WHAT GIVES YOU THE RIGHT? PROCEDURAL DUE PROCESS AND HISTORIC
PRESERVATION ORDINANCE ADMINISTRATION

by

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(Under the Direction of James Reap)

ABSTRACT

This thesis examines recent trends and emerging issues concerning the Constitutional standards for procedural due process as it relates to local historic preservation ordinance administration. Historic preservation commissions and other adjudicatory bodies are commonly criticized for making arbitrary decisions and improperly handling cases. As one of the primary ways that America protects its tangible heritage, it is important that historic preservation ordinances be administered with integrity. The mismanagement of procedural requirements exposes local governmental actions to Constitutional challenges, threatening the validity of decisions and the nullification ordinances. This paper seeks to reinforce the legitimacy of local regulations by, deriving lessons from recent developments in jurisprudence and making recommendations based on these trends. By taking modest measures to obviate procedural challenges, historic preservation commissions can fulfill their duties in a manner consistent with community standards and fundamental notions of fairness, which will safeguard the legitimacy of historic preservation legal regimes.

INDEX WORDS: Historic preservation, Procedural due process, Ordinance, Local government, Historic preservation commission, Notice, Hearing, Adjudication
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CHAPTER 1
INTRODUCTION

The question of what powers government can exercise and how it may go about effectuating such powers has been debated since the founding of the United States of America and far before that. The founding fathers started to answer this question by postulating that government at its broadest levels should fundamentally be limited. Even then, any such enumerated powers, even when granted to the government, must be carried out in a manner that satisfies the skeptical dispositions of Americans. In matters where the government is empowered to take action that can significantly affect the individual rights of an American citizen, the general rule developed over time has dictated that any such exercise of power must serve a public purpose dictated by the legislature and must be carried out in a manner consistent with the fundamental concepts of justice described in the Constitution and held by society at large. Consequently, any legislative undertaking must seek to serve and to maintain a socially palatable and relevant public purpose.

Defining the public purpose has changed over time and evolved with the changing social fabric of America and, to the typical legal observer, the precise public purpose may not always have been obvious. While it is true that such laws are designed to preserve historic places, the legal rationale for preserving historic places has changed over the course of American history. In one of the earliest instances of governmental action preserving a historic site, the Supreme Court held that preserving Gettysburg Battlefield served a noble purpose and fell under Constitutional
authority granted to the federal government. In defining the scope of uses which could justify a “taking” of property, the court asked incredulously:

Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can [it] not erect the monuments provided for by these acts of Congress, or even take possession of the [field] of battle in the name and for the benefit of all the citizens of the country for the present and for the future?²

The Court concluded that preservation of these resources seems “not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.”³ The court went on to describe such actions as one of the purest and admirable functions of government:

Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety.⁴

Through statements like this, the Supreme Court firmly situated historic preservation within the acceptable public purposes understood to justify governmental regulation. In this case, the

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² Ibid., 682.

³ Ibid.

⁴ Ibid.
primary justifications for preserving historic sites were to honor the past and to inspire civic pride in the citizens of the present.

More recent explorations into what public purpose is served by the preservation of historic sites have come to different conclusions. In her article *Preservation and Community: New Directions in the Law of Historic Preservation*, legal scholar Carol Rose observed that the primary public purpose served by historic preservation regulations is not about inspiring patriotic fervor or promoting some subjective concept of aesthetics. Rather, Rose states, “the chief function of preservation is to strengthen local community ties and community organization.”

While this paper is not an exploration of which public purpose is “correct” or most appropriate for preservation, it is essential to understand the various rationales for public involvement in preservation. The implications of a community-based rationale for preservation regulations and their administration are much different than those which hold patriotic inspiration or aesthetics as the primary objective.

In fact, if one distances themselves too far from the underlying public purpose of historic preservation regulation, they may easily lose sight of what the law requires (or should require) and how it has struck (or should strike) a balance between various competing interests. Indeed, losing sight of the purpose and scope of historic preservation regulations has led historic preservation commissions to be the subject of much criticism. A common critique of preservation administration on the local level is that design review boards over regulate and overstep their basic functions. The tendency to “design from the table” has led some critics to

conclude that historic preservation laws inhibit artistic creativity and do little more than serve the nostalgic dreams of an elite class.\(^6\)

Other critics are quick to point out issues surrounding the administrative mismanagement of historic preservation and local land use ordinances.\(^7\) Local administration of historic preservation ordinances has been the subject of criticism for a number of years. Much of the criticism directed at general land use control could be applied equally to historic preservation administration.\(^8\) Still more observers recognize the inherently difficult task of administering historic preservation ordinances in a manner that satisfies fundamental notions of procedural due process.\(^9\) This thesis is primarily concerned with the challenge of providing procedural due process and ongoing issues in preservation administration.

When the Supreme Court ruled on the validity of preservation laws to “take” or regulate private property, legal challenges to preservation regulations shifted focus from the validity of the regulations to how they were carried out. Constitutional safeguards of due process were and continue to be seen as lacking in local land use regimes, including preservation programs. This is, in part, because the two have a marred legal history.\(^10\) Unfortunately, many legal challenges


\(^8\) For a basic critique accompanied by proposed solutions see Rose, “Planning and Dealing.”


\(^10\) For an example, see In re Fout, Misc. No. 4005 (Frederick County, Md. Cir. Ct. Feb. 5, 1980) (lack of findings of fact); Jennewein v. City Council of Wilmington, 46 N.C. App. 324, 264 S.E. 2d 802 (Ct. App. 1980) (decision based
are successful, in part because: (1) administrative procedures that govern the application of historic preservation regulations can be vexing not only to the laypersons, but to governmental officials; and (2) the officials and experts tasked with applying local law to the facts are not typically experts in law or comfortable exercising judicial discretion.

When regulations are mishandled, it not only harms the individuals affected, but it exposes historic preservation undertakings to being overturned and undermines public confidence in the administration of such undertakings. Because of this, the mishandling or even the perceived mishandling of these regulations represents a significant threat to the very existence of historic preservation regulations in any given community. This is especially concerning given that some of the most important preservation work is done at the local level.\textsuperscript{11}

In the case of preservation regulations, procedural issues persist in part because issues are often settled before a court of law has the chance to rule on them.\textsuperscript{12} Moreover, if a dispute comes before a court, courts often do not clarify administrative doctrine on procedural due process because they mechanically apply certain threshold rules.\textsuperscript{13} In the article “Historic Preservation Regulation and Procedural Due Process,” Paul Edmondson was one of the first practitioners to

\begin{footnotesize}
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\item The most important preservation work occurs at the local level…” D. Hagman & J. Juergensmayer, Urban Planning and Development Control Law § 14.9 at 469 (West 2d ed. 1986); “For the most part…preservation is most effectively and aggressively administered at the local level…” Angela C. Carmella, “Landmark Preservation of Church Property,” 34 Cath. Law. 41, 43 (1990).
\item Edmondson, 775.
\item Edmondson points out the legislative-adjudicative test which is used to determine whether a discrete local administrative action is legislative or judicial in nature. The main thrust of his article argues that the mechanical application of this test has led to “an absence of needed procedural safeguards and an imposition of unnecessary safeguards.” Edmondson, 745.
\end{enumerate}
\end{footnotesize}
apply a procedural due process analysis to historic preservation actions taken by local
governments. Edmondson observed, “Courts…have failed to articulate clear procedural
requirements based on a careful analysis of the nature of historic preservation regulation. Rather
than clarify the procedural requirements, courts have often confused the requirements even
further.”14 When courts fail to do this, how can practitioners with limited experience be expected
to intuit the correct course of action?

In response to this lack of clarity, studies of historic preservation regulations and issues
with due process have been conducted in the past. In the 1980s there was a rash of analysis
surrounding preservation ordinance administration and procedural due process. Edmondson
began his analysis by looking at the legal rules governing courts in their analysis of
governmental actions. He then dissected the nature of actions taken by historic preservation
programs and argued that the current paradigm for assessing the nature of governmental actions
inhibited the court’s ability to clarify procedural requirements. Edmondson then briefly described
the methodology for determining basic procedural due process requirements for preservation
certain actions.

This thesis, while closely tracking Edmondson’s basic approach, focuses less on
convincing courts to shift the analytical approach regarding threshold considerations of
procedural propriety. Instead, this paper highlights recent issues concerning procedural due
process and posits basic guidelines and requirements that historic preservation programs should
meet. As such, the information presented by this thesis is aimed more at historic preservation
professionals than the courts.

14 Ibid., 744.
The scope of this thesis is limited to issues of procedural due process in the Constitutional sense and does not attempt to explore the procedural requirements of various state administrative procedure acts. Further, analysis is primarily targeting jurisdictions that create historic preservation commissions as a separate administrative body vesting quasi-judicial authority in its members. Areas where analysis is meant to be especially helpful is for procedural issues concerning notice, hearings, and standards.

By exploring these persisting legal issues, and laying out the basic requirements of procedural due process for HPCs—an undertaking which, it appears, has not been significantly explored since 1981—many of the critiques and threats to the integrity of historic preservation regulation can be abated. Consequently, the purpose of this thesis is to perform an up-to-date assessment of legal issues in local historic preservation ordinance administration specifically related to procedural due process and specifically limited those jurisdictions that create HPCs as a separate administrative body with quasi-judicial/legislative authority. Guiding questions for this thesis are: Have courts clarified administrative doctrine regarding historic preservation administration since the early 1980s? If so, to what extent? If not, what guidance is there regarding procedural due process for local officials in regards to certain preservation actions?

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Areas where clarification is likely to be especially helpful is for COA hearings; therefore, issues of notice, hearings, and clear standards are the focus here.
Chapter 2

BACKGROUND

In order to understand the basic requirements of due process for historic preservation ordinance administration, it is necessary to understand the origins, philosophical underpinnings, and relationship of both historic preservation law and constitutional law in America. To many, the area of procedural due process is an obscure area of law which seems tedious and bureaucratic, but, fundamentally, it underpins almost every aspect of public enterprise. Before getting into an in-depth analysis of legal rules and their application in case law, however, a brief overview of the regulatory framework is helpful in focusing the scope of analysis and understanding what is at stake should process offend the Constitution. As such, this chapter provides a general overview of the process of how historic preservation regulations are administered and concludes by laying out the origins of procedural due process doctrine and how that doctrine has come to affect the actions of local governments.

A. STATE AND LOCAL HISTORIC PRESERVATION LAW

The National Historic Preservation Act (NHPA) was signed into law on October 15, 1966. The Act was passed in reaction to the rapidly changing urban and rural landscape which was significantly spurred on by the various Urban Renewal programs initiated in the late 50s and
early 60s.\textsuperscript{16} Although many state-orchestrated, preservation efforts pre-dated the NHPA, its passage marked a significant moment in the national awareness of this type of land use regulation. Soon after the passage of the NHPA, states across the nation started to pass historic preservation acts of their own which delegated authority of establishing and administering historic resource programs to municipalities. These state acts allow municipal legislatures to create local ordinances governing the administration of historic resources and, today, there are thousands of municipalities that administer local ordinances that significantly affect the property interests of owners of historic properties.

Although municipalities often lay out the specific details in the ordinances they pass, state enabling acts for historic preservation regulations often describe a general regulatory framework. Enabling legislation typically enumerates the duties and powers of historic preservation commissions, state the qualifications and composition of HPCs, describe the process for designation, and lay out general legal standards which govern the administration of such processes. Typical state statutes require HPC members to have some degree of professional experience in related fields such as law, planning, real estate, or architecture. Enabling acts also lay out the basic process for designation of sites and districts, state the legal standards for managing such districts, and delegate the duty of designation to either the local legislature or HPC.\textsuperscript{17} In some cases, acts may punt the burden of establishing procedures to the municipalities


\textsuperscript{17} Thurber & Moyer, “State Enabling Legislation for Local Preservation Commissions” 5 (National Trust for Historic Preservation 1984). The first statewide enabling act authorizing creation of local preservation commissions was enacted in 1959. By 1970 half of the states enacted some form of enabling law and over twenty more statutes were enacted between 1970 and 1980.
which choose to enact such ordinances. The duty of creating design guidelines is also typically
delegated to a municipality or the relevant HPC. While design guidelines, standards for
designation, and methodologies for the management of historic resources may vary, they
typically adhere to criteria described in guidance documents provided by the National Park
Service. In particular, the Secretary of the Interior’s Standards for the Treatment of Historic
Properties are often copied in part or in whole into the guidance adopted by a municipality.18

In addition to recommending historic sites for designation, educating the public on
historic resources, and adopting design guidelines, HPCs manage the Certificate of
Appropriateness (COA) process. The COA process is perhaps the most important tool for
historic preservation, at the local level, and has been called the “centerpiece of local historic
preservation law.”19 This process is also ground zero for procedural due process problems that
lead to prolonged legal battles in and out of the courts.

The COA framework begins with a general prohibition on material changes to a
designated historic resource. In order for the owner of a historic property to make a significant
change, they must apply for a COA. In many jurisdictions, COAs are first sent to local staff who
then make a recommendation of whether to approve or deny the application to the HPC.20 HPCs
then conduct hearings where applicants present their case for why they would like to make an

18 See generally, Kay D. Weeks and Anne E. Grimmer, The Secretary of Interior’s Standards for the Treatment of

19 Sara C. Bronin & J. Peter Byrne, Historic Preservation Law, (2012); “[The] centerpiece of local historic
preservation law is the power to control owner changes in the exterior of designated properties.” Ibid., 271.

20 The robust nature of the application process often varies depending upon the size of the municipality. Commonly, local staff of the planning department or a historic preservation planner will assess the COA application for recommendation to the HPC.
alteration to the exterior of their house or property. Such hearings are typically open to the public, who may make statements for or against any application. The specific procedures within a hearing, such as how long an applicant may speak, how long the public may speak, who may speak, and what may be presented and argued, also vary from municipality to municipality and can have their own implications for procedural due process.

After hearing presentations by staff, the applicant, the public, and other documentary evidence, HPCs may approve, deny, or approve with conditions an application. Following the HPCs decision, an applicant or other interested individual meeting legal standards for standing may appeal the decision to an appellate body. The composition of appellate bodies varies. Appellate bodies can range from courts to specially created boards but are typically composed of the mayor and commission of the municipality. Having elected officials as the appellate body often complicates the process. Both hearings, including the hearing at the appellate level, is a quasi-judicial process. This means that an appellate mayor and commission merely uphold, overturn, or remand the HPCs decision based on the record presented. Getting elected officials to perform in such a manner is a challenge and often leads to legal challenges.

When historic preservation ordinances were still a new legal invention for municipalities, they received numerous challenges to their validity and, specifically to their constitutionality. Most challenges dealt with constitutional takings claims, attacking the validity of the assumption that historic preservation served a public purpose or that such regulations denied owners of the full economic benefit of their property. Some early challenges did address the idea of


inadequate procedural process, in the form of unclear or arbitrary criteria for designation. Aspects of these challenges persist today, but the law regarding these challenges is largely settled. Today, the focus has shifted to the issue of adequate procedure, whether based on an APA or upon the Constitution. Where procedures are most susceptible to challenge is on the local level—especially where enabling acts delegate significant authority and duties to establish such procedures to municipalities. Understanding how courts will analyze these challenges will not only help governmental officials prepare themselves for potential lawsuits but inform how they construct and administer ordinances.

B. OVERVIEW OF DUE PROCESS REQUIREMENTS

The right to procedural due process in American law originates from the 5th Amendment of the Constitution which states, “[N]o person shall…be deprived of life, liberty, or property, without due process of law.” When originally drafted, the Fifth Amendment only applied to actions taken by the Federal government, but since the passage of the 14th Amendment, this constitutional protection has been extended to the states: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” Unfortunately, the Constitution

23 U.S. Constitution, amend. 5 (emphasis added).

24 U.S. Constitution, amend. 14; “All persons born or naturalized in the US, and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person with its jurisdiction equal protection of laws.” See also Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).
does not state what exactly constitutes “due process of law” and the precise scope of this
protection has been the subject of litigation and academic analysis ever since.  

In an attempt to create a uniform minimum set of procedures and to clarify procedural
requirements, many states adopt administrative procedure acts (APAs) which create procedural
rights and administrative duties for various state entities. Such acts may create more procedural
rights than the Constitution requires, but they may not provide less. Many APAs also create their
own legal claims which a person may make when an agency or other institution fails to meet its
standards. It is important to note, however, that APAs are not the final word on whether
procedural mechanisms are adequate. Constitutional claims are argued and analyzed apart from
claims created by APAs. So, while agencies like HPCs may look to APAs for guidance, they are
not necessarily insulated from liability even if they follow the letter of the law. Consequently, in
order to satisfy constitutional requirements, government officials must look to the courts and
legal scholarship for guidance.

In order to explore the requirements of procedural due process, it is integral to understand
the basic approach a court of law would take to such a question. At first glance, it may appear to
a layperson that the constitutional protections granted by the 5th Amendment are very broad and
require due process for nearly every governmental action that affects citizens. Procedural due
process protections, however, is not so absolute as it first appears and has been circumscribed

25 In regard to deprivations of property legal analysis has focused on the “takings” issue of this clause while the
issue of what procedure is due (at least in the realm of historic preservation regulation) has been less thoroughly
studied.

26 For more information see “State Administrative Procedure Act, Revised Model Summary,” Uniform Law
Commission, the National Conference of Commissioners on Uniform State Laws, accessible at
%20Model
significantly by courts. For example, procedural due process jurisprudence has limited protections through: (1) the definition of the interest a stake—i.e. what qualifies as “life, liberty, or property;” (2) identifying certain types of governmental actions as generalized rather than individualized (and therefore not applicable); and (3) applying squishy balancing tests which allow for flexible procedural requirements for the timing and make-up of due process hearings.

For preservationists who are unfamiliar with the abstract constitutional concepts of due process, knowing how courts approach the question will help them to understand how to avoid violations. Different federal circuits and state courts have different approaches to expressing exactly what it takes to state a successful claim for a violation of procedural due process. Generally, in order to establish a procedural due process claim, courts need to find three basic elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process. The first two elements are sometimes referred to as “threshold considerations” and must be established before any procedural protections are triggered. The final element is typically assessed through the application of the Matthews test which will be explored in greater detail below.

Armed with a basic understanding of the historic preservation legal framework and the underpinnings of Constitutional due process, practitioners can already begin to operate with a


28 For an example see Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003); Greenbriar Vill., L.L.C. v. Mountain Brook, City, 345 F.3d 1258, 1264 (11th Cir. 2003) (“When courts analyze a procedural due process claim . . . they variously examine three things: (1) whether there is enough of a property interest at stake to be deemed protectable; (2) the amount of process that should be due for that protectable right; and (3) the process actually provided, be it before or after the deprivation.” (quotation marks and footnote omitted)); Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993) (“(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process.”).

29 Edmondson, 748
finer understanding of the weight imposed by the delegation of judicial authority to governmental entities like an HPC. Yet, the greater a practitioner’s understanding of how exactly a court would approach such questions of process will allow for a more nuanced and refined approach to administering historic preservation ordinances and undertakings. The next chapter begins to explain the first steps courts take in their analysis of procedural due process challenges and to review recent developments.
Before a court even begins the process of deciding whether an individual was granted due process in a hearing or other action, they must determine whether a given act requires due process. These “threshold considerations” are factors which courts must find exist in order for protections to apply to a particular governmental action. As described briefly in the previous chapter, a court must find that there is a state action of the right nature (i.e. a quasi-adjudicative, state action) and that there is a constitutionally protected interest at stake to trigger constitutional protections. Such considerations have significant consequences on the application and interpretation of historic preservation law at the federal and local level. Depending on the alleged protected interest and the nature of the action which deprives said interest, a challenge may be dismissed before in-depth analysis begins.

These considerations may upon first glance seem of little consequence to those who administer local ordinances, but continuing development of the jurisprudence regarding such threshold considerations changes the landscape of when procedural protections apply and therefore the legal vulnerability (or invulnerability) of certain municipal actions. The first threshold consideration addressed below is: what constitutes a protected interest? This consideration has continually been limited by courts but remains in flux.
A. Protected Interest

In determining whether procedural due process protections apply to a case, a court’s analysis typically begins by identifying a protected interest of some kind. The type of protected interest at stake in the context of land use regulations is almost always a property interest of some sort. As Edmondson suggests in his article, the property interests at stake in historic preservation actions (in particular the act of designation and the act of adjudicating a COA) are clearly protected by the constitution. A basic principal of property law is that owners generally have a right to the unfettered use and enjoyment of their property as long as said use does not constitute a nuisance. Case law has tended to corroborate this conclusion. The right of unfettered use and enjoyment in land, however, is not the only property interest at stake in historic preservation regulation. As courts continue to develop the idea of what constitutes property, legal claims have evolved as well. Owners and other individuals are seeking to enforce property interests previously uncontemplated.

Currently, the understanding of property in procedural due process jurisprudence includes both “old property” and “new property.” “Old property” refers to traditional understandings of

30 The in-depth definition and analysis of what constitutes a liberty interest is largely excluded from discussion.

31 “[In the] context of land use regulation, the courts have not seriously questioned the protected status of a landowner’s interest where the land is subject to a regulatory decision…Thus, in designation and certificate of appropriateness proceedings, the due process clause protects the owner's interest in the property that is the subject of the proceedings.” Edmondson at 749-750.

32 Zeigler, 1 Rathkopf's the Law of Zoning and Planning; “In addition to procedures required by statute or ordinances, procedural due process constitutionally guarantees that when individual rights are adjudicated, certain ‘fundamentally fair’ hearing procedures will be afforded an owner.” Ibid., 83.

33 For example, see Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) (holding that the right to use property for a lawful purpose is sufficiently a property right—here, the owner had a “legitimate claim of entitlement” to a zoning variance).
property such as land, money, or specific rights in land. “New property” is somewhat more controversial and difficult to define based off of common law. In *Board of Regents v. Roth*, the United States Supreme Court defined a “new property” interest to include the “interests that a person has already acquired in specific benefits.”

“New property” is essentially an entitlement where, once an individual has met the legally prescribed requirements to receive a benefit, then they have a property right to that entitlement. Some theoretical examples are governmentally guaranteed benefits which arise under specific circumstances like disability, unemployment benefits, and Medicare. The Court clarified that such an entitlement, however, must be more than an “abstract need or desire” for the interest. While the right of free use and enjoyment of land demands procedure before deprivation, is there a property right in a COA or other variance?

In an interesting case, *Natale v. Town of Ridgefield*, the plaintiff sought review of a governmental official’s denial of a permit which, the plaintiff argued he had a property right in. Natale sought to develop four parcels of land in Ridgefield, Connecticut and required rezoning for a subdivision. Natale argued that the denial of the permit amounted to a denial of due process because he held a property interest to issuance of the permit. Although the court ultimately decided that Natale held no such right, they contemplated circumstances which could give rise to such a right. Concluding, essentially that, under conceptions of “new property,” there are some circumstances where a right to a permit (as long as there is more than an “abstract need or desire” for the permit) does put a property interest at stake.

34 *Board of Regents v. Roth*, 408 U.S. 564 (1972).

35 Ibid.

36 *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)
Under the “new property” regime, property rights in entitlements like certain land use permits or variances could be established, although courts have yet to take this theory that far. Current case law suggests that a claim to a “new property” right in permits or variances will not succeed if a statute or ordinance gives the issuing body discretion whether to grant the variance or not, then it would not create an entitlement to property and procedural protections would not apply. Of course, if the issuing body does not have “significant discretion” then there would be an entitlement to the permit and therefore a protected property interest. While in practice landowners have largely failed to establish a protected property interest when seeking to defend the right to some sort of special exception or variance, there are situations where it is possible.

In the context of COAs, the concept of “new property” could have some implications depending on the nature of the issuing body, the judicial interpretation of the jurisdiction, and the procedural composition of the municipal ordinance. An owner could have a property interest in a COA under the “new property” regime if the HPC’s discretion to issue the COA was significantly limited. HPCs, however, typically have considerable discretion in their application of abstract legal standards to assess and issue or deny COAs. Consequently, under the current

37 In Biser v. Bel Air, 991 F.2d 100, 104 (4th Cir. 1993), the court held that a board of appeals had significant discretion in deciding whether granting an exception to zoning law would “adversely effect the public health safety, security, morals, or general welfare.” See also Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994), where the court held that no entitlement was created since municipal officials had broad discretion in determining whether to grant or deny a building permit. For an alternative perspective see Kenneth B. Bley & Tina R. Axelrad, “The Search for Constitutionally Protected ‘Property’ in Land-Use Law,” 29 Urb. Law. 251 (1997), which argued that procedural due process applies to discretionary land use decisions.

38 Biser v. Town of Bel Air, 991 F.2d 100 (4th Cir. 1993). The court in Biser specifically found that a special exception to a zoning regulation is not a property interest. According to the court, “A property interest ‘requires more than a ‘unilateral expectation’ that a permit or license will be issued; instead, there must be a ‘legitimate claim of entitlement.’” Ibid., 104 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). Further, the Fourth Circuit held, “In applying this standard of entitlement,…if a local agency has ‘[a]ny significant discretion’ in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest.” Biser, 104 (quoting Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 68 (4th Cir. 1992)).
conception of “new property” a property owner would not likely have a property interest in the issuance of a COA.

In recent years, however, the inclusion of “new property” has come under fire. In *Kerry v. Din*, U.S. Supreme Court held in a plurality opinion that the rejection of a visa application by the spouse of a U.S. citizen was not a property interest.\(^{39}\) According to Justice Scalia, “property” included the use, enjoyment, and disposal of possessions and protected rights should only be those which are “deeply rooted” in American society.\(^{40}\) This definition of property appears to solely track with the historical understanding of “old property.” This emerging interpretation of property interest could arguably call into question an owner’s rights to permits, special exceptions, and COAs in the land use context.

Justice Scalia’s interpretation of property would also foreclose emerging and creative arguments regarding interests in the denial of COAs. In *Shanks v. Dressel*, a group of homeowners and community institutions sought the enforcement of the Spokane Municipal Code in regards to a proposed development in a historic neighborhood.\(^{41}\) The developers in question were granted a building permit to construct a duplex addition to a clapboard-sided Four-Square house in the historic district. The alterations included the demolition of an existing garage and the erection of a “box-like dormitory building…attached to the original house.”\(^{42}\) The city’s

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\(^{39}\) *Kerry v. Din*, 135 S. Ct. 2128 (2015)

\(^{40}\) Ibid., 2134.

\(^{41}\) *Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008).

\(^{42}\) Ibid., 1085.
historic district ordinance required owners to obtain a COA for alterations of this nature, but the developers never sought a COA or any other special permit.

The plaintiffs argued that by failing to take action “sufficient...to protect the Mission Avenue Historic District,” Spokane denied the plaintiff’s procedural due process.\(^\text{43}\) The group argued that they held a property interest in the denial of a building permit unless the city complied with certificate of appropriateness procedures. The court was not convinced by the plaintiff’s arguments and held that they had no property interest in the denial of a permit in this case. The court, however, refused to deny that any such property interest could ever exist for third parties.\(^\text{44}\) Under Justice Scalia’s interpretation of property interest, any possibility of a third party’s right to enforcement of a land use regulation would be completely foreclosed.

There is no doubt that COAs put property rights at issue for the owner of the property. The question is, which property rights does the owner or neighbor have? Which could they argue they have? As described above, these questions have only become more complex in recent years. Depending on future developments, preservationists could utilize new concepts of property to seek enforcement of preservation ordinances as in \textit{Shanks}. On the other hand, aggrieved property owners could argue that denial of a COA amounts to a denial of procedural due process as in \textit{Natale}. The emergence of Scalia’s perspective has brought into question a number of property rights thought to be well established and threatens to prevent others from being developed within jurisprudence. For the time being, however, the jurisprudence does not prohibit the concept of

\(^{\text{43}}\) Ibid., 1086.

\(^{\text{44}}\) “Assuming without deciding that a property owner ever could have a constitutionally protected interest in the proper application of zoning restrictions to neighboring properties...we conclude that [the plaintiff’s] claim fails because Spokane’s historic preservation provisions do not ‘contain mandatory language’ that significantly constrains the decisionmaker’s discretion.” Ibid., 1090.
“new property” or its future expansion to other governmental benefits. As such, property interests in permits, variances, and enforcement thereof, may emerge if the circumstances meet the test iterated in Roth. While much of this debate is academic, acknowledging legal trends and possibilities will allow preservation practitioners to anticipate and prepare for either changes in case law or in local ordinances which could create new potential for legal claims.

B. NATURE OF THE ACTION

The second threshold issue which courts address for procedural due process is the nature of the action which interferes with an established protected interest. This factor is often a given under the relevant circumstances, but a fundamental requirement of the nature of an action is that it must originate from the state. Due process protections of the Constitution only limit governmental actions and not the actions of private individuals or entities. This aspect of analysis is typically obvious to courts in most situations, but it is not the end of the inquiry. If a state action affecting the protected interests of an individual is present, the character of the action is further dissected.

Depending on the character of the action, courts have required varying levels of procedural protections. Indeed, some of the early procedural due process cases have interpreted protections to be very broad while the more recent trend is to interpret such protections narrowly given the nature of the action.45 Edmondson identified the “legislative-adjudicative test” as the

45 Since Goldberg v. Kelly, 397 U.S. 254 (1970), which required a hearing with nearly all of the trappings of a civil judicial hearing, the Supreme Court has reigned in applicability of Goldberg’s broad language to very specific types of administrative hearings. Today courts balance interests of individuals affected and administrative burdens of the administrative entity. This topic is discussed in further detailed in Section III.
largest limitation on the application of procedural due process protections.\textsuperscript{46} This test refers to the process by which courts differentiate between actions which are legislative in nature or adjudicative in nature. If an action is determined to be legislative, then courts typically find that no procedural due process protections apply.\textsuperscript{47} If an action is found to be adjudicative in nature, then procedural protections apply and the court must then determine to what extent should they apply.

In his article, Edmondson argued that this test was one of the primary reasons that historic preservation procedure has gotten little attention from courts and, consequently, judicial guidance on the matter has been stifled.\textsuperscript{48} Edmondson outlined three ways that courts approach this test. The first methodology is the “traditional approach” under which, courts examine the nature of the governmental decision-making body which takes the action.\textsuperscript{49} As such, if the action is taken by the mayor and commission, then the action may be deemed outright to be legislative in nature.\textsuperscript{50} The second approach focuses on the facts which serve as the basis of the decision as the determining factor.\textsuperscript{51} Courts look to see whether the facts are legislative in nature facts which

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\textsuperscript{46} Edmondson, 758.
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\textsuperscript{47} Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989). In certain circumstances, legislative actions can be determined to give rise to procedural due process protections. One such instance is when an ordinance is passed to create a new historic district, but that district only applies to one property. For an example of this see Shelton v. Coll. Station, 780 F.2d 475 (5th Cir. 1986).
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\textsuperscript{48} Edmondson, 758.
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\textsuperscript{49} Shaw v. Burleigh County, 286 N.W.2d 792 (N.D. 1979).
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\textsuperscript{50} This approach can be a particular misstep given the nature of historic preservation regimes. Under many historic preservation regulatory frameworks, the mayor and commission of a municipality serve as the appellate level beyond the historic preservation commission in COA cases. The mayor and commission in such cases are often serving in a quasi-judicial capacity and therefore should not be given blanket authority to control the procedures before it.
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\textsuperscript{51} SEC v. Frank, 388 F.2d 486, 491-92 (2nd Cir. 1968).
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are general and policy-oriented) or judicial in nature (facts which are case specific). The third methodology considers the number of people affected and how the action relates to a given policy matter—i.e. does the action formulate policy or does it carry it out.\textsuperscript{52}

Edmondson argued that the traditional approach was too mechanical and that a better approach would ideally combine the latter two approaches. Under his prescribed approach, Edmondson argued that historic preservation decisions should largely be considered to be quasi-judicial in nature and analysis should focus more on the number of people affected rather than the nature of the decision-making body.\textsuperscript{53} He particularly found that the characterization of designations achieved by ordinance as legislative as impeding the judiciary’s ability to clarify adequate procedures.

Since the publication of Edmondson’s article, courts have worked towards clarifying the legal interests at stake concerning the legislative-adjudicative test. In \textit{L C & S, Inc. v. Warren City Area Planning Commission}, the widely respected legal scholar and judge, Judge Posner, laid out a workable rationale to distinguish between legislative and adjudicative actions.\textsuperscript{54} He stated,

\begin{quote}
Legislation is prospective in effect and, more important, general in its application. Its prospective character enables the persons affected by it to adjust to it in advance. Its generality offers further, and considerable, protection to an individual or organization that might be the legislature's target by imposing costs on all others who are within the statute's scope...Prospectivity and generality of legislation are key elements of the concept of the rule of law, a concept that long predates either the equal protection or the concern with procedural regularity embodied in our modern concept of due process of law. The right to notice and a hearing, the essence of that concept, are substitutes for the
\end{quote}

\textsuperscript{52} Fasano v. Board of County Commissioners, 507 P.2d 23 (Or. 1973).

\textsuperscript{53} Edmondson, 762.

\textsuperscript{54} L. C. & S., Inc. v. Warren Cty. Area Plan Comm'n, 244 F.3d 601 (7th Cir. 2001).
prospectivity and generality that protect citizens from oppression by legislators and thus from the potential tyranny of electoral majorities. The generality of legislation makes notice by service or otherwise impracticable; many of the persons affected by the legislation will be unknown and unknowable.\textsuperscript{55}

In \textit{Warren City}, the plaintiff argued that they deserved actual notice of the proceedings before the city concerning the designation of a historic district. The court applied the basic concepts of Posner’s legal rationale and held the city’s ordinance designating a downtown historic district to be prospective and general in nature. The aspects of the nature of the legislature which convinced them of the legislative nature was the regulation of future conduct and generality within the boundaries of the district. Consequently, the court concluded that no actual notice was necessary, no matter how light of a burden it was for the city.

Armed with a basic understanding of how courts interpret what constitutes a protectable interest and the nature of an action changes how a historic preservation ordinance may be structured or how HPC members understand and administer a historic preservation action. For example, in some districts, HPCs have the power to designate historic resources rather than merely recommend designation.\textsuperscript{56} In these cases, designations are more susceptible to challenge based on procedural due process. While a decision made by the legislative branch of the municipality would be more insulated from challenge, because of the nature of an HPC as a quasi-judicial agency, their action is more likely to require procedural due process. As stated above, under the rationale of Posner, a court may nevertheless see a designation by an HPC as a

\textsuperscript{55} Ibid., 603.

\textsuperscript{56} One example where the commission has authority to designate is the Washington D.C. Historic Preservation Review Board. See D.C. Mun. Regs tit. 6 § 1103(C)(3).
legislative action because of the prospective character of the action and generality in its application. Posner’s opinion clearly states, “the right to notice and a hearing, are substitutes” for these characteristics. While Posner’s reasoning appears to have legislators in mind, the same rationale of legislative accountability is theoretically viable for delegations of legislative authority to an HPC.

When considering the interests affected in a given action and whether they are protected by the constitution, HPC commissioners should be prepared for potentially creative challenges. Keeping the rights of third parties in mind and granting some process above and beyond what the minimums of due process require may obviate potential lawsuits while simultaneously resulting in more democratic, community-oriented decision-making. Such threshold considerations, although less significant in the day-to-day administration of historic preservation ordinances nevertheless grant valuable insight into the fundamental underpinnings and legal rationales supporting procedural rights on the local level and grant further insight into what procedures must or could be afforded in the actual hearing stage. The following chapter explains what these rights are and which rights must be afforded in the hearing stage.
CHAPTER 4
CONSTITUTIONALLY ADEQUATE PROCESS

While threshold considerations are important for courts to consider and give insight into how historic preservation laws will continue to develop, for the practicing professional the standard of what constitutes adequate process is a much more material legal obligation. It is important for local administrations to do more than simply adhere to state law and administrative procedures because such requirements do not encapsulate the entirety of what qualifies as procedural due process. Understanding and following such requirements are relatively straightforward when compared to the abstract requirements of the constitution. Consequently, the best, and perhaps only, way to understand what the constitution requires procedurally from HPCs is for HPCs to understand how a court will assess procedures granted or withheld by the commission. This section focuses on communicating this standard by stating the current understandings of constitutional requirements and highlighting recent issues which present an ongoing challenge for HPCs across the nation.

Once threshold considerations are satisfied, a court must discern what procedures will satisfy procedural due process. But what constitutes constitutionally adequate process? Such a broad concept standing alone could be understood to mean almost anything. In general, courts decide this question on a case-by-case basis considering the specific facts at issue and actual procedures granted. One of the earliest and most comprehensive iterations of procedural due
process requirements was in *Goldberg v. Kelly*.\(^{57}\) In *Goldberg*, the court applied a balancing test weighing the extent to which a person may be “condemned to suffer grievous loss” and their interest in avoiding that loss against the governmental interest in summary adjudication.\(^{58}\) This test has since been altered by the *Matthews v. Eldridge* test, but the basic rationales and laundry list of elements of a hearing as discussed in *Goldberg* still influence courts today.

Of particular interest for this paper are all the possible procedural elements of a hearing. In general, elements of a fair hearing include:

1. Timely and adequate notice detailing the reasons for proposed deprivation and effective opportunity to defend by confronting witness, presenting arguments and evidence,
2. The opportunity to confront and cross examine,
3. The right to obtain legal representation,
4. A complete record and comprehensive opinion which facilitates judicial review and guides future decisions,
5. An impartial decisionmaker who’s review is limited to the administrative record, and
6. A reasoned decision where the decisionmaker states the reasons for his determination and indicates the evidence relied upon, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.\(^{59}\)

In order to determine what elements of a fair hearing are due and when, modern courts use the balancing test iterated in *Mathews*. The court in *Mathews* stated that “[D]ue process…is not a technical conception with a fixed content unrelated to time, place and circumstances” but


\(^{58}\) Ibid., 263.

\(^{59}\) Ibid., 267-271.
“is flexible and calls for such procedural protections as the particular situation demands.” The test in Matthews requires a court to weigh three factors: (1) the nature of the private interest affected, (2) the risk of erroneous deprivations of property given the procedures used and possible value of additional or alternative procedures, and (3) the government’s interest at stake and possible administrative burdens that additional procedures would create. While in Goldberg, the conclusion of the court was that a fair hearing should include all elements of a due process hearing, the Matthews test has been used by courts to approve of procedural frameworks which do not incorporate all elements described in Goldberg. In extreme cases, courts have even found that under the Matthews test, there is no need for any of the elements of process described above.

Regardless of the various instances of interpretation and application of the Matthews test, in its most basic form, procedural due process requires sufficient notice and opportunity to be


61 Matthews v. Eldridge, 335; “In order to determine whether a litigant's due process rights were adequately protected, courts consider: (1) the private interests . . . affected by the official action; (2) the risk of an erroneous deprivation of such an interest through the procedures used and the value, if any, of additional or substitute procedural safeguards; and (3) the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.” Ibid., 335.

62 “Although the Due Process Clause generally requires notice and an opportunity to be heard before the government seizes one's property ... the Supreme Court ‘has rejected the proposition that ... the State [must always] provide a hearing prior to the initial deprivation of property.’” Reams v. Irvin, 561 F.3d 1258, 1263 (11th Cir. 2009) (emphasis in original) (internal citation omitted) (quoting Parratt, 451 U.S. at 540-41, 101 S. Ct. at 1915-16). In cases of emergency a state can deprive an individual of liberty or property without prior hearing. See Goldberg; North America Cold Storage v. Chicago (where State law providing for the destruction of food held in cold storage when determined to be risk to public health was ruled an allowable deprivation). Further, where there is an important governmental interest accompanied by a substantial assurance that the deprivation is not baseless or unwarranted circumstances may justify postponing the opportunity to be heard until after deprivation. See FDIC v. Mallen, 486 U.S. 230 (1988) (where suspension of a baking executive suspected of dishonesty was allowed).

63 Daniels v. Williams, 474 U.S. 327 (1986) (holding that a negligent deprivation of property is not a due process violation at all).
heard at a meaningful time and in a meaningful manner.\textsuperscript{64} Courts tend to break down their analysis into two parts: (1) the requirements of notice and (2) the requirements of the hearing. Below, the analysis of legal requirements is split accordingly. First, the requirements of effective notice are analyzed accompanied with recent instances of its application related to local zoning or historic preservation ordinance administration. Second, the requirements of a fair hearing are explored by looking to specific instances which concern one or more of the aforementioned six elements.

\textbf{A. Timely and Adequate Notice}

Notice is a fundamental requirement of procedural due process: without meaningful notice of the chance to make your case, no matter how robust procedural allotments are, there is no due process. The requirements of notice may at first glance appear to be clear and relatively mundane at the local level because of administrative statutes which set out specific requirements. Indeed, a common mistake made when interpreting the requirements of notice is to equate it with the basic requirements of an administrative statute.\textsuperscript{65} When one takes a closer look however, the

\textsuperscript{64} See Matthews v. Eldridge, 335 (1976); UDC Chairs Chapter, Am. Ass’n of Univ. Professors v. Bd. of Trustees of the Univ. of the Dist. of Columbia, 56 F.3d 1469, 1472 (D.C. Cir. 1995); Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003); Post v. City of Tacoma, 217 P.3d 1179 (2009).

\textsuperscript{65} See FlightCar, Inc. v. City of Millbrae, No. C 13-5802 SBA, 2014 U.S. Dist. LEXIS 81688 (N.D. Cal. June 13, 2014) (where the plaintiff alleged that the City violated due process rights by providing it with only seven instead of ten days’ notice of the Planning Commission hearing as per the state statute). The court in FlightCar clarified that a federal due process claim cannot be grounded on the violation of a procedural right created by state law; see also Samson v. City of Bainbridge Island, 683 F.3d 1051, 1060 (9th Cir. 2012) (noting that it is the Due Process Clause itself, not state law, which determines what process is due); Jenks v. Hull, 67 F.3d 307 (9th Cir. 1995) (“mere violations of state law do not constitute a violation of due process”); Sandin v. Conner, 515 U.S. 472, 483-84 (1995)); Wallace v. Tilley, 41 F.3d 296, 301 (7th Cir. 1994) (“The denial of state procedures in and of itself does not create inadequate process under the federal constitution. A violation of state law . . . is not a denial of due process, even if the state law confers a procedural right.”) (internal quotations and citation omitted).
substance of notice is much more complex and vulnerable to legal challenges. Recent challenges have illustrated that notice can not only be inadequate based on the means of notice, but based off of the qualitative nature of the notice. Furthermore, inadequate notice of legal standards which apply to a given action may lead courts to void certain decisions.

When inquiring into the adequacy of notice, courts apply a rather abstract test. As stated in *Mullane*, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” This test gets at two aspects of notice: first, that notice is “reasonably calculated” to reach the necessary parties, and second, that the notice “afford them an opportunity to present their objections.” These requirements can fail if notice is not received by the necessary party for lack of “reasonably calculated” means, if notice is too close to the date of the hearing so as to not “afford an opportunity to present,” or if the actual notice is defective in a manner that does not fully apprise the necessary parties of the case brought against them. Finally, notice is put at issue when challenges are based on the vagueness of legal standards.

In general, notice for historic preservation related proceedings is challenged based on the failure to follow statutory requirements of the relevant municipal ordinance or state statute. Consequently, judicial statements as to the constitutional requirements of due process for historic preservation proceedings is minimal. When constitutional due process is put at issue by plaintiffs, the pleadings are creative to say the least and, sometimes, clearly overreaching. Yet


67 For example, see *Citizens for the Restoration of L St. v. City of Fresno*, 177 Cal. Rptr. 3d 96 (Ct. App. 2014); *M. Wayne Robinson Builder-Developer v. City of Rome*, 564 S.E.2d 526 (Ga. Ct. App. 2002).
there are some recent cases which may provide new insights into ongoing issues and pitfalls for preservation officials.

In *Neighbors for a Healthy Gold Fork v. Valley City*, the neighborhood association claimed that notice was inadequate because it did not clarify which site plan the board would consider at the hearing and, because of this inadequacy, the association could not properly prepare for the hearing and submit rebuttal evidence.\(^{68}\) Specifically, they alleged that their engineers did not have “adequate time to review the Modified Plan and present evidence against it.”\(^{69}\) At hearing, the neighborhood association raised this issue and moved to have the exhibit relabeled to show that it was not submitted at the prior board hearing (the exhibit was backdated), but the Board refused. The court held that there was no violation of due process in this instance, but only because the hearing procedures were already extensive. In particular, the court highlighted how the Board continued the first hearing to allow for all interested parties to respond when it was clear that time allotted for the first hearing was insufficient. The court also pointed out that the record consisted of five volumes of testimony and meeting minutes and the neighborhood association failed to show how the mislabeling itself harmed them or the presentation of their case.\(^{70}\)

In another case, and in a more unique context, a planning board was sued for denying adequate notice of a meeting where they decided to file an appeal in court based off of ongoing litigation with the applicant. In *Carvalho v. Town of Lincoln*, the court held that the board did not

\(^{68}\) Neighbors for a Healthy Gold Fork v. Valley Cty., 176 P.3d 126 (Idaho 2007).

\(^{69}\) Ibid., 132.

\(^{70}\) Ibid.
violate constitutional due process even though the plaintiff received no notice of this meeting.\textsuperscript{71} The court compared the situation to that of an executive session where the members of the board meet away from the public, but where no actions are taken. In cases like this there is typically either a long history of pre-deprivation hearings before the session, or some form of full hearing soon after.\textsuperscript{72} Even in jurisdictions with open meeting laws, there are specific exclusions for closed executive sessions where pending or anticipated litigation is involved.\textsuperscript{73} Furthermore, the court found no violation because the planning board did not discuss the merits of Carvalho’s case or application at the meeting.

In \textit{Baltimore St. Parking Co v. Mayor \& Baltimore}, the plaintiff alleged that they were not granted adequate notice or a meaningful opportunity to be heard at proceedings concerning designation of their property.\textsuperscript{74} Their claim for inadequate notice was premised on the argument that the 10 days’ notice they were granted was not sufficient time to prepare their case and to produce the “expert testimony needed to deflect any purported evidence of historic and architectural significance.”\textsuperscript{75} They also argued that the 10 days was insufficient because of ongoing negotiations between the plaintiff and the municipality on a larger urban redevelopment project that included the property at issue.

\textsuperscript{72} Ibid., 88.
\textsuperscript{73} Ibid., 88.
\textsuperscript{75} Ibid., 709.
When considering the first argument, that there was inadequate time to prepare a defense, the court held there was no violation of due process. The court stated their legal standard for notice:

[T]he heart of the requirement of notification in administrative proceedings [is that] the notice should be apprised clearly of the character of the action proposed and enough of the basis upon which it rests to enable him intelligently to prepare for the hearing. If this minimum requirement is met, the notification is adequate, no matter how much it may fall short of the standards of pleading in judicial contests.\(^76\)

The court felt that the plaintiffs had sufficient time to prepare because of prior proceedings between the parties. The court noted that the plaintiffs were given notice on December 16, 2007 regarding a designation hearing to be held on January 8, 2008. The plaintiffs were granted a continuance at the January hearing, and, even though the date of the next hearing was not discussed at the time of the continuance, the court charged the applicants with actual notice of a future hearing. As of a letter dated February 5, 2008 discussing the date of the next hearing, March 11, 2008, the court charged the plaintiffs with actual notice of the date of the hearing.

In considering the plaintiff’s argument that negotiations with the city made the time-frame of notice inadequate, the court nevertheless held that there was sufficient notice. Due to the negotiations, the plaintiff sought clarification from the HPC as to whether their case would be heard at a March 11 hearing. No response was given to the plaintiffs. Nevertheless, the plaintiff attended the March 11 hearing and presented information regarding the acquisition of the property, the ongoing negotiations with the city, the draft agreement, and argued that the building is “not something you want to historically designate” because it was part of a

\(^{76}\) Ibid., 709 (Citations omitted).
“conspiracy” between the Pennsylvania Railroad and the Baltimore & Ohio Railroad.\textsuperscript{77} The court held that in light of the actual notice described above and the appearance and presentation of counsel at the March 11\textsuperscript{th} hearing, there was insufficient evidence to suggest that these negotiations negated the notice they were given. In light of the actual notice of the proceedings and regardless of the confusion of the plaintiff, the court held that the procedural requirements of notice were satisfied.

Figure 4.1: Pennsylvania Railroad Company District Office Building, 200 East Baltimore Street, Baltimore, Independent City, MD. Baltimore Independent City Maryland, 1933\textsuperscript{78}

\textsuperscript{77} Ibid., 710.

Another aspect of the right to adequate notice includes the notice of legal standards which a hearing body is going to apply to a particular case. This requirement is related to the party’s ability to “intelligently prepare” for a proposed hearing. In Edmondson’s article, he explains the problem of standards. He recognized that HPCs often have a hard time of translating the legal requirements and standards which govern whether certain changes necessitating a COA are appropriate or not. He observed that because of this, many historic preservation decisions are invalidated on vagueness grounds; however, he also recognizes that the issue is not necessarily the standards themselves but the language of the decisions. Edmondson concludes that, for due process purposes, the sufficiency of legal standards in historic preservation actions turn more on the opportunity or ability for property owners to understand them enough to be able to create an adequate defense—in other words, to know the “basis upon which [a decision] rests.”

In Hunt Valley Baptist Church v. Baltimore City, a dispute arose when the Church was denied a special exception to construct their facilities in a conservation zone. After long and contentious administrative procedures and community campaigning both for and against the development, the Church brought suit. They argued that the county’s zoning code violated constitutional due process because it contained inadequate legal standards and was thus


79 Edmondson, 773-775.

80 Ibid., 774.

81 Hunt Valley Baptist Church, Inc. v. Baltimore City, 2017 U.S. Dist. LEXIS 171539. Of particular note, this constitutional violation allegation was used by the Church as the basis of a Monell claim under § 1983. A Monell claim allows a plaintiff to sue the government for civil rights violations when a governmental agent allegedly deprived the plaintiff of Constitutional rights or rights created by federal statutes. The court held that the Church stated a viable Monell claim given the facts alleged and that the claim may proceed; however, the court dismissed the constitutional due process violation claim.
unconstitutionally vague. In considering the Church’s claim, the court stated, “[T]he vagueness doctrine ‘amounts to a due process challenge based on lack of notice, a court may not reach the merits of a plaintiff’s void for vagueness claim unless the plaintiff first shows that state action deprived him or her of ‘a constitutionally protected liberty or property interest.’”\(^82\)

The court ultimately held that the church’s claim failed because they did not establish a protectable interest, but the court did speak to the interests at risk due to vague legal standards:

“[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”\(^83\)

These interests are important to a court’s analysis of whether a particular standard runs afoul of due process.

A particularly illustrative case is *Mayes v. Dallas*.\(^84\) In *Mayes*, the plaintiff owned a brick home in a historic district. Upon application for a COA, the owner was denied permission to paint the house and to construct a walkway across the front lawn. Mayes argued that he was denied due process because the city ordinances did not provide “objective, specific standards that would prevent the arbitrary exercise of this zoning power.”\(^85\) The ordinance at issue in *Mayes* included various criteria that applied to aspects of maintenance and alterations foreseeable in a


\(^{84}\) Mayes v. Dallas, 747 F.2d 323 (5th Cir. 1984).

\(^{85}\) Ibid., 323.
The court found that due process was not denied in *Mayes* and that the city ordinance at issue complied with the requirements of the 14th Amendment. The court stated, “To satisfy due process, guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudice the outcome in each case, precluding reasonable administrative discretion.”89 Accordingly, the court observed that the standards at issue provided adequate guidance to provide structure and limit unfettered authority because the ordinance was “precise where possible,” the process was administered by professionals with the requisite qualifications, and the appeal process allowed for further review.90

In *Maher v. City of New Orleans*, the plaintiff challenged a local ordinance arguing that the standards concerning alterations and demolitions were too vague.91 The court found that these types of ordinances included sufficient guidance and limits on power because they

86 Ibid., 324.

87 Ibid., 325.

88 Ibid.

89 Ibid., 325 (quoting Maher v. City of New Orleans, 1062).

90 Ibid., 325-326.

91 Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975)
delineated boundaries of the district, defined what appropriate alterations were, offered particular regulations for specific circumstances, specified qualifications for commission members, set out a decision-making and appeals process, and relied on observable characteristics of the district for making decisions.

The above cases and examples establish that notice is more than publishing an announcement in a newspaper. It is also more than sending a letter stating the date and time of a particular type of hearing to an individual. Notice must not only comply with the statutory requirements of a given jurisdiction but must meet the Constitutional requirements. The Constitution requires that notice be detailed enough to apprise individuals of the nature of a hearing, give adequate time to prepare, and to reveal the basis upon which decisions will be made. HPCs must use their judgement and adjust for specific circumstances. Complex cases may require notice that specifies the nature of the hearing and extends the time to prepare. A common-sense approach to what constitutes “fundamentally fair” notice, under the circumstances, can ensure that parties are not disadvantaged in their efforts to navigate the COA process.

B. HEARING

Thus far, all the elements of procedural due process discussed have been primarily concerned with the procedure leading up to the actual hearing at which the rights of an individual are adjudicated. The Constitution, of course, also demands minimum procedural protections at the hearing phase itself. Courts and legal scholars have summed this inquiry into two basic questions: “what type of hearing is required?” and “when is a hearing required?”
During the administration of historic preservation actions, the issue of determining when a hearing is required is of less consequence than what type of hearing is required because local ordinances and state statutes typically require pre-deprivation hearings regardless of whether they are constitutionally required. The only actions that may require a court to inquire about the timing of hearings would be the imposition of temporary moratoriums on demolition to allow for review and assessment of significance for historic designation. While in such situations it is important to keep constitutional requirements in mind, these actions are generally deemed appropriate as long as the moratorium at issue is temporary and there are sufficient post-deprivation hearings. Because of the limited application of such an analysis and narrow focus of this thesis, only the constitutional requirements for the substance of hearings in the pre-deprivation phase are addressed here.

As to the first question—what type of hearing is required?—courts must determine what a hearing looks like. As discussed at the beginning of this chapter, Goldberg lists the elements of a fair hearing. Not every element, however, is always required to satisfy the dictates of the Constitution. The Supreme Court decided that the Matthews test is applied to determine which elements are necessary and whether the elements included in a given hearing process were sufficient to satisfy procedural due process.

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92 The general principal regarding the timing of a required hearing is that a hearing may be postponed until after the deprivation only in extraordinary situations involving a valid governmental interest. See Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). Whether this would prevent the imposition of temporary predesignation restrictions on landowners wishing to demolish or alter sites proposed for designation is, however, a different matter. An owner of a property could moot a pending designation through demolition or alteration prior to the hearing. Temporary prehearing restrictions are thus needed to preserve the effectiveness of the entire ordinance. Edmondson, 769-771 (“Thus, when the Mathews test is applied, temporary predesignation restrictions on property would appear to be constitutional.”).

93 In Board of Regents v. Roth, the Supreme Court provided the general rule that “some kind of hearing” is required prior to the deprivation of a protected interest. Generally, something less than a full trial-like hearing is required, even if the private interests are especially strong. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). All that is
In Edmondson’s article, he looks at the basic requirements of hearings in the historic preservation context. He focuses on two aspects of a hearing: (1) right to an impartial tribunal; and (2) the right to a written judgement explaining a decision. Both of these elements have been clarified by courts in recent years, and are addressed later in this thesis. Other aspects of persistent and emerging concerns, which were not addressed in detail in Edmondson’s article, are looked at critically here as well. In particular, Edmondson does not address the right to legal representation, the right to cross-examine witnesses, or the right to a complete record to facilitate judicial review. The right to legal representation is not dealt with in detail in this undertaking because it is virtually never denied by administrative tribunals. In whole, this section of the thesis addresses 1) the right to an impartial decisionmaker whose decision is limited to the administrative record, 2) the right to confront and cross-examine witnesses, and 3) the right to a complete record and comprehensive opinion which facilitates judicial review and guides future decisions.

1. An impartial decisionmaker whose review is limited to the administrative record

Historic preservation commissions are persistently criticized for letting philosophical underpinnings of the profession bias their judgement. They are often called nostalgic, arbitrary, and overly controlling such that they “design from the table.”94 These criticisms are essentially attacks on the impartiality of the HPC. While such criticisms tend to be overstated, they often sprout from a grain of truth. In some cases, these criticisms correctly highlight issues and necessary is “that the procedure be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’” Ibid., 349.

94 See the introduction for further reference to such critiques.
procedural inadequacies that expose HPC decisions to constitutional challenges. Edmondson also
recognized the philosophical baggage that many commissioners bring to the table.\textsuperscript{95} This
baggage is especially problematic because challenges to an impartial tribunal may succeed
because of the proven actions or subjective intent of the commissioners, and because of the mere
appearance of impartiality.\textsuperscript{96} If there is an the appearance of impartiality (often originating from
an ethical violation), courts will often nullify the decisions of an HPC.\textsuperscript{97}

In a particularly illustrative case, \textit{Barry v. Historic District Commission}, an HPC’s
decision to deny the application for a COA concerning proposed changes to the facade of the
plaintiff’s house was nullified and the case remanded for rehearing.\textsuperscript{98} The event which led the
court to nullify the HPC’s decision was the recusal and subsequent testimony of a commissioner.
The commissioner, after recusing themselves from the HPC, spoke against the merits of the
plaintiff’s application in great detail. Even after the attorney representing the applicant objected
to the testimony, the chairperson of the HPC allowed the commissioner to proceed and give his
testimony.\textsuperscript{99} At a second hearing, the commissioner again recused himself and continued to
comment extensively on the application as a member of the public and as an expert in
architecture. The commissioner submitted an eight-page letter to the commission which detailed

\textsuperscript{95} Edmondson, 772.


\textsuperscript{97} An administrative hearing “must be attended, not only with every element of fairness but with the very appearance
of complete fairness.” Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated and remanded on other
grounds, 381 U.S. 739 (1965); see also Withrow v. Larkin, 421 U.S. 35, 47-55 (1975).


\textsuperscript{99} Ibid., 4, 16.
his rationale for denying the application. Even though his recusal meant that he had no cote on
the COA, the HPC ultimately decided to deny the COA.

Figure 4.2: Origen S. Seymour’s Offices (1846) Photo credit: Historic Buildings of Connecticut

In holding that the commissioner’s testimony was improper, the court stated:

While proceedings before zoning and planning boards and commissions are informal and are conducted without regard to the strict rules of evidence…they cannot be so conducted as to violate the fundamental rules of natural justice…In short, [t]he conduct of the hearing must be fundamentally fair.\textsuperscript{101}

The court reasoned that public policy required a member of an HPC to “refrain from placing himself or herself in a position in which personal interest may conflict with public duty.”\textsuperscript{102} The rationale for this seemingly hardline rule was stated in the opinion:

As we previously noted, ‘[t]he test is not whether the personal interest does conflict but whether it \textit{reasonably might} conflict.’ The persuasiveness of his testimony in influencing his fellow commissioners need not be known. ‘The evil lies in its presence to any degree….However fair [the] proceedings may, in actuality, have been, it would be difficult if not impossible to satisfy [the individuals appealing from the commission’s decision] that they had received a fair and impartial hearing.’\textsuperscript{103}

Even if the court felt that the HPC was able to give the commissioner’s testimony objective consideration and that no commissioner was unduly influenced, the result would be the same. The court noted the potential conflict that may occur as a rationale for such a standard. The court observed that such conduct put the professional reputation of the testifying commissioner at stake and other commissioners may feel pressured to protect their fellow commissioner’s

\textsuperscript{101} Megin v. Zoning Board of Appeals, 942 A.2d 511, 514-516 (2008) (citations omitted; internal quotation marks omitted.).

\textsuperscript{102} Ibid., 16. The nature of what a “personal interest” constitutes is addressed in Thorne v. Zoning Commission, 423 A.2d 861 (1979) (“A personal interest has been defined as an interest in either the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A personal interest can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess.”) (Internal quotation marks omitted.) Ibid., 204-205.

\textsuperscript{103} Ibid., 18 (other citations omitted).
reputation. In light of this reasoning, the court held that all that was needed to cross the line was for the HPC to have considered such evidence.

Another common way in which commissioners may jeopardize the validity of a decision and integrity of the tribunal is through the consideration of ex parte contacts and other information outside of the record. When judges or governmental officials acting in a quasi-judicial manner communicate with a third party regarding the facts or circumstances of an ongoing case outside of the confines of the court or hearing process, then that official has made an ex parte contact. As stated above, the right at stake in this section is an impartial decisionmaker whose review is limited to the administrative record. A commissioner violates this right when they hear ex parte contacts because they are considering information outside of the administrative record.

A galvanizing case, Idaho Historic Preservation Council v. City Council of Boise, dealt with ex parte contacts in detail. At issue was the city council’s decision to overturn the HPC’s denial of a COA. The record revealed that members of the city council considered various phone calls received from constituents. The council disclosed the existence of the phone calls at a public hearing and stated that the calls were not significant, but the court held that the council’s decision was invalid because of their consideration of the calls. The court reasoned that “when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process.” In a somewhat radical move,


105 Ibid., 649.
the court upheld the lower court’s reversal of the city council’s decision because of the due process violation.

Although the decision in *Idaho* seems like a strict bar on the consideration of ex parte contacts, the court did outline how municipalities could rectify situations where ex parte contacts are heard. The court stated the circumstances surrounding when ex parte contacts would not affect the integrity of a decision:

[W]hen: (1) the ‘ex parte contacts’ were not with the proponents of change or their agents, but, rather, with relatively disinterested persons; (2) the contacts only amounted to an investigation of the merits or demerits of a proposed change; and, most importantly, (3) the occurrence and nature of the contacts were made a matter of record during a quasi-judicial hearing so that the parties to the hearing then had an opportunity to respond.\(^{106}\)

The court in *Idaho* found that this situation did not apply because the substance of the telephone calls was not recorded or disclosed, and there was no opportunity for the HPC to rebut any of the information garnered from the ex parte phone calls.\(^{107}\)

While there are a number of ways in which the impartiality of a tribunal may be challenged, the examples above illustrate a few key instances. The right to an impartial tribunal is essentially expressed in two-parts: (1) that the tribunal be impartial; and (2) that it solely base its decision on information presented at the hearing (or other means which are incorporated into the record). The impartiality of an HPC may be questioned a variety of ways, but the essential heart of the question was illustrated in *Barry*, which showed that courts are concerned with the

\(^{106}\) *Ibid.*, 650 (citations omitted).

appearance of impartiality. Consequently, when HPC members are put in a position which puts
the reputation of a member at stake, when they make inappropriate statements, or take other
inappropriate actions, courts will be skeptical of the resulting decision. As for the second
requirement for impartiality, when decision-makers consider evidence outside the official record
and take insufficient steps to remedy the impropriety, courts may nullify the decision if
appropriate steps are not taken to incorporate the ex parte contacts into the record.

The right to an impartial decisionmaker is a fundamental right which is often difficult to
maintain at the local level because of the high level of interaction between members of the
community and governing officials. Without the existence of an impartial decision-maker who
presides over the adjudicatory process, other rights included in the process seem hollow, and the
hearing itself is compromised.

2. The opportunity to confront and cross-examine witnesses

The opportunity to present evidence at a hearing to support the position of a party seems
like a common-sense inclusion for every adjudication, but how far does that right go? In
Goldberg, one of the listed rights is the right to confront and cross-examine witnesses. This
means the parties have the ability to call people to testify on their behalf, to either support a
position or to oppose a position. The ability to cross-examine witnesses is the ability for the
witness to be questioned by both parties to the conflict. This right plays a prominent role in
court-room dramas, but what is its role in quasi-judicial administrative hearings which are also
open to the public? It may be a given that an applicant can call witnesses, but can the HPC? Can
the applicant cross-examine the HPCs witness and vice-versa? Should the public be allowed to
call witnesses or to cross-examine a witness called by a COA applicant? The answers to such questions vary from case to case, and some questions have yet to be answered by the courts.

Quasi-judicial hearings such as those before an HPC are typically open to the public and are not administered in accordance with civil trial procedures. Typically, hearings begin with the presentation of the case at hand by staff and an opening statement by the applicant. Next, the public has an allotted time to respond. This period is then followed by the more formal question and answer hearing between the HPC and an applicant. While there may be advocates and experts who testify for an applicant or against an applicant for a COA, it is far less common to see opposing parties cross-examine experts or advocates. As such, this aspect of a fair hearing is rarely at issue. When this issue has arisen, it usually originates from the denial of a party’s request to cross-examine a witness.

Whether the right to cross-examine constitutes a vital aspect of a fair hearing is debatable and often depends on case-specific facts. This debate has primarily taken place with respect to zoning board hearings. Many courts hold that the mere denial of the right to cross-examine does not amount, on its face, to a denial of due process and that the right is dependent upon the outcomes of a Matthews analysis.\(^{108}\) On the other hand, some courts hold that a cross-examination is a fundamental aspect of a zoning hearing and that denial of such a right instantly offends procedural due process.\(^{109}\) The latter of the two approaches may run afoul of the

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\(^{108}\) Chongris v. Board of Appeals, 811 F.2d 36, 42 (1st Cir.) (“Omitting cross-examination at a zoning hearing or kindred event does not amount to a denial of due process in violation of the fourteenth amendment.”), cert. denied, 483 U.S. 1021 (1987); Third & Catalina v. City of Phoenix, 895 P.2d 115, 121 (Ariz. Ct. App. 1994) (holding that cross-examination in proceedings before a fire safety advisory board was not a violation of due process); Medeiros v. Hawaii County Planning Commission, 797 P.2d 59, 67-68 (1990) (Where a hearing concerning a permit application was held to satisfy due process even though the contestants were denied the right to cross-examine.).

\(^{109}\) Kelly Supply Company, Inc. v. City of Anchorage, 516 P.2d 1206, 1209 (Alaska 1973) (“The right of cross-examination undoubtedly exists in hearings on zoning matters[,]” (Citations omitted.)); Humble Oil & Refining Co.
Supreme Court’s interpretation in *Matthews*. Under *Matthews*, there appears to be wiggle room regarding every aspect of a fair hearing, consequently, a hard-lined rule in such jurisdictions appears vulnerable to challenge.\(^{110}\) Below are cases which have dealt with this issue of cross-examination and each one is different.

In *Korean Buddhist Dae Won Sa Temple v. Sullivan*, the plaintiff applied for a variance to height requirements in order to construct a Buddhist Temple.\(^{111}\) The plaintiff was granted the variance but was subsequently held to have violated the terms of the variance for height. An essential part of the plaintiff’s claim was that it was denied due process because it did not receive a trial-type hearing including the ability to cross-examine witnesses during the public hearing. The court recognized the flexible nature of the requirements of due process: “The full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing.”\(^{112}\) Nevertheless, the court found that the plaintiffs in this case should have been allowed to cross-examine, but that ultimately the denial was a harmless error on the part of the city.

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\(^{110}\) Individuals are usually allowed to cross examine witness, but such right may not be necessary depending on the balancing test. See Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997).


\(^{112}\) Ibid., 1341. See also Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974).
Figure 4.3: The temple stands today with a lowered roof. It was subsequently named Mu Ryang Sa, meaning “Broken Ridge Temple,” reflecting the incident and subsequent court cases which resulted in the broken ridge pictured above.\(^{113}\) Photo credit: Hawaiian Beach Rentals

In holding that the denial of cross-examination was harmless error, the court nevertheless stated that the procedures at issue were cause for concern. The court held that without the ability to cross-examine, especially in cases where expert testimony and technical considerations are at issue, there is a significant risk concerning the second factor (the risk of erroneous deprivation and what procedures could reduce risk). The court stated, “With regard to the second, the absence of the opportunity for cross-examination in the ZBA’s proceedings creates the potential

\(^{113}\) “Mu Ryang Sa Buddhist Temple,” Hawaiian Beach Rentals, Accessed May 8, 2018
http://www.hawaiianbeachrentals.com/Hawaii/Oahu/Honolulu/thingstodo/MuRyangSaBuddhistTemple.htm
‘risk of an erroneous deprivation’ in the form of the loss of potentially vital evidence.”114 The city argued that the administrative burden of allowing cross-examination at such hearings would be insurmountable. However, the court found this argument unconvincing because previous iterations of the zoning procedures had allowed for such procedures.115 Even though the Matthews balancing test favored the plaintiffs, in this case the court held that the plaintiffs suffered “no demonstrable prejudice” because they were afforded extensive procedures notwithstanding the denial of cross-examination. There were no expert witnesses that testified, and the plaintiffs were able to rebut opposing witnesses via oral testimony and admitted documentary evidence.

In another case involving potential unfairness regarding testimony, Rutherford v. Fairfield Historic District, the plaintiff appealed the decision of the HPC to deny a COA for window replacement of a house in a historic district.116 The plaintiff argued that the HPC acted unfairly when it solicited expert testimony in opposition to the plaintiff’s COA. In seeking this testimony, the Commission did not give prior notice of the expert. Nevertheless, the court found that the solicitation of an expert did not deny the plaintiff a fair opportunity to be heard. The court noted that the testimony was part of the record and that the plaintiff had a fair opportunity to cross-examine the witness and submit rebuttal evidence. The court stated, “[A]s long as the

114 Korean Buddhist Dae Won Sa Temple v. Sullivan, 1343.
115 Ibid., 1343.
plaintiff was provided with the opportunity to examine [the expert] and to rebut his testimony,” then such solicitation was allowable.\textsuperscript{117}

The right to confront and cross-examine witnesses allows plaintiffs to effectively make arguments to support their case and to challenge opposing arguments. Some form of this right is typically afforded to individuals, but it is not always exercised by them. It appears that in cases like \textit{Sullivan}, conflicts arise when the right is denied upon request to exercise the right. Because the right is not always put at issue, it is no wonder that administrative tribunals may have inconsistent policies and practices on the matter. Depending on the jurisdiction under which the municipality operates, however, denying the right to cross-examine could prove fatal to a decision, and, if that denial is built into the ordinance or statute itself, could require amendment or repeal of the legislation. Therefore, while the right to cross-examination is not always at the forefront of procedural due process concerns at the local level, it is always lingering beneath the surface and could be at issue of a party asserts it.

\textbf{3. Right to a complete record and comprehensive opinion which facilitates judicial review}

The right to a complete record and comprehensive opinion is widely accepted by courts and serves a judicial function beyond protecting the rights of the individual. While the full scope and requirements of the right varies it is meant to ensure that once a decision is made by a tribunal, a party can adequately understand and challenge the decision made in the next step of appeals. Often this right relates to the nature of the record-keeping and challenges revolve around a sparse or non-existent record. Both parts of this right are closely related. Without an

\textsuperscript{117} Ibid., 3.
adequate record, an HPC cannot prove what information it relied on for a given decision, thus making the decision unreasoned or unsupported. Because the essential interest served by this right is the judicial review of a decision, the exact detail required to prove that a decision is reasoned could be interpreted differently depending on the circumstances or court preferences.

Many cases focus on the adequacy of the record and what level of accuracy or detail is required by due process. In Rural Kootenai Organization v. Board of Commissioners, the Court held that transcripts of a hearing that were “replete with omissions” satisfied the requirement of due process. The court reasoned that even in lieu of the omissions, a court could determine the basis upon which the planning commission made its recommendations. In another case cited above, Valley City, the plaintiff argued that they were denied due process because of the zoning administrator’s “manipulation of the record on review.” This “manipulation” referred to the mislabeling of exhibits as being backdated, suggesting that the information was available in a prior hearing when it was actually absent at that hearing. In the same line as Rural Kootenai, the court held that this mislabeling did not constitute a fatal flaw in the integrity of the record because the record was “adequate for judicial review.”

As illustrated above, this procedural right essentially defines itself. The adequacy of the detail and completeness of the record is gauged by a court’s ability to understand the evidence relied upon and the reasons given by the decision-making body’s decision. This fact allows for a flexible standard, but also makes this standard one that is not readily apparent to individuals tasked with complying with it. As such, this legal standard is of little help for administrative bodies. Nevertheless, there are lessons inherent in the observations made by courts.

Legal challenges have helped to clarify the procedural requirements of the Constitution, but the clarification comes slowly and selectively. Some procedural issues rarely arise in practice and are therefore litigated even more rarely. Furthermore, opportunities where courts could clarify requirements are often squandered when cases are decided on technicalities or other unrelated issues. For the small number of cases that have been clarified by the courts, the decisions have left much to be desired in terms of identifying workable standards. While the Constitution grants the foundational and abstract protections of procedural due process, courts often mimic this broad guidance in their opinions. As a result, many questions remain unanswered or half-answered, and even more stand answered in a way that leaves much open to interpretation. Nevertheless, these judicial lessons can be used to improve policy and prevent potential legal liability for municipalities.
CHAPTER 5
LESSONS AND RECOMMENDATIONS

Given the review of the above cases some general observations can be made which can help HPCs and municipalities to navigate the minefield of procedural due process. This chapter first addresses the basic guidance available to HPCs and then offers general observations and tips derived from Chapters 3 and 4 to inform the structure and refinement of local ordinances and practices. The final portion of this chapter highlights the specific lessons learned from the cases discussed above and offers recommendations as to how to avoid repeating the mistakes of past HPCs and/or municipalities.

As described in the introduction to this thesis, procedural due process literature is often focused on administrative procedure acts. Perhaps the most recent foray into guiding HPCs on matters of procedural due process was a technical assistance article written by James Reap and Melvin Hill, entitled “Law and the Historic Preservation Commission: What Every Member Needs to Know.”\(^{119}\) This publication includes a useful graphic outlining some basic tips on how to comply with procedural due process.\(^{120}\)


\(^{120}\) Ibid., 8.
Many of the tips and guidance in the above table are applicable to constitutional conceptions of procedural due process. It is always useful to refer to common sense notions of what is fair under the circumstances. As stated in the chart, you should ask whether every action the commission takes is “orderly, fundamentally fair, and impartial.” A general rule which can be derived from the numerous cases cited above can add to this concept: when in doubt, provide more opportunities for a plaintiff to make their case and be heard. Neighbors is an excellent
example of a case where an HPC was insulated from liability by providing extra procedure. *Sullivan*, likewise, is an example of a case where the extensive proceedings mitigated the impact of mistakes committed by the adjudicating body to “harmless error.” The more process, the better.

Of course, administrative costs begin to increase with every procedural opportunity afforded to a party and no amount of process will guarantee that an aggrieved party will not file suit regardless of how much of a fair shake they got. Consequently, while in theory it is easy to simply advise more procedure, more procedure is not always the most efficient or practical. As such, more specific guidance can help to pinpoint key areas of risk to minimize potential liability effectively.

New cases and trends in historic preservation law have revealed these potential pitfalls and helped to clarify procedural requirements. Further, these general principles and tips do not address the more specific situations presented in the cases above. The bulk of the lessons learned from the overview of cases presented in this thesis fall under four general areas and requirements of the procedural process: (1) adequate notice, (2) impartiality of the decision maker, (3) the opportunity to be heard, and (4) making informed decisions.

A. ADEQUATE NOTICE

As detailed above in *Neighbors*, adequate notice has been used recently in more creative ways to attack HPC and other municipal decisions. Consequently, challenges not only to the timeliness of notice, but the substantive nature of notice have come under scrutiny. While it may seem like a minor risk to prepare and provide for, the steps which can be taken to obviate any such challenge are simple. In addition to following the relevant procedural statutes and
identifying the correct parties as noted in the figure above, the *Mullane* test should provide sufficient guidance for what constitutes adequate notice under the constitution: notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”\(^{121}\) Further, the guidance given by Edmondson in his article remains true: “Notice of a historic preservation action should contain a description of the action’s effect, the property affected, and the location and date of any hearing, as is usual for notice in zoning cases.”\(^{122}\)

Yet neither the chart detailed above, nor Edmondson, touch on the substantive challenges to notice. While this concern is typically mitigated when the procedures are inherently adequate, under the *Matthews* test, it could serve as an aggravating factor in conjunction with other procedural deficiencies. Furthermore, if the error is so significant that it relates to the heart of the case, then, in spite of adequate process, it may be more susceptible to challenge. The court in *Neighbors* emphasized that if the plaintiffs could show harm, the analysis would not be so easily overcome. While the requirement to show harm is a hurdle for the plaintiffs, if satisfied the balance of interests may shift so that the administrative decision is overturned. Concerning the substantive aspects of notice, there are three primary pitfalls highlighted by recent cases: (1) case-specific instances requiring more time for a party to prepare, (2) when notice is or is not required for certain types of hearings, and (3) inadequate or unclear legal standards.

Effective notice focuses on the actual ability of the notified party to prepare for a hearing. In *Baltimore* the applicant alleged that they did not have enough time to prepare for the hearing.


\(^{122}\) Edmondson, 769.
While this was not held to be the case in *Baltimore* it is important to flag the potential issue in such cases. In *Baltimore*, the applicant was in negotiations with the city over a complex redevelopment plan. The statutory requirement at issue required 10 days’ notice. Had the facts been different in *Baltimore*, (for example, had there been no prior proceedings) it is easy to foresee circumstances which may complicate the application process to the degree where 10 days is not an adequate time frame to prepare a proper defense, to include calling experts, community members, and others as witnesses. In such cases, blind adherence to statutory requirements could result in violating the constitutional requirements of procedural due process.

The situation in *Baltimore* could have been further inflamed by intergovernmental confusion and obfuscation as to the nature of the hearing. The fact that the applicant asked for clarification suggests the need for better communication in such circumstances. Adequate notice should leave no question as to the nature of the hearing. Communicate the nature of the case, cite the relevant legal codes and provide any other supplemental information relevant to their application; for example, ongoing governmental negotiations between various departments and the petitioners.

As illustrated in *Carvalho*, certain hearings may be exempted from the notice requirement. In particular executive sessions are exempted, but such sessions should be closely managed. The merits of the case should not be considered in such sessions, which should avoid any appearance of what could be seen by the public as a hearing. Thus, providing notice of what is to be discussed and maintaining a strict agenda is advisable. In *Carvalho* the HPC narrowly avoided violating procedural due process requirements during a session which considered whether to pursue litigation surrounding the application at issue. This type of session is particularly risky depending on the nature of the litigation. There is a fine line between
considering the merits of bringing litigation against a party and the merits of the application itself.

Whether there are adequate legal standards is an important legal question, and the lack of such standards may subject a municipality to considerable liability. A challenge to the adequacy of legal standards is based on inadequate procedural process in the ordinance or the practices of an adjudicating body. As noted above, a decision or ordinance could be declared void for vagueness if a party does not know what is required of them.\textsuperscript{123} In \textit{Hunt Valley}, the inadequate legal standard theory was used as a basis for a §1983 claim alleging civil rights violations. Under these types of challenges, the ordinance in its entirety or in part, may be at risk of nullification. If an ordinance is vague, but it grants authority to the HPC, the HPC can head off a challenge by adopting clear legal standards on which to base decisions. Design guidelines, designation criteria, and references to past decisions, along with transparent record-keeping, help to avoid and defeat such challenges.\textsuperscript{124}

The rationale used by the courts in \textit{Mayes} and \textit{Maher} illustrate some factors that courts consider when discerning whether standards are adequate. \textit{Mayes} and \textit{Maher} stand for the proposition that adequate legal standards for historic preservation actions should be precise (where possible), define key terms, provide particular regulations for specific circumstances, be administered by qualified professionals, set out decision-making and appeals processes, rely on observable characteristics of the district, and apply only to the specific boundaries of the historic

\textsuperscript{123} Hunt Valley Baptist Church, Inc. v. Baltimore City, 93 (quoting F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012)).

district or site. Nevertheless, the standards can be general and “need not be so rigidly drawn as to prejudge the outcome of each case.” 125 Such standards should be broad enough to preserve “reasonable administrative discretion.” 126 The list of factors described above does not need to be present for every case, however, and such standards can be general in nature. To be effective, HPCs must maintain a healthy degree of discretion and flexibility.

B. IMPARTIALITY

HPCs are tasked not only with being impartial, but with maintaining the appearance of impartiality. While it is nearly impossible to maintain the appearance of total impartiality, there are a number of proactive steps that an HPC may take to guard against such challenges. In Barry, the primary issue which led the court to nullify the HPC’s decision was the inappropriate conduct of HPC members, who allowed for the recusal and subsequent testimony of a commission member. While hindsight is twenty-twenty and such conduct may seem inappropriate on its face to most commission members, it is important to remember the diversity of municipalities.

Depending on the size of a municipality and the jurisdiction of the HPC, it is common for HPC members to be the primary historic preservation professionals in the area. Consequently, the necessity to recuse themselves from hearings arises regularly. HPC members may be local architects or contractors who have financial interests in a given historic site. Other times, a commission member may be a neighbor who has a personal interest in what happens as a result

125 Mayes v. Dallas, 325.
126 Ibid.
of a COA decision or, as in *Barry*, a commission member may simply feel passionately about a proposed change and seek to serve as an expert witness. Naturally it is important to avoid situations where the HPC members who are deciding a party’s rights are pitted against another member of the HPC, even if tangentially.

A good way to prevent compromising actions is to have policies and rules of conduct created before such a situation occurs. First, ethical guidelines and rules are a common requirement of local historic preservation ordinances, and it is worth ensuring that they are thorough. Second, as a matter of policy, HPCs should disallow members from recusing themselves in order to testify on behalf of a petitioning party. Even if the HPC member were to completely recuse themselves from the whole meeting, it is better to have someone else represent the member. It is easy to see how such a situation would look improper in contrast to what is considered fundamentally fair. A commission member should not split their time between the witness stand and the judge’s bench.

The situation in *Idaho* is another common situation and pitfall that weakens the integrity of local historic preservation actions. HPC members or elected officials often conduct site visits to better get a grasp on a given case. In such cases, risks of ex parte contacts grow: neighbors or home owners may approach the members or officials and have ex parte communications. In short, it can be difficult for public officials, especially elected officials, to refrain from ex parte contacts and therefore engage in extra judicial conduct. Of course, this behavior should be avoided, but if the situation is unavoidable or the deed is already done, municipalities can remedy the situation through the process outlined in *Idaho*. First, disclosure of such contacts is essential. Second, the official must detail the nature of the contact and describe how it varied from the information obtained in the official hearing. According to the court in *Idaho*, disclosing
the “mere existence” if the contact is not enough.\textsuperscript{127} After disclosing the contacts and basic detail of the subject matter discussed, allow parties to address the merits of the contact.\textsuperscript{128}

\textit{Idaho} describes the necessary methodology for municipalities to follow in order to remedy ex parte contacts, but the best way is to prevent them from happening in the first place. Most municipalities employ staff such as historic preservation planners or even city attorneys who could help guide petitioners through the COA process. The staff are an excellent resource for members of the public to contact, especially before hearings begin because there can be no ex parte contacts when there is not a matter pending before a judicial or quasi-judicial body. Further, this municipal staff can incorporate any communications they feel necessary into their presentation to the HPC at a hearing so that it is included in the official record. HPC members and the mayor and commission should direct curious members of the public to the staff and direct the staff to help manage the public when a matter is ongoing. In this way, government officials can better preserve the integrity of the COA process without sacrificing the community’s voice and participation.

\textbf{C. OPPORTUNITY TO BE HEARD}

As discussed in Chapter 4, the opportunity to be heard is an essential element of the list of procedural rights granted to an individual as described in \textit{Goldberg}. Recent cases related to

\textsuperscript{127} Idaho Historic Pres. Council v. City Council of Boise, 8 P.3d 646 (Idaho 2000)

\textsuperscript{128} [W]hen: (1) the ‘ex parte contacts’ were not with the proponents of change or their agents, but, rather, with relatively disinterested persons; (2) the contacts only amounted to an investigation of the merits or demerits of a proposed change; and, most importantly, (3) the occurrence and nature of the contacts were made a matter of record during a quasi-judicial hearing so that the parties to the hearing then had an opportunity to respond. Ibid., 650 (citations omitted).
land use and historic preservation discuss whether cross-examination and the right to call expert witnesses is required or merely advisable. Furthermore, the various federal jurisdictions vary in how the question of cross-examination is analyzed. As such, it is important for historic preservation professionals to be familiar with their jurisdiction.

It appears that only the fourth and ninth circuits have cases holding that cross-examination must be allowed in land use hearings (although the question is not fully settled in the ninth circuit). Recent cases affirm a case-by-case analysis that takes into account all of the procedural rights granted to the individual and determines whether the denial of cross-examination was a denial of procedural due process.

Given the uncertainty as to how courts will rule on a denial of the right to cross-examination, it is advisable for HPCs simply to grant the right. If an HPC plans to deny the right of cross-examination, then it should be sure to document its rationale for doing so and perhaps to give a legal rationale based on the Matthews test. For example, an HPC could cite specific facts and hold that given those facts, it would not grant the right to cross-examination because of the low risk of erroneous deprivation as it compares to the higher administrative burden that the procedure would create.

As to the examination of expert witnesses, review of the case law suggests that HPCs may call experts to testify and rebut the experts of a third party. The court in Rutherford reasoned that as long as the petitioner was granted the opportunity to examine and rebut the expert testimony, then the petitioner was granted a fair hearing. Should an HPC decide to call an expert, however, it should be cognizant of the fact that under the Matthews test, this likely strengthens a plaintiff’s argument that there was an erroneous deprivation. Consequently, if experts are
involved, rebuttal and cross-examination (whether in person or via submitted writings) should be allowed for a full and fair hearing.

If a petitioner chooses to exercise the right to cross examine or to call an expert, an HPC should not be caught off-guard. Procedures in the ordinance or guidelines should contemplate this possibility. An HPC may choose to tailor its policies to reflect the jurisprudence of its jurisdiction; however, it is not advisable to create a blanket prohibition. Even in flexible jurisdictions, a blanket prohibition may be unconstitutional on its face because of the case-by-case application of the *Matthews* test required for procedural due process analysis.

It is also important to note that, while these processes should generally be allowed in the initial HPC hearings, such processes may not be appropriate in appellate hearings. It is common in many jurisdictions for the appellate body for an HPC decision to be the mayor and commission or other body composed of elected officials. Sometimes, regardless of the evidence presented and the documentation thereof, these officials make procedural mistakes and run into as many, or more, challenges than HPCs.

In Georgia, for example, the mayor and commission serve as an appellate body and may “approve, modify and approve, or reject the determination made by the commission if the governing body finds the commission abused its discretion in reaching its decision.”129 It is often difficult for these appellate bodies to discern what level of procedural rights should be granted in appellate hearings. Although, the general rule is “the more the better,” in appellate hearings, procedure related to a hearing should be limited because review is limited to the record.130


130 Jackson v. Spalding City, 265 Ga. 792 (1995) ([T]he board determines the facts and applies the ordinance’s legal standard to them...[T]hus, the board of appeals functioned as an administrative body making a quasi-judicial decision when it acted on the variance application.”) at 793-794; Gwinnett County v. Ehler Enters., Inc., 270 Ga.
While courts rarely speak to procedural due process in quasi-judicial appellate bodies in the COA process, the fact that the review is limited to the record highlights some basic principles. In particular, new evidence should not be presented at the appellate hearing.¹³¹ This means that calling witnesses, cross-examination, and other procedural rights are circumscribed at an appellate hearing. As such, an appellate body should only allow procedural rights which allow them to accomplish their review of the record. Depending on the jurisdiction and documentation of the lower hearing, the HPC and petitioner will likely be allowed to file briefs and to present their case because the level of detail required in the record is more relaxed than the requirements of a full trial record.¹³² The HPCs filings or presentations, however, should be limited to explaining the rationale for its decision while the petitioner’s filings or presentation should focus on attacking said rationale.¹³³ Consequently, the process granted in appellate hearings and fact-finding hearings should reflect their context and, in the appellate setting, be limited to ascertaining whether a hearing body abused its discretion or acted arbitrarily based on the proceedings, evidence, and rationale.

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¹³² See South Neighborhood League v. Board of Commissioners of Clackamas County, 569 P.2d 1063, 1076 (1977) (en banc). (“No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.”)

¹³³ See Gwinnett County v. Ehler Enters., Inc.
D. Informed Decision Making & Preparing for Challenges

For an adjudicatory body, the essential function of the record of proceedings is to show what information and evidence was relied upon and the reasoning behind that reliance. Mistakes or minor discrepancies in the record are not fatal to a decision or a clear breach of this right. However, if such a mistake goes to a key piece of evidence upon which the HPC relied for its decision, the decision could be rendered inadequate. This information is necessary for two main reasons: (1) to allow a reviewing appellate body to assess the adequacy of the decision; and (2) to help the petitioner understand the decision and why it was made.

In order for an appellate body to review a decision, an HPC decision should identify important evidence and explain the rationale of the decision. In addition to identifying evidence relied upon, the decision should also identify negative evidence and address why this evidence was not convincing. Maintaining a well-developed record in this way, upholds the integrity of the process to a reviewing appellate body and establishes the procedures granted to the petitioner. Without a clear, accurate, and detailed record, an HPC could grant all the procedural rights described in Goldberg but would struggle to show how a given petitioner received adequate procedural due process.134

The second reason for maintaining a detailed record is legally and practically less but is perhaps the most important factor in maintaining the integrity of HPC hearings. Clearly communicating why a petitioner’s request was denied serves to allay the misgivings of an

134 While this level of detail is helpful and would constitute good practice, overly formal findings and detailed records are not usually a dispositive requirement for administrative bodies. See South Neighborhood League, 1076.
aggrieved party, and it serves to preserve public trust and uphold the dignity of the individual and community. Being that one of the most convincing legislative rationales to justify historic preservation legislation is to strengthen and serve communities, specifying the rationale for decisions is an integral part of the process, and will continue to be important as historic preservation legal regimes develop and evolve.
CHAPTER 6
CONCLUSION

Given all of the above review and analysis, have courts clarified administrative doctrine regarding historic preservation administration since the early 1980s? The short answer is yes, at least for certain aspects of procedural due process. However, guidance concerning procedural due process as is relevant to HPCs has tended to be general in nature and has tended to focus less on the constitutional aspect of procedure, but more on requirements of statutes and ordinances. Since the mid-1980s, courts have continued to develop concepts of what constitutes a property interest, notice, and to refine which rights are allowed or mandated in hearings like cross-examination, expert witnesses, and impartial decision-makers. While these areas have continued to be developed, other issues remain obscured and Edmondson’s primary concern with reforming the legislative-adjudicative test to allow for greater judicial review and clarification is a persistent point of contention.

Where courts have not spoken to specific situations or procedural rights, there are general lessons that can be derived from past cases (as described above in Chapter 5). For most cases and practitioners, these general lessons are sufficient and will keep them and their municipality out of legal trouble. For more contentious cases and where there may be more push back from the community, applicant, and even other city officials, knowing the constitutional requirements can serve to better inform and combat adverse parties, and to persuasively appeal to fundamental notions of fair play, justice, and historical legacy.
Yet, while the lessons are useful for moving forward and being prepared is essential, it is almost impossible to prepare for every possible situation that an HPC encounters. Furthermore, it is even more challenging to attempt to predict how courts would rule should prospective issues come under review. Consequently, lessons from past mistakes will only take preservationists so far. Perhaps, instead, it is useful for practitioners to worry less about what minimum legal requirements of procedure are demanded by black letter law, and instead to continually consider what seems most fair—and to make sure that any efforts to achieve that sense of fairness are well documented. Whether it is the requirements of the Constitution or local and state law, such procedures only set a floor, and it is beneficial to keep in mind what should procedural due process look like in these commission meetings.

In the introduction of this paper the public purpose of preservation law is discussed. Assuming that the community-based rationale is the predominant understanding of the public purpose served by historic preservation policies, what type of process would best serve this purpose? In the Goldberg, case, the Supreme Court spoke to the essential purposes of procedural due process hearings, listing 10 justifications:

1. To respect the dignity of the individual
2. To empower individuals to make their case
3. To enhance people’s satisfaction with government actions
4. To ensure the accuracy of agency decisions
5. To ensure consistency of agency decisions
6. To encourage agency caution before taking actions
7. To encourage wise discretion in agencies
8. To fulfill the purposes of substantive programs
9. To identify recurring problems and improve systems over time
10. To facilitate judicial review of decisions

Preservationists should keep these justifications for wielding supreme executive authority in mind when constructing ordinances, drafting guidance documents, and hearing petitioners make their case. As James Madison stated in the The Federalist No. 51, procedural due process ensures the rule of law in “a government which is to be administered by men over men.”135 Historic preservation commissions employ substantial authority granted to them by the community: they can utilize the force of the state to tell people what to do with their own property. This power should never be wielded arbitrarily. It speaks volumes of any community that passes a local ordinance that grants such a power to local, appointed officials and signifies a high level of trust held by the constituents to empower the local government. Wielding this power is a solemn duty on the part of the historic preservation professional. After all, what gives you the right to tell people what to do with their property? The answer is, the trust of the local community in the local government and the community’s valuation of their historic resources. Yet this grant of power is predicated on one condition: that the officials carrying out this responsibility do so in good faith and in a fair and forthright manner.

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