encourage the maintenance and rehabilitation of historic properties. Encourage volunteer programs to assist lower income residents.
- Specify that demolition by neglect will bar a property owner form raising an economic hardship claim in a certificate of appropriateness process. Only circumstances beyond an owner's control should entitle him or her to economic relief.

For a more detailed analysis, see Becker 1999 in the Sources of Information.

TIPS FROM THE EXPERTS # 2

Effectively Addressing ECONOMIC HARDSHIP in Local Ordinances and Procedures

- Do not consider economic hardship arguments during the designation process. Economic impact is only speculative until a property owner makes a specific proposal. Further, it clouds the issue of significance, the primary concern for designation.
- In considering economic hardship, it is crucial that the preservation commission focus on the property and not the particular economic circumstances of the owner. While the impact on a "poor widow" may appear unreasonable, the inquiry should be whether the restrictions prevent the owner from putting the property to a reasonable economic use or realizing a reasonable profit.
- Put the burden of proof on the property owner, not the commission.
- Evidence of cost or expenditures alone, is not enough. The commission should require information that will assist it to determine whether application of the ordinance will deny reasonable use of the property or prevent reasonable economic return. The evidence should address the property "as is" and if rehabilitated (which may mean just bringing it up to code). Some other factors to consider include: purchase price, assessed value and taxes, revenue, vacancy rates, operating expenses, financing, current level of return, efforts to find alternative use of the property, recent efforts to rent or sell the property, availability of economic incentives or special financing (such as tax benefits, low-interest loans, grants, or transferable development rights).
- Additional consideration may be appropriate in assessing the impact on non-profit organizations such as the ability to carry out their charitable or religious purposes (although a non-profit is not entitled to relief simply because it could otherwise earn more money).
- Determine who caused the hardship. If the owner has neglected the building, paid too much for the property, or is just gambling on getting a permit in spite of knowing the ordinance provisions, he may have created his own hardship. Government isn't required to bail an owner out of a bad business decision or speculative investment.
- Commissions should consider bringing in their own expert witnesses where necessary. If the matter goes to court, the decision will be based on evidence in the record. Local government housing, engineering, and building inspection staff may provide useful testimony.

For a more detailed analysis of economic hardship provisions see Julia Miller 1996 and 1999 in the Sources of Information.

that can be taken and who may attend, address required public notice—adopting a schedule of regular meetings, giving notice of special and emergency meetings, and identifying very limited instances where meetings can be closed, such as for discussion of personnel actions or property acquisition. In addition to invalidation of commission action, Georgia law, for example, provides that "any person knowingly and willfully conducting or participating in a meeting in violation of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $500.00." [17]

Open records laws require governments to provide prompt access to public records when requested by a citizen. This would include the materials submitted as part of a commission's decision-making process. It is important that commissions create accurate records and maintain them in an accessible location.

All commissioners should review these open meetings/ open records laws and refer any questions to their attorney. The chairman in particular needs to understand clearly the do's and don'ts of these laws. Commissions may have somewhat different rules when archeological sites are being considered, and may need to maintain a certain level of confidentiality in order to reduce the possibility that the sites may be looted or vandalized.

Off-the-Record Communications

Another important aspect of the need to conduct business in public relates to contacts and conversations about a case that are *off-the-record*, or outside of the normal proceedings. These are known as *ex parte communications*. The process of issuing a certificate of appropriateness, for example, is considered in many jurisdictions as a *quasi-judicial* proceeding. The commission is acting as judge and jury by applying the law to the facts in a particular case. The same analogy applies to a local governing body hearing appeals from a preservation commission decision.

Just as it would be improper for an interested party to communicate with the judge or a juror outside official channels while a case is going on, a similar communication with a preservation commissioner is also improper. When a commission member receives a telephone call or is approached in church or at the grocery store by someone who wants to discuss a pending issue before the commission, warning flags should go up. These contacts can affect individuals' rights to due process and equal protection and could result in the invalidation of commission action. While such a communication may cause a serious problem, it is not always fatal to a commission decision. One thing a commissioner who has such a contact can do is to reveal the content of the conversation in the course of a public hearing on the matter. In that case, the information becomes a part of the record and other interested parties can respond to or rebut the information.

Regulating Non-historic Properties and Vacant Land in Historic Districts

In order to protect the character of historic districts, it is important that preservation commissions have the power to regulate non-historic properties and undeveloped land within the districts. Courts have consistently ruled that these types of properties are not exempt from control.

In *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979), for example, the North Carolina Supreme Court rejected such a claim, stating that "preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district."[18] The court also noted

that, as opposed to banning new structures, the ordinance simply required the plaintiff "to construct them in a manner that will not result in a structure incongruous with the historic aspects of the Historic District."[19]

Another relevant case is *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Commission*, 590 A.2d 1080 (Md. Ct. Spec. App. 1991), which upheld restrictions on building materials in new subdivision near an historic area because of the public interest in protecting the historic district.

Protection of Properties Pending Designation and Anticipatory Demolition

In order to keep the bulldozers at bay while a preservation designation is under consideration, a number of communities establish a temporary time-out called a moratorium while the community decides whether to provide permanent protection. Courts have generally been supportive of this approach.

In a case involving the Swiss Avenue Historic District in Dallas (*City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974)), the court declared that, "it would be inconsistent to allow a city...the power to make zoning regulations, and then deny it the power to keep those impending regulations from being destroyed by an individual or group seeking to circumvent the ultimate result of the rezoning."[20] However, several courts, including *Southern National Bank of Houston v. City of Austin*, 582 S.W.2d 229 (Tex. Civ. App. 1979) and *Weinberg v. Barry*, 604 F.Supp. 390 (D.D.C. 1985), have noted that moratoria should have reasonable time limits.

In 2002, the U.S. Supreme Court upheld the constitutionality of a 32-month moratorium on development of property in the Lake Tahoe Basin pending the completion of a comprehensive land use plan in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Rejecting a claim that any total moratorium on development was a temporary taking, the court held that restrictions on development must be considered on a case-by-case basis under the test set out in the Penn Central case. To hold otherwise, the court said, "would render routine government processes prohibitively expensive or encourage hasty decision making."[21]

An alternative to a total development ban pending designation is an approach to interim protection employed by some cities, such as Chicago in its Landmark Ordinance §21-67. After a preliminary determination of a property's eligibility, the owner must follow the same procedure for development as if the property were already landmarked until the city council acts on designation. Whatever approach is employed, the commission should be certain its process follows the mandates of state and local law.

Another approach is the *demolition review law*, which may be separate from the historic preservation ordinance. Such an ordinance would apply to the proposed demolition of any building over a certain age, or a significant portion of a building, or otherwise meeting the criteria spelled out in the ordinance. During a specific period of time, a determination would be made as to whether the property was eligible for protection. Following the review, the property might or might not be designated under the historic preservation ordinance or otherwise receive protection. This can be an effective tool to address buildings that may have been "missed" by the community's survey and designation program or buildings that do not meet the standards or designation but otherwise have characteristics that enhance the community. It can certainly buy time for preservationists to try and negotiate an alternative to their destruction.

LITIGATION ISSUES

There are several issues that will be relevant to a preservation commission facing litigation, or considering the possibility of instituting litigation. The local government's legal department will usually handle the commission's interests in litigation. Nevertheless, it is important for commission members to understand what is going on in order to assist the attorney, who may not be familiar with historic preservation issues.

Liability

Few issues cause greater concern among local government officials than that of liability, both for the government itself and for public officials individually. In most jurisdictions, this problem has been addressed through the purchase of liability insurance policies or by tort claims acts. As long as a government official acts within the scope of his or her authority and without malice, qualified immunity will normally attach to the actions taken, and no liability will be found. If an error is made, however, the official will be protected by the insurance policies that are in place, since he or she was performing a public function or duty.

One major exception to this is in the area of civil rights violations. The Civil Rights Act of 1871, which has been codified in the United States Code as section 1983 of Title 42, provides, in pertinent part, as follows:

> *§ 1983. Civil action for deprivation of rights*
>
> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*[22]

What this means in lay language is this: if a public official's action deprives someone of his or her civil rights, that official can be sued for redress, and that includes money damages. In such a case, the official will be responsible for the payment, not the government (and not the government's insurance policies).

Members of historic preservation commissions are considered public officials, because they are acting *under color of law* (under the authority of the historic preservation ordinance). So it behooves all members of historic preservation commissions, as well as all public officials generally, to be cautious in how they exercise the powers of their positions. If they are found to have violated someone's civil rights, they will pay for it, and out of their own pockets. However, by carefully following the provisions of the local ordinance and established procedures and treating everyone fairly and equally, commissioners should be able to avoid individual liability.[23]

Jurisdiction

One of the most important issues in American jurisprudence is that of *jurisdiction*. This concept relates to the authority of the court to act. The court system (both federal and state) exists to resolve disputes between opposing parties. But in order for the courts to be able to do that and impose any penalties or sanctions on anyone, they must have jurisdiction over both the subject matter of the lawsuit and over the parties themselves. Strict rules have been developed to guide this process, and they must be carefully followed if a plaintiff (or claimant) hopes to prevail. When considering or facing a lawsuit, a commission

should be sure the action is filed in a court with jurisdiction over the matter.

Preservation commissions have issues of jurisdiction, too. State enabling legislation and local ordinances specify the parameters within which the commission may act. A commission may have authority to prevent demolition of designated properties, for example, but not of properties that might be eligible but not designated. In such a case, the commission would lack jurisdiction and be unable to prevent the issuance of a demolition permit. Commissioners should make themselves aware of their jurisdiction—the subject matters and parties over which they have authority.

Standing

Standing to sue refers to the legal right of an individual to bring a lawsuit. Not everyone has that right. What is required is that the plaintiff be able to show an actual stake in the outcome of the proceeding. The U.S. Supreme Court set out the test for standing to sue in federal courts in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992). The *Lujan* test requires

- that the plaintiff personally has suffered actual or threatened injury that is concrete and particularized, not conjectural or hypothetical;
- that the injury fairly can be traced to the challenged action; and
- that the injury is likely to be redressed by a favorable decision from the court.

Federal courts have generally recognized that aesthetic or environmental "injuries" can meet these tests.

One of the most striking aspects of the American intergovernmental system is the relative independence of the states, especially in matters of land use law. "Standing denied" in the court of one state can well be "standing approved" in another.

While many preservation ordinances allow appeals by *persons aggrieved* by the decision of the preservation commission, state courts differ widely on the meaning of that term.

A plaintiff's participation in the administrative process or ownership of property adjacent or close to the property in question can be significant factors in conferring standing in some cases. Other courts impose a very narrow interpretation. In *Allen v. Old King's Highway Regional Historic District*, 2000 Mass. App. Div. 330 (Mass. Dist. Ct.), for example, the court held that *person aggrieved* applied only to those who have demonstrated "special harm that would occur to him if the Certificate of Appropriateness awarded by the regional commission is allowed to stand."[24]

Ripeness/Exhaustion of Administrative Remedies

Ripeness is a concept that refers to the timetable of a legal dispute. Courts are reluctant to step in and make a decision before the established administrative process has been followed to its conclusion. The courts want to avoid making a decision unless they have to. Thus, they will often require that all administrative remedies provided by state law be *exhausted* before they proceed to address the merits or demerits of a particular fact situation.

Likewise, federal courts are reluctant to consider Constitutional claims until plaintiffs have exhausted their state remedies. A federal court in the District of Columbia[25] found that a case was ripe for federal review where the historic preservation commission denied requested permits, that decision was adopted by the major's agent, and District of Columbia law did not provide for compensation for denied building permits.

Where issues have been resolved outside the judicial process by an administrative agency

or even an act of God, a court will generally dismiss a case as *moot*. For example, when a building that is subject of litigation is demolished, a court will generally dismiss the case.

However, in situations otherwise moot, courts have discretion to resolve an issue of continuing public interest likely to reoccur in other cases and affect the future rights of the parties before them.[26]

With both ripeness and mootness, timing is everything. Courts are generally not eager to take up a controversy when other remedies exist or the issue has been otherwise resolved unless there is a compelling public policy reason to do so.

Laches

Laches also relates to the timetable of a case, but at the other end of the proceeding. If a party waits too long to bring a lawsuit, the court may well dismiss it because of excessive delay.

Laches is similar to a *statute of limitations*, except it is judicial rather than statutory. In general, the party attempting to use laches to bar a lawsuit must prove that the plaintiff's delay in bringing suit was unreasonable or inexcusable and that the delay has been prejudicial.

Most courts are reluctant to uphold a laches defense in environmental cases, particularly when it is shown that the plaintiffs have be actively engaged in the administrative process and have not "sat on their hands" after it became clear that there were no further administrative remedies available to them.

Doctrine of Judicial Restraint and Deference to Other Branches of Government

Judges are not shy by nature, but generally they do not like to preempt the role of other branches of the government. They believe in, and practice, the separation of powers doctrine, and are generally reluctant to invade the decision-making sphere that has been carved out for the legislature and the executive branch. Many cases can be found in which the doctrine of judicial restraint is front and center.

In the famous *Berman v. Parker* decision cited earlier, Justice Douglas not only defended the police power, he also defended the right of the legislative branch to determine what that concept means. He said this:

> *We do not sit to determine whether a particular housing project is or is not desirable... [T]he Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.*[27]

Modern courts have continued to apply the doctrine of judicial restraint and deference to other governmental branches in reviewing the decisions of local historic preservation commissions.

In *Collins v. Fuller*, No. 912479B, 1993 WL 818633 (Mass. Dist. Ct. Aug. 6, 1993), owners of a lot located in a historic district sought a certificate of appropriateness for new construction; the local historic preservation commission denied their request. The owners appealed to the local superior court to annul the decision and to issue the certificate.

Deferring to the commission's determination "unless it is legally untenable, arbitrary, or capricious," the state district court held that the commission had the statutory authority to base its decision on consideration of "exterior architectural features subject to public view that might impact on the historic and architectural integrity of the surrounding district,"[28] including the preservation of a historic

Massachusetts landscape. The commission had the right to conclude that any structure prominently visible from a historically significant wooded parkway would "spoil the very aspect of [the district] that caused its designation as an historic place,"[29] and to deny any applications for certificate of appropriateness that would have this effect.

This deference to legislative decisions can even extend to administrative agencies. *Farash Corp. v. City of Rochester*, 713 N.Y.S.2d 423 (N.Y. App. Div. 2000), was a New York case in which the appellate division reversed the holding of the lower court, because it had not deferred to the local commission's "administrative determination" to deny a demolition permit. The court found the commission's decision had support in the record, had a reasonable basis in the law, and was not arbitrary or capricious. In other words, the decision of the administrative agency appeared sound on the record, and should not have been overturned by the lower court, barring evidence of some abuse of discretion by the agency.

Therefore, in reaching its decisions, the commission should:

- identify the relevant facts of the case based on the evidence presented in the application and any public testimony;
- make a determination whether those facts warrant the approval or denial of the owner's application;
- identify the sections of the ordinance, guidelines or standards that support that determination; and
- make certain that these actions are entered into the official record.

CONCLUSION

Protecting historic resources can be challenging, especially in an increasingly litigious environment. The situation, however, is neither impossible nor hopeless. It does require a careful reading of the U.S and State Constitutions and laws, as well as local ordinances, and an understanding of the ways that the courts have interpreted these documents.

A person appointed to serve on a local historic preservation ordinance should not be frightened or worried, but he or she must be prepared to act in a legal manner. Commission members do not need to be lawyers in order to act legally. Commission members do need to know what kind of rules and behavior legally protects them and their decisions and when to consult their local legal experts.

This primer on the legal aspects of historic preservation in America is intended to provide commission members with enough legal armor to keep them out of trouble and out of the courts. Forewarned is forearmed!

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MORE LESSONS LEARNED
For Keeping Your Commission Out Of Court

- Ensure your ordinance is written in clear, simple language and is in accord with state legislation. Some of the key elements to consider are:
    - Statement of purpose
    - Definitions
    - Establishment of preservation commission; powers and duties
    - Criteria and procedures for designating and removing designation of historic properties and districts
    - Identification of actions reviewable by commission (e.g., new construction, alterations, demolition, moving, landscape features)
    - Criteria and procedures for review
    - Legal effect of commission decisions (e.g., advisory, binding)
    - Economic hardships provisions
    - Affirmative maintenance or demolition by neglect provisions
    - Appeals procedures
    - Enforcement provisions
- Be familiar with your laws, rules, and procedures:
    - Basic Federal and State constitutional principles,
    - State laws
    - Local ordinances
    - Commission bylaws
    - Rules of procedure
    - Design guidelines
- Give your procedures and guidelines careful consideration, adopt them formally and follow them carefully; revise them if they are not working or not being followed.
- Be sure you comply with all open meetings and open records laws.
- Maintain the highest ethical standards and comply with all relevant state and local ethics legislation.
- Decide issues on their merits, not on public opinion. Courts generally defer to the preservation commission where there is a reasonable basis in the record for their decision.
- Be aware of commission precedent and follow it or explain any dissimilar treatment.
- Ensure decisions are fairly and consistently enforced.
- Seek legal advice on difficult or controversial issues.
- Document, document, document. The written record will be the basis for understanding and upholding you commission's decisions.
- Regularly evaluate your own performance and make necessary changes.
- Take advantage of training opportunities; stay informed and polish your skills.

APPENDIX

Case Examples

Commission Authority

The importance of carefully following state statutory requirements is illustrated in the case of ***Russell v. Town of Amite City*, 99-1721 (La. App. 1 Cir. 11/08/00); 771 So. 2d 289**. There, the Louisiana Court of Appeals affirmed the trial court's holding that an ordinance creating a local historic district and preservation commission was null and void because the city failed to comply with state enabling legislation that required creation of a study committee, an investigation, and a report prior to designating the district. As a consequence, preservation commissioners should particularly beware of national models—what works in one state might not work in a neighboring state.

State Takings Cases

***City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996)**. Property owners sought a certificate of appropriateness from the City of Pittsburgh Historic Review Commission to demolish a house, locally designated as a historic structure. Testimony at the commission hearing for the property owners' certificate of appropriateness application dealt with the economic feasibility of renovation versus new construction on the site, and the marketability of the house in its current state. The commission denied the property owners' request for demolition, finding that the house was architecturally and historically significant, was structurally sound, and that renovation costs were comparable to those of new construction. The property owners appealed the commission's decision to the local trial court, which found in the property owners' favor.

The Supreme Court of Pennsylvania reversed. It applied the standard of *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993): "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."[30]

In addition, the court used the test of *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976), requiring "the property owner to show 'that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.'"[31] Using these standards, the court found that the evidence presented by the homeowners before the commission did not prove economic hardship. The property owners did not demonstrate that "they could not make any economic use of their property;"[27] selling the house in its current condition could conceivably turn a profit for the owners, thereby allowing some economically viable use of the property, so as not to be a taking.

***Historic Albany Foundation, Inc. v. Coyne*, 558 N.Y.S.2d 986 (N.Y. App. Div. 1990)**. A non-profit historic preservation organization sued the County of Albany, New York over its decision to demolish a county-owned block of houses located within the City of Albany without first complying with provisions of the city's Historic Resources Commission Ordinance. The county argued that the buildings were structurally unsound and posed a risk to the public. Under the city's ordinance, however, demolition without a showing of either economic hardship or that a building was a non-contributing structure was forbidden.

Under the city's ordinance, a hardship determination had to be based on three factors: ability to earn a reasonable return, adaptability to another use that would make for a reasonable return, and whether an attempt has been made to sell the property to a party interested in its

preservation. The county also challenged the constitutionality of the ordinance on a takings claim since even publicly owned property cannot be taken by another governmental entity without just compensation being paid.

The appellate division court found that the ordinance's provisions for demolition met the tests of the Penn Central case, by tying "demolition in effect to a showing either that the building is not of historical, archeological or aesthetic value, or that the owner will suffer hardship by being required to repair or maintain property incapable of yielding a reasonable return."[33] The county failed to demonstrate that the prerequisite of preparing, presenting, and having approved a new development plan for the post-demolition site would "deprive[] the county of all economically viable use of the subject property."[34]

The county's arguments for taking without just compensation, based only on its being "subjected to some as yet unknown expense of new development before it can demolish the property if [the historic preservation ordinance] is enforced," were rejected as well.[35] The ordinance stood, and the order for demolition (and the takings claim) did not.

Procedural Due Process

Sometimes a case will be won or lost simply because procedural requirements were not followed. A pair of recent procedural due process cases that originated in Deadwood, South Dakota illustrates the impact of the failure of historic preservation commissions to follow statutory procedures for decision making.

***Achtien v. City of Deadwood*, 814 F. Supp. 808 (D.S.D. 1993)**, involved the permit process for new construction within a historic district. A developer sought a certificate of appropriateness for new construction from the local historic preservation commission as a prerequisite to a building permit from the city commission. At a joint meeting of the city commission and the historic preservation commission, only three members of the five-member historic preservation commission were present. Two members voted to issue the certificate of appropriateness, one voted against. Then the city commission approved the building permit.

The state historic preservation officer challenged this decision, citing the legal requirement that a majority (three members of the five-member commission) concur. The city then rescinded its issuance of the building permit, in part because the developer had not filed an application or paid a permit fee prior to the city commission's vote, and in part because the certificate of appropriateness was not properly approved. The developer sued, claiming a violation of his procedural due process rights.

The district court found for the city, arguing that the certificate of appropriateness was not properly issued, because "an affirmative vote by only two members of the five-member commission in favor of…the certificate is insufficient to constitute a valid action by the commission."[36] Since a validly approved certificate of appropriateness was a prerequisite to the issuance of a building permit, the issuance of the building permit was void.

The court held that, because the permit process was procedurally flawed, both as to the certificate of appropriateness and as to the building permit, the developer did not "possess a property right in the [building] permit,"[37] failing to trigger the right to procedural due process.

Decided two years after the *Achtien* decision, ***Donovan v. City of Deadwood*, 538 N.W.2d 790 (S.D. 1995)**, dealt with local designation of a historic property and demolition permit decisions. A property owner sought a building demolition permit for

a "historic" icehouse, which was neither listed on the National Register of Historic Places nor locally designated as a historic resource. A city ordinance purported to empower the local historic preservation commission to issue or deny building and demolition permits.

The Deadwood Historic Preservation Commission denied the permit, basing its decision, among other things, on eligibility of the building for listing on the National Register of Historic Places, on its status as the only historic commercial property in the Pluma neighborhood, and on the lack of a proposal for a replacement building for the site. The owner won in the trial court, with the court holding that the Commission's denial went beyond its constitutional and statutory powers and was therefore invalid, and a violation of due process.

The South Dakota Supreme Court affirmed, holding that the Commission violated the property owner's procedural due process rights. The state historic preservation enabling statute set out a series of procedural steps for the designation of historic properties, triggering the local preservation ordinance. Under the statute, a local historic preservation commission must investigate and report on the significance of the property, hold a public hearing on the proposal for designation, and give written notice to the affected property owner. Furthermore, a 180-day waiting period from the time of notice to the property owner "had to be observed prior to its [the designated historic property's] demolition, material alteration, remodeling, or removal."[38] The City of Deadwood did not follow the procedural steps mandated by the South Dakota enabling legislation dealing with the designation of historic properties, and its decision was therefore nullified.

Substantive Due Process

The case of ***Bellevue Shopping Center v. Chase*, 574 A.2d 760 (R.I. 1990)** originated in Newport, Rhode Island, where a developer sought a certificate of appropriateness for a new shopping center within the town's historic district. The local historic district commission as well as zoning board of review denied his request after conducting hearings, on the basis that the center would "seriously impair the historic and/or architectural value of the surrounding area," the materials and design would be incompatible with those of neighboring structures, and increased traffic from the center would pose a threat to the structure of a neighboring historic site.[39]

The developer challenged the city's decisions as based on, among other issues, "impermissibly vague and indefinite" "historic-zoning legislation."[40] Vagueness can be a violation of due process because citizens are not put on clear notice about what is or is not permissible. The court in this case, however, disagreed, holding that the enabling legislation was not "unconstitutionally vague," citing the statute's outlined purposes, and its factors for review of applications, which together "sufficiently alert the public of the statute's scope and meaning."[41] Therefore, the enabling legislation did not violate due process.

***Tourkow v. City of Fort Wayne*, 563 N.E.2d 151 (Ind. App. 1990)**, echoed the ruling of the Bellevue Shopping Center court, upholding the decision of a local historic preservation commission as valid and not a violation of substantive due process. In this case, the owner of a home located within a historic district sought certificate of appropriateness for installation of vinyl siding for her home. The local historic preservation review board denied her application, and the homeowner appealed to the local trial court, which affirmed the review board's decision.

The homeowner claimed that the denial of the certificate by

the review board "substantially prejudiced her," and argued that the review board's decision was "arbitrary and capricious because public opinion influenced it."[42] The court found that the board had a "long-standing practice of denying applications to install artificial siding" because of the material's lack of historic authenticity and tendency to damage original materials, and so did not treat the applicant homeowner any differently than it had treated similarly situated applicants.[43] The court found therefore that the board's denial was not "arbitrary and capricious."

The homeowner also claimed that the standards in the local architectural review ordinance were "vague and unascertainable."[44] The ordinance stipulated "before 'a conspicuous change in the exterior appearance' of an historical building takes place, the board must issue a certificate of appropriateness."[45] The court found that the proposed installation of vinyl siding was "clearly a 'conspicuous change' in appearance," and that the homeowner applicant failed to demonstrate the board's denial to be "either contrary to constitutional right or arbitrary and capricious" and to meet her burden of proof on these issues.[46]

The homeowner further objected to the "absence of written findings of fact in the Review Board's notice of denial."[47] The state code required the board to "state its reasons for the denial…in writing and…advise the applicant."[48] The court found that although the board did not state its rationale for its denial in its notice to the homeowner, the inclusion of the board's findings of fact in the minutes of the meeting (during which the homeowner's application was discussed) was sufficient to meet the statutory requirement of "written findings."[49]

Equal Protection

In ***Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002)**, the owner of a locally designated landmark home informed the village planner that he intended to cover the exterior of his home to eliminate a lead paint hazard. Initially, the village planner advised against a stucco-like treatment and, according to the homeowner, suggested use of aluminum or vinyl siding, and directed the owner to obtain building permits for the planned work. The homeowner filed an application for the commission's approval of the project, and meanwhile the building contractor applied for and obtained a building permit to install vinyl siding without being informed of the need to obtain a certificate. Meanwhile, the homeowner received a letter advising him that his application for vinyl siding would probably be denied, and the village planning staff prepared a report to the same effect, citing the state preservation agency's guidance against vinyl siding as not meeting the Secretary of the Interior's Treatment Standards for facades visible to the public.

The homeowner in *Nevel* filed a federal suit, claiming denial of equal protection. The homeowner alleged that he had been "intentionally treated differently from others similarly situated" and that there was no "rational basis for the difference in treatment," a two-part test established in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Under this test, the claimant must show that (1) "he was singled out for differential treatment," and (2) "the differential treatment was irrational or arbitrary."[50]

Here, the homeowner's evidence of differential treatment—the village's approval of siding for a non-historic home and for a historic non-residential city building—was not persuasive, and failed to show that any differential treatment was either "irrational or arbitrary," or promoted by ill-will. Because the homeowner could not establish that he was in fact singled out

for differential treatment, the circuit court affirmed the district court, ruling for the village.

Religious Freedom

In a joint statement issued at the time the Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed in 2000, the Senate sponsors specifically noted (as reported in the Congressional Record, 146 Cong. Rec. S7774-01) that:

- the act does not provide religious institutions with immunity from land use regulation, nor relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions;
- not every activity carried out by a religious organization constitutes "religious exercise" (such as situations where a church owns a commercial building and uses the revenues to support its religious activities);
- the act does not change the "substantial burden" standard articulated by the Supreme Court;
- the religious claimant challenging a regulation bears the burden of proof on the issue of substantial burden on religious exercise; and
- where the government demonstrates a specific accommodation to relieve a substantial burden, the burden of persuasion that the accommodation is unreasonable or ineffective is on the religious claimant.

The last point may be particularly important for local governments that, for example, try to accommodate the needs of a religious institution through flexible application of design standards to its historic property while substantially accomplishing the purpose of the preservation ordinance.

In ***Mintz v. Roman Catholic Bishop*, 424 F.Supp.2d 309 (D. Mass. 2006)**, the District Court of Massachusetts decided a RLUIPA claim by finding that the city's regulations regarding building coverage, setbacks, parking, and permitting did not apply to a church that wanted to build a parish center because the activities to occur in the parish center encompassed those protected by the term religious exercise and the bylaws put a substantial burden on this religious exercise

Likewise, in ***Living Water Church of God v. Charter Twp. Of Meridian,* 384 F.Supp.2d 1123 (W.D. Mich2005)**, the District Court for the Western District of Michigan held that denial of a church's building permit was in violation of RLUIPA because it did not further a compelling government interest and was not the least restrictive means to achieve the government's end. The proposed 25,000 square foot building was denied by the city because the footprint was deemed too large given the size of the property and the scale of the neighborhood.

However, in ***The Episcopal Student Foundation v. City of Ann Arbor,* 341 F.Supp.2d 691 (E.D. Mich. 2004)**, a city's denial of a demolition permit did not violate RLUIPA because the city did not impose a substantial burden on the exercise of religion.

Obviously the differing approaches of the various lower courts could be resolved by the Supreme Court should it choose to take a RLUIPA case as it did with RFRA in the *Boerne* case.

Freedom of Speech

Freedom of speech issues can also become enmeshed with other aspects of cultural heritage preservation. In ***Mellen v. City of New Orleans,* 1998 WL 614187 (E.D. La. 1998)** the court struck down New Orleans' noise ordinance as "overbroad." The court found that music is a form of speech and it is appropriate to impose reasonable time, place, and manner

restrictions on speech. However, the ordinance in question was a blanket restriction placed across the city. The court decided that it had to look at the particular neighborhood to determine the validity of the ordinance. Here, music was found to be an important part of the culture of the French Quarter where the club that violated the ordinance was located.

Demolition by Neglect

In ***Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975)**, the U.S. Court of Appeals upheld provisions in a local ordinance requiring reasonable maintenance and repair of buildings in New Orleans's French Quarter. Where the overall purpose of the preservation ordinance is a proper one, the court reasoned that required upkeep of buildings was reasonably necessary to accomplish the law's goals.

Rejecting the takings claim, the court stated: "The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not *per se* render that ordinance a taking."[51] The court cited other examples of acceptable affirmative requirements placed on a property owner including provision of fire sprinklers, emergency facilities, exits, and lights.

In ***Buttnick v. City of Seattle*, 719 P.2d 93 (Wash. 1986)**, the Washington State Supreme Court upheld the city's requirement that a property owner remove and replace a deteriorated and unsafe parapet. The court referenced a city council finding that "a reasonable effort was not made by the property owner to correct the public safety hazard presented by deteriorated parapet and pediment when the hazard was first cited" in spite of numerous contacts and hearings.[52]

The opinion found sufficient evidence that the council applied the appropriate standard required by *Penn Central* and *Maher* when it concluded that the estimated cost of replacement of the parapet did not impose an unnecessary or undue hardship on the plaintiff, considering the property's market value and income producing potential.

In ***District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. 1994)**, the Court of Appeals reversed an approval by the mayor's agent to demolish a dilapidated historic building because the demolition permit was unauthorized under District law. The court's opinion noted that the law authorized the city to require reconstruction where demolition was done in violation of the law. The court found that would be an appropriate option since the record indicated that the corporate owner was largely responsible for the building's rapid decline and for the destruction of its most important features, and that the building was not beyond repair.

Economic Hardship

The Pennsylvania Supreme Court was presented a combined takings and economic hardship claim in ***City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996)** and held in favor of the preservation commission. The owners had known when purchasing the dilapidated house that it was a landmark needing substantial repairs. Nevertheless, they failed to hire an architect or contractor to give them an estimate of the feasibility and cost of renovation.

The court held that the owners did not meet their burden of proof because they failed to establish the house could not be resold "as is" for the amount they paid or that the combined purchase price and rehabilitation costs exceeded market value. Thus, no significant economic hardship had been established.

Similarly, in ***Zaruba v. Village of Oak Park*, 695 N.E.2d 510 (Ill. App. Ct. 1998)**, the Illinois Supreme Court upheld the denial

of an economic hardship variance to demolish an historic house, rejecting the owner's claim that he was unaware of the specifics of the preservation ordinance. Factors cited by the court included the owner's overpayment for the property and his failure to either try selling it "as is" or exploring alternatives that might have received commission approval. Interestingly, the preservation alternative was more favorable financially to the owner than the proposed plans for the property.

Courts are generally unwilling to allow owners to use economic hardship claims to get themselves out of bad business decisions. In ***Kalorama Heights Ltd. Partnership v. District of Columbia*, 655 A.2d. 865 (D.C. 1995)**, the D.C. Court of Appeals found that the applicant's purchase of the contributing property in a historic district with the hope of developing a twelve-story luxury condominium was "a 'speculative investment' tantamount to a 'gamble'."[53]

This case also demonstrates how important it is for the preservation commission to build a solid record and place the burden of proving economic hardship on the applicant. The Kalorama court upheld the District's denial of a demolition permit citing substantial evidence in the record, including the applicant's failure to prove it was not economically feasible to renovate or sell the property as a single-family dwelling.

Ex-parte Communication

In ***Idaho Historic Preservation Council, Inc. v. City Council of Boise*, 8 P.3d 646 (Idaho 2000)**, a property owner sought a permit for demolition of a warehouse. The local historic preservation commission denied the application; the property owner appealed to the city council, which approved the certificate.

A local historic preservation organization filed petition for review of the council's decision in the local trial court, which ruled that the city council violated due process "because it received and considered information outside of the appellate record in granting the certificate of appropriateness [for demolition]."[54]

The historic preservation organization had appealed the council decision, seeking review of among other issues the question of "[w]hether the City Council's receipt of phone calls from interested parties and the general public violated the due process standards of a quasi-judicial proceeding."[55]

The city claimed no due process violation "because the subsequent hearing [on the application] cured any improper influence from the ex parte communications."[56] The court established that "when a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law."[57]

Deviation from this standard means in actual fact that "a second fact-gathering session [has occurred] without proper notice, a clear violation of due process."[58] Members of the city council who received calls prior to the public meeting failed to record or disclose the substance of the calls, and the commission therefore had no chance to rebut any evidence or arguments of the callers.

The court discussed the situations which would be exceptions to the general prohibition on ex parte communications:

- the ex parte contacts were not with the proponents of change or their agents, but, rather, with relatively disinterested persons;
- the contacts only amounted to an investigation of the merits or demerits of a proposed change; and, most importantly,
- the occurrence and nature of the contacts were made a matter of record during

> a quasi-judicial hearing so that the parties to the hearing then had an opportunity to respond.[59]

The court, however, declined to apply these exceptions in this situation, finding that the nondisclosure of the identities of the callers or the nature of the conversations between the callers and council members made it "impossible for the Commission to effectively respond to the arguments that the callers may have advanced."[60] The court held here that "the receipt of phone calls in this case, without more specific disclosure, violated procedural due process."[61]

The ***Rutherford v. Fairfield Historic District*, No. 25 58 74, 1990 WL 271008 (Conn. Super. Ct. May 18, 1990)** decision from Connecticut demonstrates the sort of situation in which a historic preservation commission can find itself—and prevail against an ex parte communications challenge.

In this case, the owner of a home in a historic district sought a certificate of appropriateness from the Fairfield Historic District Commission for window replacements for his home, located in a historic district. The commission denied the homeowner's application, and the homeowner challenged the commission's decision, claiming, among other issues, that their decision was invalid and violated due process because of ex parte communications between commission members and an expert witness.

The *Rutherford* court held that the ex parte communications referred to by the homeowner did not violate the homeowner's due process. The commission, composed of laypersons, has the right to "receive technical advice to carry out its responsibilities, as long as the [applicant] was provided with the opportunity to examine [the expert witness] and to rebut his testimony."[62] Furthermore, there is no evidence that the commission received evidence after the public hearing; the expert testimony took place in public, and the homeowner-applicant had the right to question and rebut the witness.

Standing

A state case involving this principle arose in Massachusetts in 2000—***Allen v. Old King's Highway Regional Historic District*, 2000 Mass. App. Div. 330 (Mass. Dist. Ct.)**. Nearby owners to an affected property appealed the grant of a certificate of appropriateness by a regional historic preservation commission; the enabling statute for the commission allowed such appeals by any *person aggrieved* by its decisions. Faced with the question of whether or not these property owners were persons aggrieved with standing to appeal, the court held the statutory definition of *person aggrieved* applied only to those who have demonstrated "special harm that would occur to him if the Certificate of Appropriateness awarded by the regional commission is allowed to stand."[63]

In addition, the court concluded, "[g]eneral civic interest in the enforcement of historic zoning is not sufficient to confer standing."[64] For example, "[s]ubjective and unspecified fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law."[65]

Finally, the court held that a party's participation in the administrative appeal process or ownership of property close to the tract in question was not enough to confer standing.

***Burke v. City of Charleston*, 139 F.3d 401 (4th Cir. 1998)** is another case relating to the issue of standing. In this case, after a local artist painted a bright,

colorful mural depicting a fanciful "creature world" on the side of a building located within the Charleston historic district and sold it to the building's owner, the city board of architectural review ordered its removal. The artist sued the city, challenging the constitutionality of the ordinance on First Amendment grounds.

The artist appealed the adverse determination of the federal district court; the Fourth Circuit Federal Court of Appeals found that the artist lacked standing, because when the artist sold his mural to the owner of the building on which it was painted, the artist "relinquished his First Amendment rights."[66] Therefore, the owner alone had the right to display the mural, and thereby the "legally cognizable interest in the display" of the work.[67] The artist did not prove "injury-in-fact"—the court found that the one who had the right to display the mural (the owner, if anyone, but not the artist) suffered a potential injury from the city's order to remove it. Thus, the artist did not have legal standing to oppose the removal of the mural.

Laches

A state court case that addressed this issue was ***City of Dalton v. Carroll*, 515 S.E.2d 144 (Ga. 1999)**. The prior owner of a home failed to obtain a building permit or certificate of appropriateness for construction of a metal carport located within the historic district.

The city received a complaint about the carport and notified the current owner within ten days. After the owner failed to remove the carport, the city sought a declaratory judgment and injunction. The trial court denied both claims, holding that laches barred the city's claim.

The state supreme court reversed, and considered the factors for applying laches—length of the delay, the reasons for it, the resulting loss of evidence, and the prejudice suffered. In this case, the court found that the city did not delay enforcement of its architectural review ordinances, but notified the property owner within ten days of receiving the complaint, and that it was the predecessor owner's failure to obtain the building permit that caused a six month delay between construction and discovery.

Furthermore, the property owner failed to comply with the city ordinances after notification. "Under these circumstances…it is not inequitable to permit the city to enforce its claim against [the property owner]."[68] While it is important to pursue out-of-court solutions and avoid frivolous lawsuits, it is equally important to take legal action without delay when it is necessary.

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2 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).
3 *Merriam v. Moody's Ex'r*, 25 Iowa 163, 170 (1868) superceded by statute Iowa Code §§364.2(2) and 364.2(3) (1983), as recognized in *Council Bluffs v. Cain,* 342 N.W.2d 810 (Iowa 1983).
4 *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (emphasis added).
5 *Id*. at 413.
6 *Penn Cent*., 438 U.S. at 124.
7 *Id. at 131.*
8 *Id*. at 130.
9 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Scalia does not use the exact term "categorical taking" in the opinion of the Court.
10 *See also Lingle v. Chevron*, 544 U.S. 528, 539 (2005) (reaffirming Penn Central test).
11 *McNabb v. United States*, 318 U.S. 332, 347 (1943)
12 *The People ex rel. Klaeren v. The Village of Lisle*, 316 Ill. App. 3d 770, 786 (2000)
13 *Id*.
14 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
15 *See* Autumn L. Rierson, RLUIPA: Four Years Later, 20 Preservation L. R. 1169 (2003).
16 *City of Toledo v. Finn*, No. L-92-168, 1993 WL 18809 (Ohio Ct. App. Jan. 19, 1993).
17 O.C.G.A. § 50-14-6 (2005).
18 *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444, 451 (N.C. 1979).
19 *Id.*
20 *City of Dallas v. Crownrich*, 506 S.W.2d 654, 659-60 (Tex. Civ. App. 1974).
21 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002).
22 Civil Rights Act of 1871, 42 U.S.C. § 1983 (2007).
23 A commissioner would be entitled to immunity unless his "act is so obviously wrong, in the light of preexisting law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994); abrogated by *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).
24 *Allen v. Old King's Highway Reg'l Historic Dist.*, 2000 Mass. App. Div. 330, 331 (Mass. Dist. Ct.).
25 *District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp.2d 30 (D.D.C. 1998).
26 *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App. 3d 203 (1981).
27 *Berman v. Parker*, 348 U.S. 26, 33 (1954).
28 *Collins v. Fuller*, No. 912479B, 1993 WL 818633, at *1 (Mass. Dist. Ct. Aug. 6, 1993).
29 *Id*.

30 *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612, 617 (Pa. 1993).
31 *City of Pittsburgh v. Weinberg*, 676 A.2d 207, 211 (Pa. 1996) (quoting *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976)).
32 *Weinberg*, 544 Pa. at 287.
33 *Historic Albany Found., Inc. v. Coyne*, 558 N.Y.S.2d 986, 988 (App. Div. 1990).
34 *Id*. at 989-90.
35 *Id*. at 990.
36 *Achtien v. City of Deadwood*, 814 F. Supp. 808, 813 (D.S.D. 1993).
37 *Id.*
38 *Donovan v. City of Deadwood*, 538 N.W.2d 790, 793 (S.D.1995) (quoting S.D. Codified Laws § 1-19B-23 (1995)).
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41 *Id.* at 765.
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45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 153-154.
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56 *Id*. at 649.
57 *Id*.
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59 *Id*. at 650.
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62 *Rutherford v. Fairfield Historic Dist.*, No. 25 58 74, 1990 WL 271008, at *3 (Conn. Super. Ct. May 18, 1990).
63 *Allen v. Old King's Highway Reg'l Historic Dist.*, 2000 Mass. App. Div. 330, 331 (Mass. Dist. Ct.).
64 *Id*.
65 *Id*. (quoting *Barvenik v. Bd. of Aldermen of Newton*, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992)).
66 *Burke v. City of Charleston*, 139 F.3d 401, 403 (4th Cir. 1998).
67 *Id.*
68 *City of Dalton v. Carroll*, 515 S.E.2d 144, 145 (Ga. 1999).

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