

# Historic Preservation Law

## Theory and Practice

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## Part One: Constitutional Foundations and Legal Background

### Constitutional Rights

- ◇ Eminent Domain
- ◇ Regulatory Takings
- ◇ Due Process
- ◇ Equal Protection
- ◇ First Amendment

### State Law Requirements

- ◇ Georgia Historic Preservation Act
- ◇ Zoning Procedures Law
- ◇ Open Meetings Law
- ◇ Conflicts of Interest

First part of this session: constitutional basis for HP regulation; background on certain other relevant laws

Second part: nitty gritty – what all this means for local gov't preservation commissions

What can you do to make good decisions and avoid getting sued: title of written materials (“Making Defensible Decisions”) is apt

## The Bundle of Rights

- ◇ Property owner can convey partial rights in property without losing ownership (e.g., through leases, easements, etc.)
- ◇ **Government regulation** may also deprive owner of a portion of rights



Under our system of gov't and economic system, ownership of property is not unitary; ownership includes not just physical features (land and buildings) but a "bundle of rights"

Even when we own property in "fee simple" we seldom actually own the entire bundle

Mortgages, easements, leases etc. all represent rights in our property that have been given to someone else, but we still consider ourselves the owner

Same with government regulation: zoning, development codes, HP ordinances all represent a small infringement of our rights to do whatever we want to with our property

## Constitutional Foundations

### Property Ownership Rights:

- ◇ No person shall... be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." *U.S. Const. Amend. V (applies to federal gov't)*
- ◇ "...nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV (applies to states)*

Concept of property ownership and gov't power to regulate it grounded in constitutional law

As preservationists, easy to forget that many otherwise reasonable people find property regulation offensive

Lots of statements about "property rights" that aren't accurate – constitution balances property rights against gov't responsibility to provide for public health, safety welfare – authorizes regulation, including HP regulation, within limits  
>Gov't can take some the sticks from our bundle of rights.

## The Balancing Test



### Governmental power

To **take** property for a **public purpose**

- ◇ To **regulate** property to promote the **public health, safety, welfare**

### Property Owner's rights

**Compensation** if property taken

- ◇ **Due process**
- ◇ **Equal protection**

Gov't police powers are not unlimited

Property can be taken outright (I.e., condemnation)

IF it's done for a public purpose that promotes the public health, safety, welfare

Provided that property owner is given due process and that the taking is not discriminatory

AND property owner is compensated for what's taken

## Eminent Domain

- ◇ Government may **take** private property to devote to public purpose as long as it pays **just compensation**



But what is a legitimate public purpose ?  
(*Kelo v. New London*)

## Just Compensation

Required

- ◇ if the owner is dispossessed of the property through eminent domain

OR

- ◇ is deprived of all reasonable use of property through *regulatory taking*



Compensation is only required if the property is actually taken away

Or if regulations on the property deprive the owner of all reasonable use of it

As HPC member you will hear owners complain that they should be compensated for having to comply with HP ordinance – not true under current interpretation of constitution UNLESS it rises to a taking

## Property Regulation

(zoning, development, preservation ordinances...)

- ◇ Government may subject private property to reasonable **regulation** to promote the **public health, safety, welfare**
- ◇ This includes **preserving aesthetic, cultural, historic resources.**

*(Penn Central v. NYC)*



## Preservation Ordinances

### Limit the free use of property

- ◇ By imposing architectural and aesthetic standards
- ◇ By limiting demolition



### Promote the public welfare

- ◇ by preserving historic and cultural resources
- ◇ by respecting aesthetic values

## Scope of Preservation Regulation

Regulation is NOT a “taking” as long as it is

- ◇ substantially related to promotion of general welfare
- ◇ does not deprive owner of all beneficial use of the property



## "Demolition By Neglect"

May Preservation Ordinance  
Impose Maintenance Requirements?



Yes, preservation ordinance may require owners to spend money if the purpose is legitimate, the means reasonable and not excessively burdensome

(Maher v. City of New Orleans)

"Demolition by neglect" is a form of passive resistance to HP regulation: if you won't let me tear it down, I'll let it fall apart.

HP ordinances **may** require owners to take certain measures to maintain property, esp. where it can be tied to public safety reasons such as preventing fire hazards, collapse, etc.

## Due Process

- ◊ **Procedural due process** requires notice & opportunity to be heard before decision is made



- ◊ **Substantive due process** protects against unlawful taking, requires compensation for taking

## Due Process Requirements For Preservation Ordinances

- ◇ The ordinance must be **clearly written** so that citizens will know how to comply
- ◇ The standards must be **sufficiently detailed** so that decisions will be predictable, not arbitrary
- ◇ The ordinance and guidelines **should not leave decisions to the unfettered discretion** of the commission



## The Equal Protection Clause

- ◇ "...nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV*



## Equal Protection Requirements for Preservation Ordinances

- ◇ Individual or class cannot be **singled out** for different treatment without a **rational basis** for doing so.
- ◇ Ordinance should have **general application** to an appropriately defined district or class of properties.
- ◇ District or class must be defined in a manner that is **rationally related** to legitimate preservation interests:

An ordinance or gov't action that treats one persons differently from other similarly situated persons violates equal protection clause of 14<sup>th</sup> amendment *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), owner asked without adequate reason to grant a 33-foot easement to the municipality to connect the property to the municipal water supply when other arguably similarly situated owners were only required to grant a 15-foot easement

In HP context: denying one property owner COA to erect fence when other similarly situated property owners were given COAs for similar fences and there is no preservation inteerest that justifies the distinction

## Historic Preservation Laws and the First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. Amend. I.

Does enforcement of an historic preservation ordinance result in a substantial burden on the church's free exercise of religion?



Generally the courts have held that religious properties may be designated as historic properties or landmarks without violating the First Amendment.

A religious organization must comply with the regulatory aspects of the preservation ordinance **unless** it regulates a building feature that is integral to the religious exercise

Example: ordinance forbids

## Procedural Requirements: Due Process and State Law

### Notice to public

- ◊ Before approving ordinance
- ◊ Before designating districts

### Notice to affected property owners:

- ◊ Before making decisions affecting them (includes neighbors)

### Hearing

- ◊ Public hearing on ordinance, district designation
- ◊ Public hearing on individual applications
- ◊ Opportunity to comment and present evidence (both for and against)

## Georgia Historic Preservation Act

O.C.G.A. Section 22-10-40 et seq.

- ◇ State enabling legislation authorizing local governments to designate properties and districts, establish design review process, and create local preservation commission
- ◇ Determines scope of preservation commission authority to regulate “material changes in appearance” of historic properties as defined in statute

## Georgia Zoning Procedures Law: O.C.G.A. Section 36-66-1, et seq.

- ◇ Specifies procedural (notice, hearing, etc.) requirements for the enactment and application of laws governing “zoning decisions”
- ◇ Defines “zoning decision” as a governmental action affecting the use or development of property according to districts
- ◇ *Probably* applies to preservation ordinance since it regulates use/development of property only in historic districts

## Georgia Open Meetings Law

O.C.G.A. Section 50-14-1, et. Seq.

- ◇ requires that meetings of government agencies be open to the public
- ◇ applies to preservation commissions whenever a quorum gathers to conduct official business
- ◇ Requires 24 hours posted notice of meeting
- ◇ Violation invalidates action taken



## Avoiding Conflicts of Interest For Preservation Commissioners

- ◇ O.C.G.A. Section 45-10-3 (Ethics standards for state and local government officials)
- ◇ O.C.G.A. Section 36-67A-2 (Conflicts of Interest for zoning and planning commission members)
- ◇ Local ordinance or commission bylaws.

**DISCLOSURE** of potential conflict of interest (financial interest in property or business entity affected by decision).

If a conflict exists, **REFRAIN FROM PARTICIPATING** in decision making process.

## Part Two: Theory Into Practice

### *Why Do Preservation Commissions get Sued?*

- ◇ Common legal challenges and how to avoid or overcome them
- ◇ Making your decisions hold up on appeal.

## Legal Challenges to HPC Decisions

### *Appeals*

directly challenge

decision on its merits

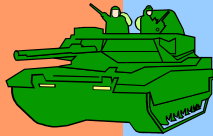
(e.g., denial of COA)

### *Constitutional/legal challenges*

◇ to HP ordinance

◇ to designation

◇ to conduct of hearing



# Appeals

Under most ordinances:



- ◇ non-jury proceeding in county superior court
- ◇ "on the record" (not "de novo")
- ◇ within thirty days of decision
- ◇ by unsuccessful applicant or protesting neighbor

Underscores importance of developing complete record before HPC – must contain evidence to support each finding

Must be written and/or taped record – best to have transcript for judge to read

Need designated person to maintain record who can certify that it is the true record and send it up to the court

No new evidence may be introduced before superior court! No trial, just hearing (oral argument)

Some ordinances (e.g. DeKalb) provide for appeal to Board of Commissioners or City Council before going to court.

## Writ of Certiorari

Appeal procedure commonly required by HP ordinance (governed by OCGA Section 5-4-1, et seq.)

Ancient writ for appeal of judicial or quasi-judicial decisions of local courts or administrative bodies

HP Commission is named as "respondent;" responsible for sending up record

No one really understands it, including courts

County or City should also be named as a defendant – separate party from HPC

Each should have separate counsel

Be aware that city council or county commission & law dept. may not be as motivated as you are to uphold your decision

## Legal "Standing"

Who is entitled to take HPC to court?

- ◇ applicant
- ◇ affected neighbors IF they have standing  
(as defined by ordinance and/or common law)

*Standing = property interest + special damage*  
*"Dependent standing" for civic associations*

Dekalb Co. v. Wapensky: must show interest (usually property ownership) plus special damages (negative impacts) not common to community as a whole  
Adjacent or in close proximity; reduction in value or use/enjoyment of property, etc.  
Civic Ass'n must be accompanied by indiv. property owners unless it owns property

## "Abuse of Discretion" Standard

= *Standard of review* applied by court.

HPC may abuse its discretion

- ◇ by making **factual** findings that are unsupported by any evidence;
- ◇ by committing **legal error**; or
- ◇ by failing to follow correct procedures



Standard of review is the yardstick used by the court to decide whether to reverse HPC decision

Court does not "second-guess" HPC

Abuse of discretion is deferential standard

Should be upheld as long as there was any evidence to support factual findings

## Defensible Decision Checklist

1. Describe application and establish HPC jurisdiction. (e.g., is a COA required? Why?)
2. Make factual findings as to each ordinance criterion for COA, *citing specific evidence in record*.
3. State conclusion in terms of ordinance standard (e.g., has applicant shown that requirements are met for COA approval?
4. Are any conditions necessary? Why?).
5. State decision, including any conditions.
6. Advise parties of appeal rights.



Track the language of the ordinance  
Follow a logical sequence

## Outcome of Appeal

Court <b>affirms</b> HPC decision (e.g., upholds denial of COA)	Court <b>reverses</b> HPC decision (e.g., reverses denial and grants COA)	Court <b>reverses</b> HPC decision and <b>remands</b> (e.g., reverses denial of COA and remands to HPC for additional consideration)
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## Constitutional Challenges

◇ to ordinance "on its face"

e.g., due process challenge on grounds that ordinance is vague, overly broad, vagueness, violates equal protection

◇ to ordinance "as applied" to applicant in this case

e.g., procedural violations, equal protection claim, takings claim

Should be raised by party before HPC (exhaustion requirement) even though HPC not expected to resolve constitutional issues

That's why applicants submit constitutional objections letters

## Legal Challenges to Ordinance

- ◇ Ordinance exceeds scope of lawful HPC jurisdiction under GHPA
- ◇ Ordinance was not properly enacted by council or commission
- ◇ Guidelines were not properly adopted
- ◇ HPC has failed to establish procedural rules
- ◇ HPC members should have been disqualified from voting

*Et cetera....*

First three issues outside of HPC control – need to monitor, enlist support of city/county attorney

Make sure proper notice was given, public hearings held, when ordinance enacted. If in doubt, do it over.

Jurisdictional challenge: e.g., does GHPA allow HPC to regulate platting patterns (not visible)

## Top Ten Recommendations For Avoiding/Overcoming Legal Challenges

1. Know your ordinance inside out and follow it.
2. Be sure your ordinance contains clear guidelines.
3. Establish rules of procedure and follow them faithfully every time.
4. Give reasons for your findings, both orally and in writing.
5. Be sure there is strict compliance with notice requirements.

## Top Ten, *continued*

6. Be sure there is factual evidence IN THE RECORD to support each finding.
7. Be sure you state your decision in terms of the legal standard – track the ordinance language.
8. Allow applicants and opponents equal time to be heard; err on the side of generosity.
9. Fully disclose any potential conflict; if in doubt, recuse.
10. Have a system in place for maintaining an accurate written record of all proceedings.