Procedural Due Process in Plain English: A Guide for Preservation Commissions

by Bradford J. White & Paul W. Edmondson
One of the most basic concepts underlying the American experiment in democratic government has always been a special sense of "fairness"—the idea that all citizens are to be treated equally before the law. This sense of fairness and equality are what the Fourteenth Amendment and equivalent provisions in most state constitutions are all about. Without these words, the American Constitution—indeed, the grand adventure itself—would be meaningless.

The concept of fairness or "due process" embodied in the Fourteenth Amendment embraces two central ideas. One is that the process of making laws will be open to everyone. The other is that in administering and enforcing the law, the procedures employed will not only be open, but essentially neutral as well. In other words, laws will not be passed without the knowledge of citizens subject to them, and the procedures by which they are enforced will be impartial—applicable equally to all.

Nowhere are these concepts more important than in the passage, administration, and enforcement of historic district, landmark, and other preservation regulations of local and state governments. These are the principal tools by which the owners of private property are specially burdened with the task of preserving the heritage of the larger society.

But there is a difficult problem that arises from the increasingly widespread use of these tools. In the ordinary situation, the enforcement of most regulations relies heavily on lawyers and judges familiar with legal processes and the special language of the law. On the other hand, local preservation ordinances are increasingly administered by lay persons who, though typically untrained in the law, are nonetheless held to its very high standards of performance and accountability.

The courts have made it clear in case after case that the basic standards of fairness to be observed in administering our preservation regulations are no less applicable to lay persons than to lawyers and judges. But these laws are often highly technical, sometimes almost to the point of unintelligibility, and the many lay members of our historic district and landmarks commissions must oftentimes act like lawyers and judges, like it or not, qualified or not.

This publication has been crafted in the hope of bringing some of the complex rules arising from the concept of "procedural due process" down to earth for the lay commission. It is essential that they take this essay seriously and conduct themselves according to the precepts set forth. The preservation of the American heritage as well as its underlying democratic traditions requires no less.

Robert E. Stipe
Trustee Emeritus
National Trust for Historic Preservation
Professor Emeritus of Design,
North Carolina State University

A public hearing allows property owners to have input with regard to decisions about their property. Hearings also provide a forum for the presentation of specific facts surrounding a property.

-- Photo by Elizabeth Byrd Wood.
Procedural Due Process: An Overview

The term “procedural due process” is shorthand for a set of legal and practical principles, derived from the Constitution, court decisions, and state and local statutory provisions, intended to ensure that government agencies at all levels—federal, state, and local—act fairly in making decisions affecting the interests of individual citizens. In the pages that follow, this publication sets out the basic legal framework that the courts use in approaching procedural due process questions, as well as specific guidance on topics that commonly arise in the context of local ordinances granting regulatory powers to historic preservation commissions or review boards.

As the information in this publication is considered, it may be useful to keep the following overview in mind:

1. “Procedural due process” refers to procedures designed to safeguard individuals from arbitrary governmental action. These procedures help to ensure that the substance of a decision by a government agency or official is reasonable, publicly accepted, and not susceptible to legal challenge. In the preservation context, procedural due process includes the need for notice of a commission action, the need for and type of hearing required, and the procedures necessary for fair and informed decision making.

2. The baseline to look for procedural requirements are those procedures imposed by statute—state enabling legislation, preservation ordinances, state sunshine laws, administrative procedure acts, and others. Because due process requirements vary from state to state, these statutory sources—as well as relevant case law from the state—must be consulted in determining what procedures apply in any given case.

3. It is the responsibility of each preservation commission to establish and follow its own rules of procedure that meet the requirements of this statutory baseline, and that go beyond those requirements as necessary to provide additional detail to satisfy constitutional and fairness requirements.

4. Property owners, neighbors, and interested members of the general public must be provided a reasonable opportunity to be heard on any matter considered by a preservation commission that affects their interests. There can be no opportunity to be heard, however, without appropriate notice of an upcoming action by the preservation commission. Therefore preservation commissions must provide reasonable notice of any upcoming action to affected property owners, neighbors, other interested parties, and the general public. Notice may include:
   • individually mailed notice,
   • published notice (usually through local newspapers), and
   • posted notice.

Generally, the closer the distance a person is from a property under consideration by a commission, the more appropriate it is to use individually mailed notice. Notice should be sufficiently detailed so that the person receiving the notice understands the nature of the action the commission is considering, the date, time, and place for any public hearing, and the opportunity for public participation.

5. A public hearing should be held prior to a commission action on a specific application or proposal. One exception is the case of interim controls, including preliminary designations of historic properties, in which case temporary restrictions on the use of property may be put into place pending final action by the commission on a nominated property, in order to prevent demolition or significant alteration of properties under consideration for protection.

6. Public hearings by preservation commissions must be carried out in a businesslike manner, but need not have the formality of trial-like hearings. Consequently, except where a particular jurisdiction may require it (consult your local attorney), swearing-in of witnesses and formal cross-examination are generally not required. Hearings should be open to the public, consistent with state “sunshine acts,” and managed in a way that permits a meaningful opportunity for interested parties to present their views and relevant information. Commissions may use reasonable time limits and other means to manage the conduct of the hearing, so long as these requirements are applied even-handedly to all parties. Above all, every participant in a public hearing has the right to be treated fairly and with respect.

7. A preservation commission’s decision should adequately explain the basis of the decision, with specific reference to information in the record and the relevant standards and criteria included in the preservation ordinance.

8. The commission should carefully record its actions
through written minutes. It is also advisable to maintain an audio or video recording of commission meetings and hearings, which can be transcribed as necessary (or as may be required as a standard procedure by local practice).

9. The tenets of procedural due process require decision making by a fair and unbiased tribunal. Consequently, preservation commission members should avoid even the perception of bias or prejudgment in their conduct, particularly by avoiding extraneous commentary during—or outside of—commission meetings. Commission members should also be careful to avoid conflicts of interest, or even the appearance of a conflict, due to a personal, financial, or professional interest in the subject matter of a proceeding (or with an interested party). Where a potential conflict exists, advice should be sought from a competent outside source, such as a city or municipal attorney. If a conflict is found to exist, a commissioner may not participate in the decision-making process.

10. A commission’s decisions should be made on the basis of information contained in the public record and available to all interested parties. Ex parte contacts (private communications between an interested party and a commissioner on an issue before the commission) should be prohibited.

11. Commission members should work closely with their city or municipal attorney to establish workable procedures, and particularly to ensure that any local or state-level variations in procedural requirements are addressed and incorporated into a commission’s own rules of procedure.

**The Legal Framework**

"... nor shall any State deprive any person of life, liberty, or property without due process of law."

- U.S. Const. Amend. XIV

The Due Process Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment (which applies to the federal government) together enshrine one of the most fundamental concepts of American democracy: that government agencies and officials at all levels must act fairly in making decisions that affect the rights of the individual. The term “due process,” as it has come to be interpreted over the years, effectively stands as shorthand for a set of legal principles designed to safeguard individuals from arbitrary governmental action.

The various federal and state courts have recognized two categories of protections: due process. The first, “procedural due process,” refers to the manner in which government decision making is carried out. The second, “substantive due process,” addresses the rationality or reasonableness of the substance of the decision. Thus, the Constitution requires that both the process and the result of governmental decision making meet basic constitutional standards of fairness and rationality. From a practical standpoint, however, careful attention to the procedural aspects of decision making—in the preservation context, as in any other—can help to ensure that the substance of the decision is reasonable, accepted by the public, and likely to be upheld if challenged in court.

What is “procedural due process”? The procedural protections emanating from the Due Process Clause generally are considered to cover three related subjects:

1. The need for, and type of, notice required of governmental actions;
2. The need for, and type of, hearing required; and
3. The need for fair and informed decision making.

What the Constitution may require for different types of governmental actions, however, depends on the particular circumstances involved. As remarked by Supreme Court Justice Thurgood Marshall, “[w]e have often noted that procedural due process means many different things in the numerous contexts in which it applies.”

In the context of local historic preservation commissions and review boards, the issue of procedural due process may be framed as the following question:

What rights do the various parties who may be interested in either (1) the designation of a historic property or (2) the issuance of a permit relating to a designated property have in the decision-making process of the governmental agency responsible for those actions?

From a constitutional standpoint, the answer to this question may be found through application of an analytical framework that considers four separate factors (as described below). It is essential to note however, that many procedural requirements are also expressly set out in state or local laws, independent of the requirements of the Constitution. Those statutory procedures may be more or less stringent than those required by the Constitution, but in any case must be followed. Another complicating factor is that there are often state-by-state differences in the way different courts interpret the law in this area; these jurisdictional differences should also be noted in determining how much “process” should be afforded in any particular case.
The Constitution and the Courts

From a legal standpoint, procedural due process, like many other constitutional doctrines, may be described as a set of general principles, the application of which depends on a balancing of several different factors.

There are four basic factors considered by the courts in determining which procedural standards apply to specific governmental actions affecting the interests of private individuals. They are:

1. the nature of the governmental action;
2. the nature of the interest of the person in question;
3. the nature of the interference by the proposed governmental action; and
4. the nature of the government’s interest in carrying out the action.

What is the nature of the governmental action in question? Courts addressing procedural due process issues often make a distinction between two types of governmental actions: those that are “legislative” in nature, and those that are considered “adjudicative.”

“Legislative” actions—those that involve the adoption of general public policies—are usually not considered to require extensive procedural protections for individual members of the public. The reason for this is that the public process involved in making legislative decisions itself addresses many fairness concerns, because of the large number of persons affected, the openness of the process, and the degree to which elected officials are directly accountable to the public through the electoral process. Consequently, legislative actions are not generally subject to detailed hearing, notice, or public participation requirements.

“Adjudicative” actions, on the other hand, usually involve the application of previously-adopted policies to individual cases and specific factual circumstances, and are more likely to pose questions of fairness and impartiality. Consequently, such actions generally require more extensive procedural protections for the individual.

Where do the actions of local preservation commissions and review boards fit into this conceptual framework? The answer, unfortunately, is not totally predictable—because of the different way in which preservation ordinances work, and because of jurisdictional differences in case law from one state to another.

In the context of local preservation ordinances, there are generally two different types of government actions. First is the action of designating a property, or a district of properties, as historic. Second is a local preservation commission or review board’s action in considering a specific permit application relating to a particular property, once that property has been designated. These actions are carried out in different ways by different communities. In some communities, for example, designation is made by
the local legislative body (often after recommendation or nomination by a historic preservation commission); in other cases, historic preservation commissions are solely responsible for designation.

Designations, particularly those made by a local legislative body through the adoption of an ordinance, are more likely to be considered to be legislative in character (meaning that the courts may expect less stringent procedural requirements). Unless this is clear under state law, however, it is advisable to check with local counsel to determine whether designations (or the action of formally recommending properties for designation) should follow stricter notice and hearing requirements that may apply to "adjudicative" proceedings. In any event, commissions involved in making or recommending designations should establish basic procedures for notice and public participation to ensure that their actions are publicly accepted as fair and reasonable.

Commission actions on permit applications or certificates of appropriateness, as a general rule, are more likely to be considered adjudicative, and subject to a higher level of procedural requirements. (This, as discussed below, does not usually mean trial-like procedures.) Again, because of state-by-state variations, it is advisable to check with local counsel to find out how courts in any given jurisdiction are likely to characterize such permit actions, and what requirements may flow from that characterization in that state.

What is the interest of the person entitled to procedural protection? Governmental actions affecting the use of land affect different parties in different ways. The general rule is that the interest of any individual varies in accordance with his or her proximity to the property that is the subject of the governmental action—in other words, the greater the distance a person is from that property, the less procedural protections may be required.

To what degree does the proposed governmental action actually interfere in a protected interest? Procedural due process applies to any governmental action that affects a "life, liberty, or property" interest recognized by the Constitution. Different types of governmental actions have different impacts on each of those interests. The constitutional analysis of procedural due process used by the courts requires an examination of the nature of the interference, in order to adjust the procedures accordingly. Historic preservation regulations affect private property or economic interests, rather than interests relating to life or liberty.

Within this area of interests, however, the degree of actual regulation may vary considerably, depending on the legal authority given to the local historic preservation commission or review board. For example, a preservation ordinance that merely imposes a demolition delay has far less of an impact on the property and economic interests of the property owner than does a regulation authorizing a demolition denial. The less the degree of regulation, the less the degree of procedural protection will be required from a constitutional standpoint. (In certain situations, a commission's actions may be considered merely ministerial, and not require extensive procedures.) Conversely, the stricter the degree of controls included in a local preservation regulation, the greater the degree of procedural protections that may be due individuals affected.

What is the nature of the government's interest? In any regulatory proceeding, the public has an interest in ensuring that the government conducts its activities in a manner that is efficient both from a standpoint of time and economy of
effort. This public interest in a workable decision-making process always serves as a legitimate limit on procedural steps. Notice requirements, for example, must be reasonably tailored to balance the interests of the individual with the broader interests of the community. Thus, the high cost and time-consuming nature of a mailed notice may justify resorting to newspaper announcements or posted notices for individuals other than those directly affected by a commission proceeding. Similarly, public hearings—when required—must be reasonably limited in time and in scope. Otherwise, endless "process" could prevent governmental action altogether.

A Practical Approach for Looking at Procedural Due Process

The constitutional framework described above should be understood as general guidance that can help local governments understand the way that the courts approach the issue of procedural due process. From a practical standpoint, however, this constitutional framework gives little specific direction for determining what procedures should be used in any particular context. Nonetheless, several basic principles can serve as a practical approach for local preservation commissions that recognize the need to establish a workable set of procedures to govern the various actions that may be taken by a local historic preservation commission or review board.

Look first at statutory sources. The term "procedural due process" generally refers to the constitutional requirements emanating from the Due Process Clause. From a practical point of view, however, procedural requirements may be imposed both by the Constitution and by independent statutory sources. These sources, in the preservation context, may include state enabling laws for preservation regulations at the local level (or home rule laws for those ordinances based on home rule powers), the terms of the local preservation ordinance itself, or other laws—state or local—specifically designed to set out procedural requirements for administrative decision making (often called administrative procedure acts).

In many cases, these laws include some minimal reference to notice and hearing requirements; in a few, procedural requirements are much more detailed. In any case, the basic requirements imposed by statute should be considered to be the baseline for procedural requirements for any local preservation commission and must be followed carefully. Those baseline statutory requirements—where sketchy—should be supplemented with more detailed procedural guidelines to ensure that constitutional due process requirements are fully met.

Understand state case law variations. It is important that local preservation commissions be aware of any special procedural rules that have been recognized by the courts of their particular state. In some cases, the general constitutional requirements of procedural due process have been addressed by state courts in contexts that may be of direct relevance to local preservation commissions—particularly in the context of zoning and other land-use controls. These decisions may give special attention to issues such as cross-examination, whether hearings must be taken under oath, and whether transcripts may be required.

It is advisable for local preservation commissions to seek the guidance of a local attorney—either a municipal attorney or lawyer in private practice—with a working knowledge of the particular court decisions in their state that may be relevant in determining the procedures that should be followed by the commission in exercising its authority.

Establish basic procedures that are fair to individual citizens, but that are also workable for the government. And stick to them. Once the minimal statutory requirements and state variations are understood, the basic constitutional framework described above should be used by local preservation commissions to establish an expanded set of procedural requirements addressing the various decisions or actions taken by the commission in carrying out its responsibilities. The procedures—which may be adopted by the commission in the form of guidelines or regulations—should be as fair as possible to individual property owners and to members of the public generally. They should not, however, be so detailed or onerous that they are unworkable for the commission. Procedures that are too detailed are not likely to be followed to the letter, and may later be used to challenge the substantive decisions of the local preservation commission. Both flexibility in approach, and consistency in application, are key to effective—and defensible—procedures.

What Process is Due?

"The fundamental requisite of due process of law is the opportunity to be heard."

—Grannis v. Ordean, 234 U.S. 385 (1914)

What type of notice requirements apply to the different actions taken by historic preservation commissions? When is a hearing required? What type of
proceedings must be followed at a hearing? Must transcripts be taken? Is cross-examination required? What factors are necessary for fair decision making? When should a commissioner consider recusing himself or herself because of a potential conflict of interest? What form should a final decision follow?

While there are few unequivocal answers to any of these questions, application of the various principles described in the previous section of this publication can help to establish a workable, and legally defensible, set of procedural guidelines for carrying out the work of a local preservation commission.

Notice

General Principles

The need for notice stems from the requirement that people have a right to be heard before a government agency or official takes an action affecting a protected interest. Interested parties cannot properly exercise their "right to be heard" unless the local government or administrative agency informs them in advance of the action that may be taken. In other words, a hearing is not meaningful and may be legally challenged—if interested parties are not given a reasonable opportunity to participate.

What does the procedural due process requirement for notice mean for local preservation commissions? It means that some type of notice should be provided to all interested parties before a commission takes an action affecting any specific property. Notice should be given, for example, prior to a commission designating a landmark or historic district (or formally recommending a building or district for designation), or before approving or denying a permit relating to the alteration or demolition of a historic property, or before acting on a claim of economic hardship.

Who should get notice, and what form should it take? The first place to look for notice requirements is in the historic preservation notifying ordinance. To the extent that notice requirements are spelled out in the ordinance, commissions should follow them closely. If no notice requirements are included in the ordinance—or other laws, including state enabling acts—other local land-use regulations may provide a useful framework for developing notice requirements. Beyond this, the following guidelines should be followed:

ATTENTION

Informational Meeting for the Proposed Strong Avenue Historic District

Plan to attend a question and answer presentation given by the members of the Historic and Cultural Preservation Commission of the City of Elkhart. The meeting will address the benefits and responsibilities of becoming a local historic district; myths about historic districts; boundaries; certificates of appropriateness (COA); and the district designation process.

A series of 3 informational meetings are scheduled for the following dates and locations:

when & where

January 24, 1995
Lexington Building
120 West Lexington Street

time: 7 p.m.

February 8, 1995
Municipal Building
City Council Chambers
229 South Second Street

time: 7 p.m.

February 13, 1995
Augustana Lutheran Church
1333 Kilbourn Street

time: 7 p.m.

A mailed notice is generally only required for those persons directly affected by a local commission's actions.
property owners within a set distance from the property—300 feet, for example. For these individuals, mailing notice to the "owner of record" listed on the property tax rolls is generally considered sufficient. Due process does not require that a title search be undertaken to establish ownership (although a few state statutes and local ordinances require that ownership be established from deed information). In most cases, consistent use of an established database, such as property tax records or water department records, is sufficient for purposes of identifying owners for this type of notice.

For persons located in the area of an impending action, who may be interested in the proceedings but who are not required under local procedures to receive individual mailed notice, the posting of a sign on the subject property is generally considered sufficient to meet procedural due process requirements. For the general public, notice may be provided through publication in a newspaper of general circulation in the community. While not always considered necessary as a matter of constitutional law, public advertised notice serves as an effective and cost-efficient method of apprising the general public of impending actions that a commission is considering.

What about content? Regardless of the type of notice used, the content of the notice should be sufficiently detailed to permit the person receiving the notice to understand the nature of the action that the commission is considering, the date, time and place for any public hearing, and the opportunity for public participation in any proceeding. A good measure of determining whether the notice meets requirements of fairness and due process is whether a reasonable person would be able to understand the nature and consequences of the action being considered by the commission.

Special Considerations in the Notice Area
Beyond these general principles, a number of issues may arise from time to time in the notice area that are worth noting in particular. They include the following:

Designation by reference to another historic register. Some preservation ordinances provide for local designation of properties on the basis of eligibility or listing in the National Register of Historic Places. The National Register was not, however, intended to be used as a local regulatory tool, and does not have the same impact on private property interests as local designation does. Consequently, the federal government (which administers the Register) may not have applied the same notice requirements for a National Register listing that would ordinarily apply to a local regulatory program. (Notice local land requirements for National Register nominations are specified in federal regulations, and differ from those described here.) Consequently any local preservation ordinance and preservation commission that provides for local designation on the basis of eligibility or listing in the National Register should provide separate notice to the property owner before locally designating the property because of the potential effect of local designation on private property interests.

Notice to new purchasers of property. Most courts recognize that new purchasers have a responsibility to investigate the legal status of the property, particularly as to matters that are part of the public record, such as zoning classifications or historic designation.
Therefore, most new purchasers cannot claim that they were not given notice of a property’s local historic designation status, since they were legally “on notice” at the time of purchase. Nonetheless, while not a constitutional requirement, it is a good idea, where possible, to record local historic designations in local land records. Some communities include historic designation as an item on a seller’s disclosure form. In addition, some communities make it a practice to mail information to new purchasers notifying them of the property’s prior designation and explaining the procedures under the historic preservation ordinance.

With the proliferation of Geographic Information System (GIS) technology allowing local governments to record a wealth of information about each parcel located in a community in a database, information regarding historic designation should be simple to archive and obtain, and should satisfy any notice concerns relating to subsequent purchasers of designated buildings.

Failure to give notice. Failure to give notice to an interested party may not invalidate an administrative proceeding, such as a public hearing, if the party in question learns of the proceeding some other way and ends up participating. (This is referred to as a party having received “actual notice.”) In some states, however, failure to comply with statutory notice requirements, even if such requirements are more stringent than those constitutionally required by due process, may invalidate the preservation commission’s actions. Therefore, when drafting a preservation ordinance or preparing rules and regulations regarding notice, local communities should be careful not to over-complicate notice requirements, because of the potential for technical failure. In any case, a commission should carefully follow the notice requirements in the ordinance or statute.

New notice requirements. If a hearing has been called after proper notice, but new matters are addressed that were not included in the original notice, new notice may be required. The need for new notice and further proceedings depends on simple issues of fairness—i.e., whether a member of the public might reasonably have anticipated that the new matter would arise at the hearing. Most courts will take a practical approach in dealing with this issue—for instance, if a new subject is brought up at a hearing, the preservation commission may be able to leave the record open for a set period of time for additional written public comment. The best solution to this problem is to ensure that the initial notice is sufficiently detailed to permit a member of the public to understand what will be addressed at the hearing, but not so limited in scope that it can be read to exclude consideration of related matters.

Interim or preliminary controls. In some cases, it may be necessary for local communities to adopt interim or preliminary protections for properties prior to formal designation, in order to preserve the status quo while a detailed preservation program is established. Generally, courts have permitted interim restrictions on the use of property, particularly in emergency situations, without prior notice. Affected individuals should be given notice of the restriction within a reasonable amount of time after it goes into effect. However, whenever possible—and when it does not thwart the purpose of the interim regulation—prior notice should be provided.

The Public Hearing
The public hearing serves three basic purposes. First, the hearing provides the property owner an opportunity to have input with regard to decisions about his or her property. Second, the hearing provides a forum for the presentation of specific facts concerning a property. Third, the hearing pro-
vides the decision makers with information on public opinion on public policy matters.

Due process does not insist that the public hearing meet specific, rigidly applied standards. Instead, courts seek to balance private interests relating to an individual's "right to be heard" against the public interest of fair but efficient hearings, so that decision making can take place at the local level on a regular basis. Therefore, unless there is statutory or other legal guidance in a particular state or local community that suggests otherwise (which should be carefully determined by the preservation commission with the assistance of a knowledgeable attorney), public hearings can be fairly informal.

How informal? "Informal" in the sense of not being "trial-like"—in other words, no swearing of witnesses, no cross-examination as long as opposing interests have a reasonable opportunity to present their views, and representation by counsel, while generally permitted, is not mandatory.

Basically, what it required is that those affected by commission decisions have a fair opportunity to be informed of factors that will be considered by the commission, to present information relevant to the decision, and to understand the basis for the decision once it is made.

The basic elements of fair hearing include:

- An unbiased tribunal;
- Fair notice of the proposed action and the grounds asserted for it;
- An opportunity to present reasons why the proposed action should or should not be taken;
- The opportunity to present witnesses and relevant evidence;
- A meeting open to the public; and
- The making of a record and statement of reasons.

How do these elements work in the context of a local preservation commission? The following guidelines should provide some specific direction.

**Timing of hearing.** The general rule in procedural due process is that a hearing should be held prior to a governmental action affecting a protected property interest. In a few limited instances, however, the hearing may be held within a reasonable time after the government takes action.

In the case of local historic preservation commissions, the action of designating a property, or acting on a permit application—following the general rule—should be preceded by a public hearing. One limited exception, however, is the use of interim controls pending a commission's final decision on whether to designate nominated property as historic. In such a case, interim restrictions may be necessary to prevent significant alteration or demolition pending completion of the designation process. In other words, the restrictions may be necessary to limit a property owner's ability to circumvent the nomination process by altering or demolishing a historic property before the government can act. If a commission action involves this type of interim control (sometimes called a "preliminary designation"), the required public hearing may take place after imposition of the restriction, in light of the danger of demolition and the temporary nature of the regulation. The necessary hearing should be held as soon as possible after the temporary restriction is set in place.

**Role of preservation commission members and staff.** The preservation commission is usually composed of members who have some expertise in architectural history, architecture, law, real estate, rehabilitation, or others who are simply interested in the preservation and protection of historic resources. More and more frequently, historic preservation ordinances are requiring that some commission members include residents living in individual landmarks or within historic districts to ensure that the commission is representative of those members of the public who are subject to the commission's regulatory powers.

Questions frequently arise as to the role that the commission and its staff must play in the hearing process. One of the responsibilities of the commission is to hear evidence and make recommendations or decisions regarding designation and issuance of permits. In this role, the commission must listen to the testimony of witnesses and consider other evidence presented to them, and make a decision based on information in the record. Commission members, are allowed—and should be encouraged—to ask questions of witnesses to determine if their testimony is credible. Commission members, however, must be careful not to "testify" at the hearing and should avoid making decisions based on their personal knowledge of facts specific to a particular case if those facts are not part of the record or not publicly known. This is not to say that a commission member's personal experience does not come into play in the decision-making process—after all, commission members are often chosen to serve because of their specific knowledge and expertise in preservation or a related field. However, knowledge and expertise should be used simply to evaluate the evidence presented in a specific case.

Commission staff members play a different role. Staff members are responsible for putting together the record on which the commission's
decision is based. In a number of jurisdictions, staff members may actually present information regarding the matter at issue at the hearing, and may report on information gathered from their own investigations of the facts in a particular case. (This is often presented as a formal staff report, with recommendations, which becomes part of the public record.) In working with the commission, however, staff members should be careful not to present facts that are not made part of the public record and avoid taking an active role in making the decision itself.

Role of preservation organizations. In all cases, and especially in communities that do not provide staff to the preservation commission, local preservation organizations or other interested individuals can play a critical role in providing testimony at the hearing. Commissions should ensure that all sides of a particular issue are presented for the record; in instances where only the applicant’s side is presented—regardless of how meritorious—the commission may find it difficult to point to any fact in the record that would justify denying the application.

Swearing in of witnesses. Most jurisdictions do not require that local commissions swear in witnesses at public hearings, so long as testimony is taken in such a manner that all those involved understand the importance of the testimony. Some courts, however, have ruled (and some state statutes require) that witnesses before any local administrative agency acting in a “quasi-judicial” capacity give testimony while under oath to ensure a fair hearing. This is one of those issues that should be checked carefully with the assistance of local counsel, in order to determine whether the actions of local preservation commissions are considered to come within such a requirement.

Cross-examination and rebuttal. The ability of an interested party to question or dispute the testimony of adverse witnesses is an important element of due process. In the context of an administrative proceeding, however, few courts have found that the ability to challenge the testimony of witnesses must be carried out through formal cross-examination. The courts have generally recognized that hearings of this type may be relatively informal in nature and do not have to be conducted as if before a court. (Indeed, the use of court-like procedures may actually deter public participation.) Therefore, a commission’s refusal to permit a formal cross-examination would usually not be considered to deprive the parties of a fair and impartial hearing.

Indeed, historic preservation proceedings rarely lend themselves to cross-examination. For example, designation hearings often involve the use of expert opinions regarding the significance of buildings to architecture, history, and culture, rather than questions of fact. The need to challenge expert testimony can be met more effectively through the presentation of opposing opinions and information. Testimony by all sides of a preservation issue effectively places all controversies squarely before the commission and becomes part of the record upon which commission members base their decision.

Voting. Commission members should not be allowed to vote by proxy. If a member is unable to attend a meeting where a decision is to be made, that commission member should not be permitted to vote. No commission member should be able to vote on a particular designation, permit application, or economic hardship request unless he or she has “heard” the testimony, either by having been present at the subject hearing or by having reviewed the record, audio or video recordings, or transcripts. In addition, as discussed in further detail below, commission members must abstain from voting when they have a conflict of interest.

“Sunshine Acts.” Many states (and some localities) have adopted so-called “sunshine acts”—statutes that define what constitutes a meeting and require that every portion of an administrative agency and legislative meeting be open to public observation except in specific situations. Typical sunshine acts define a meeting as taking place whenever a certain number of commission members gather to discuss commission business. Sometimes the number is quantified in the statute or sometimes it is tied to the local ordinance’s definition of a quorum. To ensure that such meetings are open to the public, the commission must provide public notice of the meeting (usually under terms defined in the sunshine act or other local ordinances governing public meetings). Specific cases that would provide exceptions to the sunshine act may include discussions relating to discipline of an employee or litigation strategy. In these cases, the information to be discussed could be damaging to an individual or could jeopardize the attorney/client relationship, and the agency is allowed to meet in executive session.

Commission members and commission staff must know and understand the sunshine act of their state. Questions about the application of the sunshine act most often arise in meetings that take place outside of the normal course of events—for example, when some or all commiss-
ession members go to a property at the same time to assess its significance for designation, or to better understand a property owner's request for a building permit. In these instances, particularly when a specific date and time have been set for the property visit, the “meeting” should be given public notice in accordance with the notice requirements stated in the particular state's sunshine act, or the appropriate local ordinances. It is easy to run afoul of state sunshine acts, and commissions should make every effort to comply with them to ensure due process.

**Maintenance of a record.** Commissions are responsible for compiling and preparing records and making them available to interested parties. The commission should be able to charge a modest fee to cover the costs of making copies of transcripts of testimony and minutes, or otherwise providing copies of the record of proceedings to interested parties. However, the commission should also make the record available for public inspection at an appropriate location, such as the commission's own offices or the city clerk's office. Failure to maintain a record may be grounds for reversal or remand of a decision that has been appealed to the courts. (The issue of record-based decision making, including what constitutes a record, is discussed further below.)

**Role of the expert.** The expert witness has become a standard component of the hearing process. Technical information, accompanied by opinion evidence from experts and lay people, helps to explain the importance of a proposed action and relates the action to the standards and criteria included in the ordinance. In situations where a commission relies on lay testimony rather than expert testimony, the commission may find that its decision is challenged as "against the weight of the evidence." A commission can reject an expert's opinion in weighing and balancing the evidence even where there is no other expert testimony. In such a case, however, the commission must clearly establish why the testimony of the expert is not being accepted, for example by showing that the testimony was not credible because of lack of expertise in the subject matter, or inconsistencies in the expert's own testimony, or because of bias, conflicting evidence, or conflict of interest. (If expert testimony is one-sided, some commissions are authorized to call on their own initiative other experts to testify, to give a more balanced picture.)

**Role of counsel.** Due process does not require that attorneys be present at preservation commission proceedings. Nonetheless, the participation of (or representation by) counsel should not be prohibited. At the same time, a preservation commission should not permit the presence of lawyers to turn an informal hearing process into a trial-like setting.

**Timing of witnesses.** The commission should have established rules that are applied even-handedly and fairly to all witnesses, and that provide the public with a fair opportunity to present testimony. All witnesses, not just those supporting the applicant or proponent, should be granted a reasonable time for testimony. However, a commission should not be forced to hear redundant testimony. It is appropriate for the commission to ask that a spokesperson be appointed to address a particular point of view. Another option for the commission is to leave the record open for an established period of time to obtain written comment.

A variety of techniques may be used to provide interested parties with a reasonable time to be heard. One way to do this is to provide proponents and opponents with a set amount of time—for example 15 minutes each—for direct presentation, with a brief opportunity for rebuttal, as well as an opportunity for interested members of the public to make a brief statement, and an open record for submission of written comments for a period of time after the hearing. Whatever technique is used, the commission should apply it consistently to all interested parties, and provide some flexibility depending on the complexity of the matter at issue.

**Relevancy of admitted information.** Commissions, unlike courts, are not required to follow strict rules of evidence. Courts have recognized that rules of evidence in administrative proceedings, such as commission hearings, should be given more flexibility in favor of admission of evidence. Even where irrelevant evidence has been "admitted" during the hearing process, the commission, in weighing and balancing that evidence, may properly give it little or no weight. Still, the commission should avoid accepting obviously irrelevant evidence into the record, as it will only serve to prolong hearings and add confusion to the decision-making process.

**Applicant's and public's right of access to information prior to hearing, including staff recommendations or case reports.** Just as applicants and the public have the right to review transcripts and minutes of meetings, they also should be given reasonable access to relevant information prior to a commission hearing. Due process does not require that the propo-
nents or opponents of a designation or permit application enter into a formal "discovery" process with the commission (such as might be required in a trial-like setting); however, any interested party should be given the opportunity to review information that relates to the matter of an upcoming proceeding. Generally, this should include staff recommendations or case reports on the matter (unless this information is deemed confidential, which is the case in some jurisdictions; it is advisable to check this with local counsel). If the matter involves a single property owner, information should be provided to the property owner at the same time it is provided to commission members (preferably prior to the hearing). If many property owners are involved, it is advisable to include any public notice instructions as to where and how information on the decision may be reviewed prior to the hearing.

**Record-Based Decision Making**

The right to be heard also includes the right to a responsive decision. This simply means that a preservation commission's decision should adequately explain the basis of the decision, with specific reference to information in the record and to applicable ordinance criteria. Some state statutes and many preservation ordinances require express findings of fact (or a detailed statement of reasons) and a written decision. These may not be necessary to meet constitutional due process standards (for example, a hearing transcript or written minutes, if sufficiently detailed, may suffice instead of a formal written decision). However, it is strongly advisable that commissions articulate—preferably in writing—a summary of findings of fact, the basis for the decision with references to the appropriate ordinance criteria and record, and the decision. To ensure that a responsive decision is made by the commission:

- a record of the commission hearings and decision-making process must be prepared;
- the commission must issue a decision that lays out the rationale for the action taken by the commission;
- the decision must be consistent with ordinance criteria and supported by facts in the record;
- the decision should be consistent with previous decisions dealing with similar circumstances;
- minutes of the meeting at which the decision was made should be prepared, maintained, and approved at the following meeting; and
- a verbatim record in the form of an audio or video recording or transcript should be maintained.

**Preparation of the record.**

Preservation commissions should make determinations regarding landmark designation and hearings, certificates of appropriateness, and certificates of economic hardship that set forth clear findings of fact from the record. These findings, together with a discussion of how the facts relate to specific ordinance criteria, serve as the basis for the decision.

What constitutes the record? The record is a compilation of testimony from the hearings, written information provided by witnesses, staff reports and recommendations, and any other information that is placed into the record and used to form the basis for the decision. Testimony may be recorded in the form of written minutes or audio or video recordings. Audio and video recordings are more reliable, particularly when professional court reporters are not available to prepare a formal transcript.

Written information provided by witnesses and other interested parties must be maintained as part of the record. It is important to maintain the record as a history of the decision-making process, in case the decision is later challenged or in case a similar matter should arise in the future.

**Consistency in decision making.** Due process requires that all applications and applicants coming before the commission be treated consistently. In addition, the commission should make every effort to make decisions that are consistent with one another. However, the overriding principle in the decision-making process is that decisions be supported by information in the record. In some cases, courts have upheld commission decisions that are seemingly inconsistent with previous decisions, so long as they are supported by information in the record and are consistent with the ordinance.

For example, at least one court has upheld a commission's denial of a permit to apply vinyl siding on a house even where the commission had previously routinely approved such requests. The court concluded that the findings of fact supported such a decision. Thus, commissions should make every effort to follow precedent, but at the same time, not be hamstrung by it. As a practical matter, few cases are clearly identical. Good recordkeeping, however, is essential in order to note different facts that may justify different decisions. Caution must also be taken in those cases that deal with issues never before addressed by a commission. In making a decision on an application, the commission should carefully consider how its
writing and approved by the commission at its next meeting. Minutes should also be reasonably available for review by the public.

While minutes serve as the detailed summary of the commission’s meeting, a verbatim record should also be maintained by audio or video recording. The recording need not be transcribed (unless required by local ordinance or other statutory source). However, it should be available if questions arise later about evidence presented, or if an absent commission member needs to review the proceedings in detail in order to participate in the commission’s consideration of the matter.

**Bias, Conflicts, and Other Complications**

A wide variety of other issues relating to the conduct of commissioners, including conflict of interest, *ex parte* contacts, bias, and the role of advisory commissions, must be understood as part of the overall subject of procedural due process.

Whether a historic preservation commission decision meets procedural due process requirements often depends on commission members remaining unbiased and free from actual or apparent conflicts of interest. As many legal commentators and courts have recognized, “an impartial decision maker is essential in meeting due process requirements.”

Biased commission members create two problems for historic preservation commissions. First, bias or conflict of interest may serve as grounds for challenging, and possibly overturning, commission decisions. Second, any appearance that the members of the commission are biased or have conflicts of interest will diminish the public perception of the preservation commission and call into question the fairness of their decision-making process.

Three types of bias—institutional policy bias, prejudgment of a case, and personal animus—are discussed below.

**Institutional policy bias.** Allegations are occasionally made that the very mission of the historic preservation commission creates an institutional policy bias, since most preservation commission members have some expertise or interest relating to historic preservation. Courts have recognized, however, that the specialized backgrounds of many individual commission members generally help to ensure fair and informed decision making, because of the complexity of issues involved. Courts also recognize that commission members inevitably will have personal opinions regarding a preferred course of development or solution to the issue before them. Due process does not require that commissioners have no opinion about the matter before them, but rather, that commissioners consider the evidence with an open mind and give full and fair consideration to all points of view presented with respect to the facts of a particular case.

**Prejudgment of a case.** Another form of bias is prejudgment of the facts of a case. Prejudgment may be alleged, for example, where members of a commission have made public statements regarding the importance of saving a particular structure prior to closing of the record for designation or permit review. To avoid allegations of prejudgment, commission members should always refrain from making statements regarding a particular matter outside of the commission meeting setting and prior to completing the decision-making process.
Personal animus. Extremely difficult to prove are allegations that a particular commission member has personal animus, or is engaged in a personal vendetta, against a particular applicant. Still, commission members should ensure that personal feelings about an applicant do not enter into the decision-making process. Some extreme cases may require that the commission member remove himself or herself from the decision-making process.

Conflicts of interest. Allegations of conflict of interest are more successful in court than any other type of bias claim. Commission members should be careful to ensure that they do not have any type of personal, financial, or professional stake in any proceeding before them. When a conflict of interest exists, the commission member should formally remove himself or herself from the decision-making process. This includes leaving the room during any hearing or discussion of the matter, and making no further statement or comment about the matter. Most local governments have separate conflict of interest ordinances or guidelines; in some cases these are spelled out in the preservation ordinance or the commission's rules and regulations. Although these provisions may vary, they all direct commission members with real or potential conflicts to refrain from participating in the review of the matter at issue. Some commissions recognize only financial conflicts, although most also recognize that conflicts may arise that are personal in nature.

As a general rule, being open about potential conflicts early in the decision-making process will help to avoid later allegations of due process violations.

Also, if any individual commission member finds that his or her personal, professional, or business interests result in recurring conflicts of interest, it may be advisable for that member to step down from the commission, rather than risk impairment of the commission's functions.

Personal conflicts. These are generally easy to identify and usually revolve around the relationship between a commission member and an applicant that would create a conflict between self interest and civic obligations. Direct relationships, such as brother or father are easy to identify. Indirect relationships, such as neighbors or close personal friends, may pose more difficult questions. Commission members should understand that a conflict may exist even if a relationship creates only an appearance of impropriety.

Financial conflicts. If a commission member's financial interests will be directly or indirectly affected by a decision of the commission, he or she should be disqualified from the decision-making process. In general, financial interests are easily identified. For example, if a commission member owns the structure at issue or is a limited partner in an entity that owns the structure at issue, a financial conflict exists. In addition, if the value of the property owned by a commissioner will be directly enhanced by the decision of the commission, the commissioner should be disqualified. This will likely occur when the commissioner owns property adjacent to a derelict landmark or a potential landmark. In this type of case the commissioner may also have a personal conflict because of the relationship with his or her neighbor. More difficult conflict issues arise when the conflict is less direct—for example, when a commissioner owns property in the vicinity of the property at issue. In such a case, it may be advisable to seek advice from an attorney who is familiar with such issues in order to obtain a prior ruling on any potential conflict. In any case, early disclosure and resolution of any fact or relationship that may reasonably be construed to be a potential conflict may help to ward off a later claim of impropriety.

Professional conflicts. A professional conflict may occur when a commissioner's professional interests interfere with his or her ability to make an impartial decision. Since many preservation commissioners have some professional interest in historic preservation, this type of conflict can easily arise. Clearly, in the instance where a commissioner is the architect for the applicant, he or she cannot participate in the decision-making process. (In such a case, the potential conflict is both professional and financial.) More difficult are issues arising from past employers or professional relationships, or involving commissioners who are directors or policymakers for a local advocacy group that is taking a public position on a particular designation or permit application. While mere association or past professional relationship with a particular advocacy group or organization is usually insufficient to constitute a conflict of interest, to avoid accusations of conflict of interest, the commissioner would be well-advised to note—both publicly and early in the process—his or her relationship with the organization. It may also be advisable in such circumstances to ask the city attorney or outside counsel to give an opinion for the record about any potential conflict.
Most commission members have some expertise in historic preservation, and courts recognize that the specialized background generally helps to ensure fair and informed decision making.

— Photo courtesy of the Preservation League of New York State

Personal conduct. Generally, commission members can be expected to act in a professional manner, without any general directive from procedural rules or guidelines. Occasionally, however, a commission member will take some action, such as attending a commission meeting while under the influence of alcohol, that will be particularly embarrassing to a commission. Clearly, these instances should be avoided. Commissions should have rules and regulations addressing personal conduct so that when problems do occur they can be handled promptly and appropriately. Applicants and their representatives, witnesses, and others coming before the commission must be treated courteously and professionally even under contentious circumstances. Commission members should also attend meetings on a regular basis. Most preservation ordinances or rules and regulations address regular meeting attendance. Missing a predetermined number of consecutive meetings may be automatic grounds for dismissal as a commissioner.

Ex parte contacts. Another potential problem for preservation commissions is how to avoid the charge that a commissioner’s decision is tainted because of ex parte contacts or communications. An ex parte contact or communication is an oral or written communication that is not on the public record, and of which other interested parties are not given reasonable prior notice. There are a whole range of ex parte contacts that may arise in the course of a commission proceeding. For example, a commissioner may want to visit a property before a hearing to better understand the significance of the property for designation or the possible impacts of issuing a permit. While site visits are appropriate and useful, they should be conducted carefully and openly (preferably, after public notice) to prevent being turned into a private briefing for commissioners by the property owner or applicant. In another example, the commissioner may happen to speak to the applicant—or to a local preservation advocate—in a social setting unrelated to the commission proceeding.

To preserve fairness, it is important to prevent any information from one side of an issue to be given to the decision maker without all interested parties having an opportunity to know, and if necessary, counter that information. This type of one-sided information may taint the decision of a commissioner who receives it, and may result in a subsequent legal challenge. Ex parte contacts are contrary to the ideals of fairness encompassed within the concept of procedural due process, because interested parties cannot rebut or challenge the information. It is good practice to prohibit all ex parte communications and to adhere to this rule. Commission members should politely inform callers or others that they are not permitted to discuss a pending matter outside of the hearing room.

A few jurisdictions recognize ex parte contacts as being acceptable when a commission is acting in a quasi-legislative manner, such as designation of a historic district. However, this type of distinction is difficult to apply with any consistency, and in any event may open the commission’s actions up to challenge on the basis of other types of bias.

To avoid due process challenges based on ex parte contacts, preservation commissions should adopt rules and regulations that clearly prohibit such contacts. Commissions should also prohibit commissioners from providing advice or opinion to applicants or potential applicants prior to a hearing.
Ten Tips from the City Attorney

Attorneys Robert L. Zoesckler and Kate Herrmann Stacy have each spent a considerable portion of their legal careers advising local preservation commissions and staff about how to carry out their responsibilities in a manner that is both effective from a preservation standpoint, and fair to those individuals affected. The following practical tips for preservation commissions reflect some of the guiding principles that these two attorneys have found useful in helping to keep their clients out of trouble, and out of court.

1. Create and follow your own rules of procedure. Every commission or board should compile a set of rules governing their procedures. These rules should be simple, clear, and easy to interpret and enforce—but also flexible enough to handle difficult situations. Once promulgated, procedural rules should be strictly followed. An oral summary of your procedures is an excellent way to begin each meeting.

2. Treat every person fairly and impartially. Treating a party fairly and impartially is more important than ruling in their favor. Parties frequently choose to appeal a commission decision less because they lost than out of a sense of unfair or biased treatment. As a practical matter, a large and legitimate part of due process is perception. Take your constitutional responsibility to provide a fair and meaningful hearing seriously:
   - Treat everyone politely and with respect.
   - Give every speaker your attention.
   - Reciprocate courtesies—if you grant one party extra time automatically extend that courtesy to the other parties.
   - Never express personal feelings about any individual.

3. Always maintain control and decorum. Usually the chairperson bears this responsibility, but all members should assist. Be fair but firm. Never let speakers cross-talk or speak out of turn. If necessary, gavel them down. Do not allow clapping or demonstrations. It is unfair to others and a major perception problem to allow a public meeting to get out of hand or become disruptive.

4. Do not delay or compromise decision making unnecessarily. Avoid the human urge to delay every controversial decision in the hope that it will be resolved later, or to compromise every problem. Accept the fact that you will not be able to make everyone happy, and that you must make a decision that usually makes you the enemy to a substantial part of the public. Delay frequently takes a heavy toll on financial resources. Similarly, compromise always sounds good, but frequently backfires and is often directly contrary to the criteria you are required by the law to follow. If a tangible result is likely or further testimony necessary, deferral or compromise may be appropriate. Otherwise, take the plunge, make the difficult decision, and move on.

5. Remember Ms. McGillicuddy. If you encounter trouble deciding a thorny notice issue, it may help to imagine the existence of an unknown citizen—a Ms. McGillicuddy—who stays at home reading legal notices. Think about how she would react to your conduct. Focus on what she would know—not what you know. Would she be aware that you are taking up an issue you did not publish? How would she know that you decided to delay the meeting until tomorrow night? When in doubt, defer the meeting to ensure proper notice. Try to remain objective by keeping your focus on the unknown public when dealing with notice questions.

6. Avoid surprises. Try to avoid surprising the public with new information at the decision-making hearing. Allow the public an opportunity to review available information on the matter before the commission ahead of time whenever feasible. Get notices and agendas out to the public as early as possible.

7. Record, record, record. This is the most important point to remember. A good record is an absolute necessity on appeal, due to the type of decisions most commissions render. If you want your decision to be upheld, you must have a good record to support that decision:
   - Always be aware that what you say is being recorded. Assume it will be transcribed and read. Hearings are not social gatherings. Flip comments, in addition to being inappropriate, will often come back to haunt you.
   - Be meticulous in your record keeping. Make an audio or video tape of every meeting. If the machine breaks, stop the meeting until it is repaired.
   - Date every document, preferably with a colored stamp to identify an original. Maintain all of these documents in a master docket.
   - Never go "off the record" to have private discussions unless you first comply with your jurisdiction's sunshine laws and consult with legal counsel, if possible.
   - Never express your conclusions prior to hearing all of the evidence.
   - The person who decides must hear. Review the record. Do not vote if you are not familiar with the record or have not actually heard or reviewed everything in the record.

8. Listen to your legal counsel. Every commission needs legal counsel on occasion. If you anticipate a difficult hearing, ask your attorney to attend. If you ask a legal question, follow the advice given. The worst posture for legal counsel is to answer a question, only to have the client make a contrary decision on the record—such inconsistencies are difficult to defend in court. If you are not prepared to follow advice, do not ask the question.

9. Explain your decisions. The public should know why you voted the way you did, and often, your jurisdiction's laws will require some form of factual findings and conclusions:
   - Try to make sure every decision has an explained rationale, either written or expressed at the public hearing.
   - Be consistent in your decision making. Explain the basis for apparent inconsistencies on the record.

10. Follow your criteria. Though not always framed in procedural terms, this point is critical. Read and understand the criteria in your ordinance. Listen to the evidence. Determine the facts. Then apply those facts to the applicable criteria. By tying your decision to the criteria with a very tight knot, you are treating all parties fairly while providing a sound foundation in case of an appeal.
Ex parte communications, however, may not be fatal to a proceeding, particularly if disclosed at an early date. When an ex parte contact or communication has been made, the commissioner should disclose for the record the nature and character of the contact. Such disclosure will give the interested parties an opportunity to rebut or challenge the information.

Advisory commissions. Due process requirements, as a legal matter, may not apply to the actions of administrative agencies that have only advisory functions. Nonetheless, where such agencies make recommendations that are relied upon by a decision-making body, it is prudent that they also follow the general principles of procedural due process in carrying out their advisory powers.

In the preservation context, while not common, some local governments have established advisory commissions for each locally-designated historic district to provide input on preservation matters. It is strongly recommended that these advisory commissions establish and follow basic procedural due process guidelines, by providing proper notice of meetings, holding public meetings, conducting proceedings in a manner that provides interested parties a reasonable opportunity to participate, and making a decision within a reasonable time.

Court Decisions

Under the Fifth Amendment to the U.S. Constitution, no person may be denied certain fundamental rights without due process of law. “Substantive due process” insists that governmental actions affecting an individual’s constitutionally protected interest in “life, liberty, and property” be rational or reasonable. “Procedural due process,” the counterpart to substantive due process, refers to the manner in which governmental decision making is carried out. It requires that individuals with “protected property interests” be provided with notice and an opportunity to be heard before a governmental entity may render a decision affecting an individual’s constitutionally protected interests. It also requires that a decision maker be fair and impartial. Issues such as notice and public hearing requirements, record-based decision making, bias, conflicts of interest, ex parte contacts, and other considerations come into play.

The following court decisions have addressed challenges to the procedures employed by preservation commissions and other governmental bodies in the designation or regulation of historic structures. While most of these decisions raised constitutional claims, a few involved challenges to notice and hearing requirements and other issues under preservation ordinances and other governing statutes. While these decisions were not decided on due process grounds, a court’s analysis on statutory procedural claims can be instructive.

In reviewing these cases, you will need to pay attention to which court made the decision as well as the basis on which the decision was made. There could be differing results among states and within the same state. Also keep in mind that guidance on a particular issue may come from non-preservation cases. A state supreme court decision on a conflict-of-interest claim in a zoning rather than preservation context, for example, may bear more directly on the outcome of a case than a trial court’s ruling on a preservation matter. In some situations, there may not be any preservation-based decisions on a point or an insufficient number of preservation decisions to provide a fairly comfortable analysis of what the law requires.

Finally, keep in mind the very important caveat that procedural rules vary on a state-by-state basis.
Readers are strongly encouraged to check with city attorneys and other lawyers who may be familiar with local administrative law and practice.

**Constitutionally Protected Property Interest**

The Due Process Clause of the U.S. Constitution guarantees the right to notice and the opportunity to be heard before a governmental action may affect interests in property. This means that a "constitutionally-protected property interest" must be at stake. Because some governmental actions do not affect property rights to the extent recognized by the U.S. Constitution, cases may be dismissed simply because there is no constitutionally-recognized right to due process. For example, an agency may issue a decision on a preservation matter that is merely advisory or the decision, such as the listing of a property, may have no effect on what an individual may do with his or her property. The listing is merely honorific.

**National and State Register Listings**

Pennsylvania Miller & Son Paving, Inc. v. The Pennsylvania Historical and Museum Commission, Nos. 1573 C.D. 1991 and 2494 C.D. 1991 (Pa. Commw. June 30, 1993). Property interest in land proposed for listing in the National Register of Historic Places as a historic district did not invoke due process rights, where actions of the state commission, which recommended to the National Park Service that the owner's property be included in a proposed historic district, were advisory and did not culminate in a final determination affecting those rights.

New York (federal court). Moody Hill Farms Ltd. Partnership v. U.S. Dept. of the Interior, 205 F.3d 554 (2d Cir. 1999). Listing in the National Register Historic District does not give rise to a "constitutionally protected property interest" since it does not impose any burdens on a property owner's use of his or her property. While National Register listing may trigger requirements under a state or local law, the burdens are imposed by state law and thus do not give rise to a due process claim against the National Park Service.

Virginia (federal court). Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980). Secretary of the Interior's action in listing property as a National Historic Landmark "place substantial restrictions on plaintiffs' property interest [in the mining of vermiculite] so as to require satisfaction of procedural due process" where listing "triggers the application of several federal statues, the effect of which is to discourage private and governmental development of land."

Virginia. Virginia Historic Landmarks Commission v. Board of Supervisors, 230 S.E.2d 449 (Va. 1976). Identification of the Green Springs Historic District as a landmark for the Virginia Landmarks Register by state commission was not "so immediate, direct, or significant as to assume constitutional proportions and to necessitate the requirement of public notice or public hearing," where identification was a "hortatory act."

**Cultural Resources**

Alabama. Ex Parte Bridges, No. 1041248 (Ala. Sept. 30, 1995). Lawsuit seeking declaration that Alabama Underwater Cultural Resources Act was unconstitutional on due process grounds dismissed where plaintiff scuba diver lacked protected property right to cultural resources embedded in state-owned waterways.

**Building Permits**

Indiana (federal court). Boczar v. Kingen, Nos. 00-1907 and 00-3259 (7th Cir. May 1, 2002) cert. denied, 122 S. Ct. 340 (Oct. 9, 2001). Due process claim rejected where applicant lacked a constitutionally-protected property interest in building permits that had been issued based on a "mistake of fact" and "in violation of the ordinance requiring the [preservation commission's] approval." Applicant had "misrepresented" the contents of her building permit application by submitting a certificate of appropriateness for a differently-designed project.

South Dakota (federal court). Achien v. City of Deadwood, 814 F. Supp. 808 (D.S.D. 1993). Property owners lacked a constitutionally-protected property interest in a rescinded building permit where the city had failed to issue a valid certificate of appropriateness in the first instance, thereby making the building permit void. Under South Dakota law, the affirmative vote of the entire body is required before any legal action can be taken. Because only two of the five members of the preservation commission had voted in favor of the certificate of appropriateness, the vote was void.

**Neighboring Property Owners and Organizations**

District of Columbia. Dupont Circle Citizens Association v. Barry, 455 A.2d 417 (D.C. 1983). Mayor's Agent's refusal to grant citizens association a hearing before approving construction of an office building in a historic district upheld where association's interest in the "property values within the historic district" and "the historic character of that designated neighborhood" were "too
vague and speculative to command procedural safeguards beyond those already provided by statute.”

New York. Zartman v. Reism, 399 N.Y.S.2d 506 (App. Div. 1977). Interests of adjoining landowners in preservation of historic landmarks and buildings did not rise to the level of a constitutionally-protected property interest, and thus they were not entitled to the procedural safeguards of notice and hearing.

Character of the Governmental Action
The outcome of a particular due process claim may vary depending upon the “nature of the proceeding.” Actions that are legislative in character usually do not require extensive procedural protections such as detailed notice, hearing, and public participation requirements. This is because legislative decisions generally involve the adoption of policies or laws that are applicable to a large number of persons and are typically made by elected officials who are directly accountable to the public through the election process. Actions that are adjudicative in character, by comparison, involve the application of legislative policies or laws to specific cases pertaining to a distinct set of facts. Because of the direct impact of these proceedings on an individual’s right to “life, liberty, and property,” more extensive procedural protections, such as advance notice and hearing are required. In between, are “quasi-legislative” or “quasi-judicial” actions. Because these actions assume only some of the characteristics of a legislative or adjudicative proceeding, the procedural requirements that must be adhered to may vary. Many administrative actions fall within these categories.

As a general rule, actions involving the issuance of certificates of appropriateness or variances for economic hardship are viewed as adjudicative or “quasi-judicial.” Designation proceedings for historic districts or landmarks, on the other hand, may be viewed as “quasi-legislative” or “quasi-judicial,” depending upon the proceedings involved and the interpretation of the court. Because of the variations in treatment from state to state, preservation commissions should consult with an attorney knowledgeable about local administrative law on this issue.

Historic Designation
Colorado. Sarkisian v. City and County of Denver, No. 02CA0264 (Colo. App. Dec. 4, 2003). Action of city council creating a historic district is legislative in nature but process for recommending designation by preservation commission is quasi-judicial. Compare, Native American Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004). City’s adoption of ordinances, including designation ordinance, which enabled university to bypass substantive and procedural requirements governing the regulation of properties in local historic district was quasi-judicial rather than legislative because “they concerned the rights, duties, and obligations of specific individuals and did not constitute a general rule or policy to an open class of individuals.”

District of Columbia. Metropolitan Baptist Church v. District of Columbia, 718 A.2d 119 (D.C. App. 1998). Designations of historic property are legislative “even though the decisions affect specific property owners within a specific neighborhood,” because “they also affect the public and require the digestion of various economic, environmental, and aesthetic considerations.” “The board [is] making ‘a policy decision directed toward the general public,’ which is a legislative process, rather than ‘weighing particular information and arriving at a decision directed at the rights of specific individuals,’ which is an adjudicatory process.”


Illinois (federal court). Northwestern University v. City of Evanston, No. 00 C 7309 (N.D. Ill. Sept. 11, 2002, reconsideration denied, No. 00 C 7309 (N.S. Ill. Dec. 5, 2002). Northwestern University was not entitled to an individualized hearing on the inclusion of its property in a historic district because the ordinance’s “generality and prospectively [sic] suggest it was a legislative rather than an adjudicatory act.” The ordinance applied to “numerous property (some of whom objected to their inclusion) other than Northwestern” and that the ordinance “regulates the future use of the property.”

Minnesota. Handicraft Block Ltd. Partnership v. City of Minneapolis, 611 N.W. 2d 16 (Minn. 2000). Historic designation proceeding was not “quasi-legislative,” even though the decision to designate was made by the Minneapolis City Council, because it involved (1) the investigation of a disputed claim and the weighing of evidentiary facts; (2) the application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim. See also, Billy Graham Evangelistic Assn. v. City of Minneapolis, 667 N.W.2d 117 (Minn. 2003) and Coalition for Non-Profit Student Housing v. City of Minneapolis, No. A03-1873 (Minn. App. Oct. 5, 2004). Designation proceedings are quasi-judicial in nature.

New York. *In re Application of 400 East 64th Street Block Ass'n, No. 45766 (N.Y. App. Div. May 19, 1992).* Historic designation is a reviewable administrative function and is not a legislative act.


Virginia. *Virginia Historic Landmarks Commission v. Board of Supervisors*, 230 S.E.2d 449 (Va. 1976). Virginia Landmarks Commission is not an agency as defined under Virginia law and the resolution identifying the Green Springs Historic District as a landmark for the Virginia Landmarks Register cannot be "construed as a 'rule' of general application, and the proceedings conducted by the Commission incident to the adoption of the resolution was not 'a contested case' involving such rights, duties, or privileges of a person that are required by law to be determined after a hearing."

**Notice**

The constitutional right to notice stems from the requirement that an individual has the right to be heard before the government can take an action that affects the individual's property interest. The right to a hearing is not met unless the individual has been given notice of the hearing, thereby providing the individual with a reasonable opportunity to participate. The notice must be timely and should apprise the individual of the course of action under consideration.

**Right to Notice**

California (federal court). *League of Residential Neighborhood Advocates v. City of Los Angeles*, No. 06-56211 (9th Cir. Aug. 21, 2007). Settlement agreement enabling congregation to operate synagogue in residential zone under certain conditions is void where City of Los Angeles effectively granted synagogue conditional use permit without providing notice and hearing, as required under state law. Separate due process claim not reached.

Colorado. *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo. App. 2004). City deprived affected property owners of due process protections, including notice and hearing, by adopting two, privately negotiated ordinances that enabled university to bypass substantive and procedural requirements for acting on applications for a landmark alteration certificate.

Illinois (federal court). *Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002). Designation of property as a historic landmark under city ordinance was not void from its inception even though the village had provided prior owner with notice of designation by publication rather than personal, written notice. There was no statutory requirement under preservation ordinance for personal notice and present owner lacked standing to enforce due process rights of a third party.

New York. *St. James United Methodist Church, Inc. v. City of Kingston*, No. 22 (N.Y. Sup. Ct., Ulster Cty., Mar. 11, 1977). Constitutional issue of whether owner had been denied procedural due process in the designation of a church as a historic landmark not reached where court found that town had failed to comply with statutory notice requirements. Publication of notice of public hearing in newspaper is insufficient where personal notice is required by law.

**Sufficiency of Notice**

city failed to provide adequate public notice concerning the scope of the proposed amendment.

Minnesota. **Coalition for Non-Profit Student Housing v. City of Minneapolis**, No. A03-1873 (Minn. App. Oct. 5, 2004). City did not violate due process rights of coalition in designating certain fraternity and sorority houses as a historic district where preservation commission followed ordinance procedures; sent letters notifying affected parties of a designation report and public hearing; affected parties corresponded with commission and others; and 28 people testified at hearing.

New York. **St. James United Methodist Church, Inc. v. City of Kingston**, No. 22 (N.Y. Sup. Ct., Ulster Cty., Mar. 11, 1977). Notice by letter was insufficient because it did not give specific notice of proposed action in understandable “laypersons’” terms.

Virginia. **Jenkins v. City of Portsmouth**, No. 2006cv2235 (E.D. Va. Nov. 27, 2006). Applicant was not deprived of due process rights in the review of application to install vinyl siding and reconfigure windows where applicant was made aware of rights to appeal and was given opportunity to do so.

**Timeliness of Notice**

Illinois (federal court). **International College of Surgeons v. City of Chicago**, Nos. 91 C 1587 and 91 C 5564 (N.D. Ill. Dec. 30, 1992), aff’d on other grounds, 153 F.3d 356 (7th Cir. 1998). City did not deprive owners of constitutional right to due process by authorizing preservation commission to preliminarily designate property as a landmark without affording owners notice and the opportunity to object before the preliminary designation was applied, because the owners were “entitled to written notice of any preliminary determination” and “a public hearing on the merits.”


New York. **City of New York v. 10-12 Cooper Square, Inc.**, 793 N.Y.S.2d 688 (N.Y. Cty. Sup. Ct. 2004). Designation of 158-year old house as landmark in 1970 upheld, even though the records failed to establish that notice of the public hearing before landmarks commission had been given, where the homeowners “had failed to provide sufficient evidence of substantial or irregular conduct to overcome the presumption” of legality and “the balance of the evidence is consistent with and confirms the Landmarks Preservation Commission’s action and the Board of Estimate’s Resolution.”

**Timeliness of Claim**

Tennessee. **Metropolitan Gov’t of Nashville and Davidson Cty. v. Hudson**, 148 S.W.3d 907 (Tenn. App. 2003). Property owner may not challenge procedural irregularities in the adoption of design guidelines for a historic district established well over 10 years ago.

**Actual Notice**

Colorado. **Sarkisian v. City and County of Denver**, No. 02CA0264 (Colo. App. Dec. 4, 2003). Owner waived arguments regarding alleged deficiencies of preservation commission’s published notice and lacked standing to assert due process or equal protection claims against the city where owner had received actual notice, participated in the designation hearings, and did not raise any objection to the notice.

Florida. **City of Jacksonville v. Huffman**, 764 So.2d 695 (Fla. App. 2000). Florida Circuit Court decision striking down Jacksonville City Council’s approval of the construction of a medical office building in a local historic district on notice grounds reversed where neighbors “were provided a full opportunity to present their objections in their appeal of the Commission’s decision in a hearing before the Land Use and Zoning Committee, which was conducted de novo.” Evidence before the Committee appraised it of neighbors’ objections to the project, and provided competent, substantial evidence for the Certificate of Approval.

Georgia. **M. Wayne Robinson Builder-Developer, Inc. v. City of Rome**, 564 S.E.2d 526 (Ga. App. 2002), cert. denied, No. S02C1278 (Ga. Sept. 30, 2002). Amendment to designation ordinance upheld against claim that the laws were enacted in violation of statutory notice requirements where owners received adequate notice of initial public hearing before the historic preservation commission. City’s failure to include list of names of property owners in the ordinance was “immaterial,” given that the purpose of the list was to assure notice to property owners, and the plaintiff was not harmed by the omission because it had received notice of the designation.

New York. **Zartman v. Reisem**, 399 N.Y.S.2d 506 (App. Div. 1977). Adjoining property owners “are in no position to complain about the inadequacy of the notice or the ordinance’s failure to require a public hearing” where they personally appeared at an initial board hearing and appeared and submitted evidence at a subsequent hearing.
Washington, Swoboda v. Town of La Conner, 987 P.2d 103 (Wash. App. 1999). Town did not violate property owner’s procedural due process rights by allegedly failing to provide adequate notice and an opportunity to be heard, where the owner’s “rights were not adjudicated” at the 1996 hearing and where the owner explicitly waived his legal right to notice and presented testimony at a subsequent hearing.

**Public Hearing**
The public hearing provides an individual with the opportunity to present meaningful evidence, including testimony, on the proposed governmental action. To satisfy due process requirements, the hearing must also be open to the public and include the development of a record. In historic preservation proceedings, public hearings involving the designation of property as an individual landmark or historic district or consideration of applications for a certificate of appropriateness tend to be informal and generally do not include the right to cross-examine witnesses. Generally speaking, due process requirements may be met so long as the individual has been given the right to present information relevant to the decision and understands the basis for the decision, once it is made.

**Timing of Hearing**
District of Columbia (federal court). Weinberg v. Barry, 604 F. Supp. 390 (D.D.C. 1985). “[T]he imposition of landmark status for the period until the Review Board acts on a pending landmark application (or until 90 days passes without a decision following the filing of a permit application) does not violate plaintiffs’ due process rights.” The “90-day decision mechanism allows plaintiffs themselves to trigger a prompt hearing (pursuant to applicable regulations) and a timely and reviewable final decision on the landmark application.”

**Failure to Provide Hearing**
California (federal court). League of Residental Neighborhood Advocates v. City of Los Angeles, No. 06-56211 (9th Cir. Aug. 21, 2007). Settlement agreement enabling congregation to operate synagogue in residential zone under certain conditions is void where City of Los Angeles effectively granted synagogue conditional use permit without providing notice and hearing, as required under state law. Separate due process claim not reached.

Colorado. Native American Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004). City did not substantially comply with ordinance even though property owner had opportunity to be heard in connection with ordinance enabling university to bypass historic preservation ordinance requirements where the meeting was not a quasi-judicial hearing and was held after city had already reached agreement with the university.

New York. Maxion-Graham v. Landmarks Preservation Comm’n, 767 N.Y.S.2d 594 (N.Y. App. 2004). Resident not entitled to second public hearing for certificate of appropriateness, even though design for school addition was modified after the initial hearing, since the public was “fully apprised” of addition at initial hearing.

**Opportunity to Testify or Present Witnesses and Evidence**
District of Columbia. Donnelly Associates, Ltd. v. District of Columbia Historic Preservation Review Board, 520 A.2d 270 (D.C. App. 1987). Landowner is not constitutionally entitled to a full evidentiary hearing prior to the designation of its properties as historic landmarks, where the temporary deprivation resulting from an interim protection provision is limited, the permanent deprivation under the act will not result in “serious economic loss,” and the regulations provide extensive procedural protections. Cross-examination “will not appreciably add to the ample opportunities already afforded to interested parties to present affirmative and rebuttal evidence and argue their positions to the Board” and cross examination will only frustrate the decision-making process, given the wide range of issues involved and the possibility that numerous persons may testify.

District of Columbia. Metropolitan Baptist Church v. District of Columbia, 718 A.2d 119 (D.C. App. 1998). District of Columbia Historic Preservation Review Board did not abuse its discretion in denying owner’s request to continue hearing or to keep the record open for an additional 30 days where the designation hearing is quasi-legislative in nature and the review board had complied with all relevant procedures.

Illinois (federal court). International College of Surgeons v. City of Chicago, No. 91 C 1587 (N.D. Ill. Dec. 30, 1994), aff’d on other grounds, 153 F.3d 356 (7th Cir. 1998). Owners of historic property were not denied due process when preservation commission refused to consider evidence of proposed redevelopment because the rules authorized the issuance of a demolition permit only when the property does not contribute to the character of the historic district.

applicants for certificates of appropriateness by imposing a “3 minute time limit” for public comment.

Cross Examination and Rebuttal
District of Columbia. Donnelly Assoc. v. D.C. Historic Preservation Review Board, 520 A.2d 270 (D.C. App. 1987). Landowner is not entitled to full trial-type hearing in designation proceeding where preservation board's inquiry “will seldom involve issues of fact that cross-examination will help to resolve,” the administrative burden of requiring cross-examination would frustrate the decision-making process; and the public interest favors not permitting cross-examinations, given the potential number and variety of interests that may testify at designation proceedings and the board’s own determination that its procedures are fair. “[T]he right to cross-examination in an administrative proceeding is among those rights considered ‘less “fundamental” than other procedural rights.””

Experts
Connecticut. Rutherford v. Fairfield Historic District, No. 25 S 74 (Conn. Super. May 18, 1990). Owner was not denied fair hearing on application to replace windows on historic Greek Revival house where the commission had retained an expert on the appropriateness of the proposed replacement windows. “Because the Commission is composed of laymen it is entitled to professional technical assistance in carrying out its responsibilities.”

Minneapolis. Billy Graham Evangelistic Ass’n v. City of Minneapolis, 667 N.W.2d 117 (Minn. 2003). City had acted appropriately in accepting and considering all expert testimony before reaching its decision.

Open Meetings
Nevada. Dewey v. Redevelopment Agency, 64 P.3d 1070 (Nev. 2003). Agency did not violate Open Meeting Law by holding back-to-back staff briefings regarding the demolition of the historic Mapes Hotel. The briefings were not “meetings” within the meaning of the act, although they were designed to permit agency members to gather information and discuss the highly complex redevelopment proposal. The briefings lacked an official quorum and a “constructive quorum” did not exist because preservationists had failed to establish, by substantial evidence that no deliberations or “serial collective discussions” occurred between briefings or that agency members had met privately for purpose of taking action on or collectively discussing a matter of public business.

Record-Based Decision Making
The right to due process includes the right to an explanation of the decision affecting one’s property interest. In many cases, the preservation ordinance or other applicable statutory laws will set forth the procedures that must be followed in preparing a record and issuing a written decision, including the time by which a decision must be rendered and the form and content of a “notice of decision.” This may include a summary of the commission’s findings of fact, the basis for the decision with reference to applicable criteria, as well as the decision. Due process or administrative claims may arise where a preservation commission has failed to keep a record or articulate the basis for its decision.

Notice and Timing of Decision
District of Columbia. Donnelly Assoc. v. D.C. Historic Preservation Review Board, 520 A.2d 270 (D.C. App. 1987). Party received formal notice of board decision only after receipt of written decision, even though board had rendered decision orally in presence of parties at hearing, because board’s own rules provide that decision becomes final when mailed to the parties.

Indiana. Tourkow v. City of Fort Wayne, 563 N.E.2d 151 (Ind. App. 1990). Failure to include findings of fact in notice of denial constituted “harmless error” where the review board’s findings had been included in its minutes.

New York. Salvatore v. City of Schenectady, 530 N.Y.S. 2d 863 (App. Div. 1988). Court ordered issuance of building permit for new construction in historic district, without regard to certificate of approval, because the historic district commission had failed to act within the 45-day period required by the town’s preservation ordinance.

Evidence Considered
Maryland. In re Seta, No. C-05-104930 (Md. Cir. Ct. Nov. 9, 2005) (unpublished). Annapolis Historic Preservation Commission did not violate due process rights of applicants for certificates of appropriateness by considering 17 photographs that were submitted after the evidence was closed since applicants had failed to make a timely objection, and it was unclear whether the photographs were indeed new evidence or that prejudice resulted.

Massachusetts. M & P Partner II, LLC v. Newton Historical Comm’n, 824 N.E.2d 487 (Mass. App. Ct. 2005). Erroneous testimony by a single witness and claims that commission was improperly moved by citizen testi-
mony was insufficient to overturn decision to designate 1880s house as historic landmark where record as a whole justified the designation.

**Statement of Findings for Decision**

Louisiana (federal court). *Maker v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975). Court of appeals affirmed lower court's rejection of argument that city council violated owner's due process rights by failing to support decision prohibiting demolition with reasons. Record as a whole supported the council's position that property had architectural merit.

New York. *Assheton v. Planning Board of Cooperstown*, No. 47624 (N.Y. Sup. Ct. Apr. 3, 1991). Denial of permit to install vinyl siding on 100-year-old house was arbitrary and capricious where board never made a finding regarding the property's historical significance.

Rhode Island. *Bellevue Shopping Center Ass'n v. Chase*, 556 A.2d 45 (R.I. 1989). Denial of application to construct addition on shopping center in Newport historic district vacated and remanded for further proceedings where the zoning board of review had failed to state findings of fact and conclusions of law.

**Consistency in Decision Making**

Due process insists that a commission treat all applicants and applications consistently. Occasionally applicants may charge that a preservation commission abused its discretion or violated due process rights where the commission's decisions appear inconsistent.

**Impartial Decision Making**

A fundamental component of procedural due process is the right to an impartial proceeding. Impartiality requires that the decision maker be free of bias or conflicts of interest and avoid "ex parte contacts," or communications outside the context of a public record. Due process rights may be denied if members of
a preservation commission are biased in their decision making or have a conflict of interest. In general, there are three types of bias that may arise—institutional policy bias, prejudgment of a case, and personal animus. Property owners sometimes claim that the preservation commission is institutionally biased in favor of historic preservation, because its members are required to have a professional background or interest in historic architecture. Courts have rejected this argument as baseless and found that expertise is needed to prevent arbitrary and capricious decision making.

Institutional Policy Bias
California. Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco, 165 Cal.Rptr. 401 (App. 1980). Record does not support contention of agency partiality of the environmental impact statement where there was ample opportunity for public input and comment. “California Environmental Quality Act assumes as inevitable an institutional bias within an agency proposing a project and provides the procedural requirements to assure that the decision maker does not fail to note the facts and understand the serious arguments advanced by the opponents to the EIR.”

District of Columbia. Citizens Committee to Save Historic Rhodes Tavern v. Department of Housing and Community Development, 432 A.2d 710 (D.C. App.), cert. denied, 102 S. Ct. 599 (1981). Due process rights are not violated by mere appearance of unfairness arising from status of mayor’s agent (decision maker) as employee of the District of Columbia (whose officials favored demolition). Decision maker was not a recipient of an ex parte contact and there was no showing of personal interest or bias.


Prejudgment of a Case
Colorado. Native American Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004). Privately negotiated ordinance enabling university to bypass historic preservation requirements invalid, even though property owner had opportunity to be heard, where meeting was not a quasi-judicial hearing and was held after city had already reached agreement with the university.

Connecticut. First Church of Christ v. Ridgefield Historic District Comm’n, No. 32 11 92 (Conn. Super. Ct. Mar. 3, 1998), aff’d on other grounds, 737 A.2d 989 (Conn. App. 1999), review denied, 742 A.2d 358 (Conn. 1999). Preservation commission did not abuse its discretion and fail to provide a fair hearing by allegedly pre-determining that vinyl siding would not be permitted. Commission had conducted several site inspections and held two public hearings and the record showed that the church had the opportunity to fully present its views and the commission fully considered its proposal.

Personal Animus
Illinois (federal court). First National Bank of Highland Park v. Village of Schaumburg, No. 85-C-2427 (N.D. Ill. Sept. 21, 1987). Plaintiff Larry Klairmont sufficiently stated a due process claim that the commission had arbitrarily and unconstitutionally based its decision to deny approval of proposed supermarket in local historic district on personal animosity where the commission chairman had allegedly stated that “we do not like Klairmont . . . or his son.”

Conflict of Interest
The constitutional right to an impartial hearing may be infringed upon in situations where the decision maker has a conflict of interest, whether personal, financial, or professional. Constitutional conflict of interest claims are fairly rare because most local governments have adopted rules that govern preservation commission practices. Commission members with real or potential conflicts generally do not participate in proceedings where a conflict, either actual or perceived, may exist.
Personal Conflicts
Connecticut. Moreno v. Brookfield Historic Dist. Comm’n, No. DBDCV064056488S (Conn.Super. 2007). Commission decision denying application for stone wall upheld where evidence did not support claim that two commission members lived together and resided within a visible distance from the plaintiffs’ property and there was no showing of “bias, predetermination, financial or personal interest of the members tainted the proceedings and affected the vote on the application.”

Delaware. Harvey v. Zoning Board of Adjustment, No. 00A-04-007 CG (Del. Super. Ct. Nov. 27, 2000). Zoning board did not violate petitioner’s due process rights even though three board members were married to town officials because none of the officials had a financial interest in the outcome.

Professional Conflicts
Maryland. Historic Annapolis v. Annapolis Emergency Hospital, 281 Md. 738 (App. 1977)(order not reported). Petition for writ of certiorari to review trial court ruling, which had declared unconstitutional the composition of the five-member historic district commission whose chair was a vice-president and member of nonprofit historic preservation organization that testified before the commission, denied.

New York. New York Yacht Club v. Landmarks Preservation Commission, No. 550/80 (N.Y. Sup. Ct. Feb. 13, 1980). Alleged conflict of interest by chairman of the commission was “unsubstantiated” where the chairman “neither moved to calendar the Yacht Club for reconsideration nor voted on the designation.” Entire decision making process was not “tainted” even though chairman represented an organization that had once sought designation of the club.

Ex Parte Contacts
“Ex parte contacts,” or communications outside the context of a public record may give rise to due process claims. If interested parties are not present when such communications are made, they may not be given fair notice or an opportunity to respond. Preservation commission members should avoid such contacts to reduce the risk of being overturned on appeal and, more fundamentally, to maintain the appearance of neutrality and fairness.

Connecticut. Rutherford v. Fairfield Historic District, No. 25 58 74 (Conn. Super. May 18, 1990). Owner was not denied fair hearing regarding application to replace windows on historic Greek Revival house where commission members communicated with and retained expert regarding the appropriateness of the proposed replacement windows. Owner had a fair opportunity to cross-examine the expert and submit evidence to rebut his testimony.

District of Columbia. Citizens Association of Georgetown v. Zoning Commission of the District of Columbia, 392 A.2d 1027 (D.C. App. 1978). Ex parte contacts between zoning commission staff and developers regarding permissible development of Georgetown’s historic waterfront under rulemaking proceedings, after record was formally closed, did not violate the requirements of the District of Columbia Administrative Procedure Act or due process. Commission’s treatment of the various issues and its extended explanation for the action taken set out in the Statement of Reasons show that appellants’ participation in these proceedings was not just pro forma and that its submissions were not simply ignored.

Idaho. Idaho Historic Preservation Council, Inc. v. City Council of Boise, 8 P.3d 651 (Idaho 2000). Boise City Council decision to grant a certificate of appropriateness for the demolition of warehouse building in local historic district nullified where the council had “violated due process by accepting ex parte telephone calls without disclosing the names of the caller’s comments concerning the proposed destruction of the [building].” “The members of the City Council who accepted phone calls failed to disclose the name and other identifying information of the callers, and also failed to reveal the nature of the conversation, making it impossible for the Council to effectively respond to the arguments that the callers may have advanced.” “By considering the input received in the ex parte telephone conversations, the City Council improperly extended its inquiry beyond the limits of the public record” and therefore violated “due process of the law.”

Further Reading
Listed below are sources for additional information on procedural due process.

Law Review Articles


Reports and Other Publications

National Trust for Historic Preservation, Preservation Law Reporter. Published between 1982 and 2004 by the Law Department of the National Trust for Historic Preservation, the Preservation Law Reporter provides articles and summaries of court decisions involving a variety of issues, including procedural due process. (202) 588-6035.


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Bradford J. White is vice president of LR Development Company in Chicago. Paul W. Edmondson is general counsel to the National Trust for Historic Preservation in Washington.

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