

PROCEDURAL DUE PROCESS
in Plain English
A GUIDE FOR PRESERVATION COMMISSIONS



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FOREWORD

ONE OF THE MOST basic concepts underlying the American experiment in democratic government has always been a special sense of “fairness” — the idea that all citizens are to be treated equally before the law. This sense of fairness and equality are what the Fourteenth Amendment and equivalent provisions in most state constitutions are all about. Without these words, the American Constitution — indeed, the grand adventure itself — would be meaningless.

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

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



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



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

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

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I. PROCEDURAL DUE PROCESS: AN OVERVIEW



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



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

1. “Procedural due process” refers to procedures designed to safeguard individuals from arbitrary governmental action. These procedures help to ensure that the substance of a decision by a government agency or official is reasonable, publicly accepted, and not susceptible to legal challenge. In the preservation context, procedural due process includes the need for **notice** of a commission action, the need for and type of **hearing** required, and the procedures necessary for **fair and informed decisionmaking**.
2. The **baseline** to look for procedural requirements are those procedures imposed by statute—state enabling legislation, preservation ordinances, state sunshine laws, administrative procedure acts, and others. Because due process requirements vary from state to state, these statutory sources—as well as relevant case law from the state—must be consulted in determining what procedures apply in any given case.

3. It is the responsibility of each preservation commission to establish and follow its own **rules of procedure** that meet the requirements of this statutory baseline, and that go beyond those requirements as necessary to provide additional detail to satisfy constitutional and fairness requirements.
4. Property owners, neighbors, and interested members of the general public must be provided a reasonable opportunity to be heard on any matter considered by a preservation commission that affects their interests. There can be no opportunity to be heard, however, without appropriate notice of an upcoming action by a preservation commission. Therefore, preservation commissions must provide reasonable notice of any upcoming action to affected property owners, neighbors, other interested parties, and the general public. Notice may include (1) individually **mailed notice**, (2) **published notice** (usually through local newspapers), and (3) **posted notice**. Generally, the closer the distance a person is from a property under consideration by a commission, the more appropriate it is to use individually mailed notice. Notice should be sufficiently detailed so that the person receiving the notice understands the nature of the action the commission is considering, the date, time, and place for any public hearing, and the opportunity for public participation.
5. A public hearing should be held **prior to** a commission action on a specific application or proposal. One exception is the case of **interim controls**, including preliminary designations of historic properties, in which case temporary restrictions on the use of property may be put into place pending final action by the commission on a nominated property, in order to prevent demolition or significant alteration of properties under consideration for protection.
6. Public hearings by preservation commissions must be carried out in a **business-like** manner, but need not have the formality of trial-like hearings. Consequently, except where a particular jurisdiction may require it (consult your local attorney), swearing-in of witnesses and formal cross-examina-

tion are generally not required. Hearings should be **open to the public**, consistent with state “sunshine acts,” and managed in a way that permits a meaningful opportunity for interested parties to present their views and relevant information. Commissions may use **reasonable time limits** and other means to manage the conduct of the hearing, so long as these requirements are applied even-handedly to all parties. Above all, every participant in a public hearing has the right to be treated fairly, and with respect.

7. A preservation commission’s decision should adequately explain the **basis of the decision**, with specific reference to information in **the record** and the relevant **standards and criteria** included in the preservation ordinance.
8. The commission should carefully record its actions through **written minutes**. It is also advisable to maintain **an audio or video recording** of commission meetings and hearings, which can be transcribed as necessary (or as may be required as a standard procedure by local practice).
9. The tenets of procedural due process require decisionmaking by a fair and unbiased tribunal. Consequently, preservation commission members should avoid even the perception of **bias or prejudice** in their conduct, particularly by avoiding extraneous commentary during—or outside of—commission meetings. Commission members should also be careful to avoid **conflicts of interest**, or even the appearance of a conflict, due to a personal, financial, or professional interest in the subject matter of a proceeding (or with an interested party). Where a potential conflict exists, advice should be sought from a competent outside source, such as a city or municipal attorney. If a conflict is found to exist, a commissioner may not participate in the decisionmaking process.
10. A commission’s decisions should be made on the basis of information contained in the public record and available to all interested parties. **Ex parte contacts** (private communications between an interested party and a commissioner on an issue before the commission) should be prohibited.

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

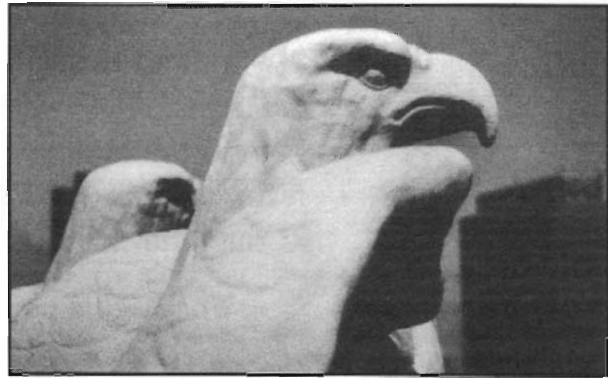
II. THE LEGAL FRAMEWORK



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

—U.S. Const. Amend. XIV

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



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

What *is* “procedural due process”? The procedural protections

emanating from the Due Process Clause generally are considered to cover three related subjects:

- (1) the need for, and type of, **notice** required of governmental actions;
- (2) the need for, and type of, **hearing** required; and
- (3) the need for **fair and informed decision-making**.

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

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

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

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

“Procedural due process means many different things in the numerous contexts in which it applies.”

A. THE CONSTITUTION AND THE COURTS

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

There are four basic factors considered by the courts in determining which procedural standards apply to specific governmental actions affecting the interests of private individuals. They are: (1) the nature of the governmental action; (2) the nature of the interest of the person in question; (3) the nature of the interference by the proposed governmental action; and (4) the nature of the government's interest in carrying out the action.

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

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

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

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

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It is advisable to check with local counsel to find out how courts in any given jurisdiction are likely to characterize the various actions that may be taken by the preservation commission.

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

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

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

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

In the case of historic preservation ordinances, the owner or occupant of a particular property under consideration for designation, or that is the subject of a permit proceeding, clearly has a strong interest that may be affected by the government action—an interest in the legitimate use of land. Adjacent landowners, who are likely to be directly affected by changes to a historic property, also have a strong interest. In the case of a historic district, other property owners within that district may have a lesser, but nonetheless distinct, interest in any action that may affect the integrity of the historic district. Even members of the general public have an interest in the action, although generally their interests are less tangible than those so directly affected.

Each of these interested parties may be entitled to *some* procedural protection, through notice or an opportunity to participate in a public hearing. Nonetheless, the *degree* of protection afforded may vary, depending on the interest. For example, a landowner who has applied for a permit to alter his or her property has such a strong interest in the outcome of the preservation commission proceeding that he or she should be entitled to receive individual written notice of an upcoming hearing on that application. However, a landowner three blocks away has a lesser interest in the proceeding, and may have to rely on some lesser degree of notice—such as a notice published in a local newspaper, or a sign posted in front of the property in question. Thus, the answer to the question “What amount of process am I due?” may depend to a certain degree on the person asking the question.

3. To what degree does the proposed governmental action actually interfere in a protected interest?

Procedural due process applies to any governmental action that affects a “life, liberty, or property” interest recognized by the Constitution. Different types of governmental actions have different impacts on each of those interests. The constitutional analysis of procedural due process used by the courts requires an examination of the nature of the interference, in order to adjust the procedures accordingly.

Historic preservation regulations affect private property or economic interests, rather than interests relating to life or liberty. Within this area of interests, however, the degree of actual regula-

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

4. What is the nature of the government's interest?

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

B. A PRACTICAL APPROACH FOR LOOKING AT PROCEDURAL DUE PROCESS

The constitutional framework described above should be understood as general guidance that can help local governments understand the way that the courts approach the issue of procedural due process. From a practical standpoint, however, this constitutional framework gives little specific direction for determining what procedures should be used in any particular context. Nonetheless, several basic principles can serve as a practical approach for local

preservation commissions that recognize the need to establish a workable set of procedures to govern the various actions that may be taken by a local historic preservation commission or review board.

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

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

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

It is advisable for local preservation commissions to seek the guidance of a local attorney—either a municipal attorney or lawyer in private practice—with a working knowledge of the particular

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court decisions in their state that may be relevant in determining the procedures that should be followed by the commission in exercising its authority.

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

III. WHAT PROCESS IS DUE?



“The fundamental requisite of due process of law is the opportunity to be heard.”—Grannis v. Ordean, 234 U.S. 385 (1914)

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



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

A. NOTICE

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

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

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

Who should receive notice? The individual whose property is under consideration for historic designation should be given notice of any upcoming hearing by a preservation commission on the proposed designation. Also, the individual who has applied for a permit to alter or demolish a designated property should be given notice of the commission's planned consideration of that application.

Are neighbors and other nearby property owners entitled to notice? While their *legal* entitlement to notice may be less obvious, as a matter of fairness—and to ensure broad public acceptance of commission decisions—*some* provision for notice to nearby property owners should be established. (The different ways that notice may be accomplished are described below.)

What about the general public? Although the interests of the public at large may not be as obvious as those directly affected by the actions of a preservation commission, it is advisable (and in many cases required by statute) that a commission give some type of public notice concerning its upcoming actions. After all, preservation commissions are designed to promote the educational, cultural, economic, and general welfare of the public through the preservation and protection of historic and architectural resources, and to provide a sense of community identity. Consistent with this

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purpose, preservation commissions should provide notice of upcoming actions to the general public, as well as to interested parties. (Some communities, in addition to providing general public notice of pending actions in the newspaper, provide individual mailed notice as a courtesy to interested organizations and individuals.)

What type of notice is required? The most common types of notice are: (1) individual mailed notice; (2) published notice (usually through local newspapers); and (3) posted notice (generally on a sign on the property that is the subject of the action). These three types of notice vary in degree in both cost and effectiveness.

The use of individual mailed notice is generally only required for those persons who will be directly affected by a local commission's actions—particularly the owner whose property is under consideration for designation, or the person who has applied for a permit to alter or demolish a designated property. A number of communities, as standard practice, also provide individual mailed notice to adjacent property owners within a set distance from the property—three hundred feet, for example. For these individuals, mailing notice to the “owner of record” listed on the property tax rolls is generally considered sufficient. Due process does not require that a title search be undertaken to establish ownership (although a few state statutes and local ordinances require that ownership be established from deed information). In most cases, consistent use of an established database, such as property tax records or water department records, is sufficient for purposes of identifying owners for this type of notice.

For others in the area, who may be interested in the proceedings but who are not required under local procedures to receive individual mailed notice, the posting of a sign on the subject property is generally considered sufficient to meet procedural due process requirements.

For the general public, public advertised notice is generally both effective and cost-efficient. While not always considered necessary as a matter of constitutional law, notice through publication in a newspaper of general circulation in the community is generally considered an appropriate method to provide notice to the general public of impending actions that a commission is considering.

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

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

Designation by reference to another source may provide no notice. Some preservation ordinances provide for local designation of properties on the basis of eligibility or listing in the National Register of Historic Places. The National Register was not, however, intended to be used as a local regulatory tool, and does not have the same impact on private property interests as local designation does. (See discussion above on pages 9-10.) Consequently, the federal government (which administers the Register) may not have applied the same notice requirements for a National Register listing that would ordinarily apply to a local regulatory program. (Notice requirements for National Register nominations are specified in federal regulations, and differ from those described here.) Consequently, any local preservation ordinance and preservation commission that provides for local designation on the basis of eligibility or listing in the National Register should provide separate notice to the property owner before locally designating the property because of the potential effect of local designation on private property interests.

Notice to new purchasers of property. Most courts recognize that new purchasers have a responsibility to investigate the legal status of the property, particularly as to matters that are part of the public record, such as zoning classifications or historic designation. Therefore, most new purchasers cannot claim that they were not given notice of a property's local historic designation status, since they were legally "on notice" at the time of purchase. Nonetheless, while not a constitutional requirement, it is a good idea, where

possible, to record local historic designations in local land records. Some communities include historic designation as an item on a seller's disclosure form. In addition, some communities make it a practice to mail information to new purchasers notifying them of the property's prior designation and explaining the procedures under the historic preservation ordinance. With the proliferation of Geographic Information System (GIS) technology allowing local governments to record a wealth of information about each parcel located in a community in a data base, information regarding historic designation should be simple to archive and obtain, and should satisfy any notice concerns relating to subsequent purchasers of designated buildings.

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

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

If a hearing addresses new matters that were not included in the original notice, new notice may be required.

what will be addressed at the hearing, but not so limited in scope that it can be read to exclude consideration of related matters.

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

B. THE PUBLIC HEARING

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

Courts have not rigidly applied standards for public hearings to meet these purposes. Instead, the courts generally weigh private interests relating to an individual's "right to be heard" against the public interest of fair but efficient hearings, so that decisionmaking can take place at the local level on a regular basis. Therefore, unless there is statutory or other legal guidance in a particular state or local community that suggests otherwise (which should be carefully determined by the preservation commission with the assistance of a knowledgeable attorney), public hearings can be fairly informal. How informal? "Informal" in the sense of not being "trial-like"—in other words, no swearing in of witnesses, no cross examination as long as opposing interests have a reasonable opportunity to present their views, and representation by counsel, while generally permitted, is not mandatory. Basically, what is required is that those affected by commission decisions have a fair opportunity to be informed of factors that will be considered by the commission, to present information relevant to the decision, and to

Those affected by commission decisions must have a fair opportunity to be informed of factors to be considered, to present information relevant to the decision, and to understand the basis for the decision once it is made.

understand the basis for the decision once it is made.

The basic elements of a fair hearing include:

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

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

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

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

The general rule in procedural due process is that a hearing should be held *prior* to a governmental action affecting a protected property interest.

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

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

Commission members are allowed—and should be encouraged—to ask questions of witnesses to determine if their testimony is credible. Commission members, however, must be careful not to “testify” at the hearing nor base their decision on information not made part of the public record.

Commission staff members, however, have a different role. Staff members play an important—and often active—role in putting together the record on which the commission's decision is based, but should not play an active role in making the decision itself. In a number of jurisdictions, staff members may actually present information regarding the matter at issue at the hearing, and may report on information gathered from their own investigations of the

Commission members are allowed, and should be encouraged, to ask questions of witnesses to determine if their testimony is credible. Commission members, however, must be careful not to “testify” at the hearing.

facts in a particular case. (This is often presented as a formal staff report, with recommendations, which becomes part of the public record.) In working with the commission, however, staff members should be careful not to present facts that are not made part of the public record.

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

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

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

Most jurisdictions do not require that local commissions swear in witnesses at public hearings, so long as testimony is taken in such a manner that all those involved understand the importance of the testimony.

examination will help resolve, because opinions regarding the significance of buildings to architecture, history and culture are not particularly well-suited to explanation through cross-examination. Instead, the ability to present opposing views and information will generally satisfy the interests that would otherwise be served by formal cross-examination. Testimony by all sides of a preservation issue effectively places all controversies squarely before the commission and becomes part of the record upon which commission members base their decision.

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

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

Commission members and commission staff must know and understand the sunshine act of their state. Questions about the

Commission members and commission staff must know and understand the “sunshine act” of their state, which requires meetings to be held openly after public notice.

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

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

Role of the expert. The expert witness has become a standard component of the hearing process. Technical information, accompanied by opinion evidence from experts and laypeople, help to explain the importance of a proposed action and relate the action to the standards and criteria included in the ordinance. In situations where a commission relies on lay testimony rather than expert testimony, the commission may find that its decision is challenged as “against the weight of the evidence.” A commission can reject an expert’s opinion in weighing and balancing the evidence even where there is no other expert testimony. However, in such a case the commission must clearly establish why the testimony of the expert is not being accepted, for example by showing that the testimony was not credible because of inconsistencies, or because of bias, conflicting evidence, or conflict of interest. (If expert testimony is one-sided, some commissions are authorized to call on their own

Commissions are responsible for compiling and preparing records and making them available to interested parties.

initiative other experts to testify, to give a more balanced picture.)

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

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

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

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

Where testimony by many individual members of the public is likely to be redundant, it is appropriate for the commission to ask that a spokesperson be appointed to address a particular point of view.

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

C. RECORD-BASED DECISIONMAKING

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

To ensure that a responsive decision is made by the commis-

A preservation commission's decision should adequately explain the basis of the decision, with specific reference to information in the record and to applicable ordinance criteria.

The record is a compilation of testimony from the hearings, written information provided by witnesses, staff reports and recommendations, and any other information that is placed into the record and used to form the basis for the decision.

sion: (1) a record of the commission hearings and decisionmaking process must be prepared; (2) the commission must issue a decision that lays out the rationale for the action taken by the commission; (3) the decision must be consistent with ordinance criteria and supported by facts in the record; (4) the decision should be consistent with previous decisions dealing with similar circumstances; (5) minutes of the meeting at which the decision was made should be prepared, maintained, and approved at the following meeting; and (6) a verbatim record in the form of an audio or video recording or transcript should be maintained.

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

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

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

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

For example, at least one court has upheld a commission's denial of a permit to apply vinyl siding on a house even where the commission had previously routinely approved such requests. The court concluded that the findings of fact supported such a decision. Thus, commissions should make every effort to follow precedent but at the same time not be hamstrung by it. As a practical matter, few cases are clearly identical. Good recordkeeping, however, is essential in order to note different facts that may justify different decisions.

Caution must also be taken in those cases that deal with issues never before considered by a commission. Before making a decision, the commission should carefully examine the facts and consider how the decision may apply to future applicants.

Minutes, Recordings, and Transcripts. Minutes of meetings are essential in preparing and maintaining a record for the commission to review in making its decisions or maintaining a history of the commission and its prior decisions for future commissioners. Minutes help give the commission an institutional memory and consistency, not only from meeting to meeting, but also over a long period of time as commission members change and are replaced. Minutes should be in writing and approved by the commission at its next meeting. Minutes should also be reasonably available for review by the public.

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

D. BIAS, CONFLICTS, AND OTHER COMPLICATIONS

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

Bias. Whether a historic preservation commission decision

Minutes of meetings are essential in preparing and maintaining a record for the commission

Commission members should always refrain from making statements regarding a particular matter outside of the commission meeting setting.

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

Biased commission members create two problems for historic preservation commissions. First, commission decisions may be challenged as violating due process requirements on the grounds of bias or conflict of interest. Second, any appearance that the members of the commission are biased or have conflicts of interest will diminish the public perception of the preservation commission and call into question the fairness of their decisionmaking process. Three types of bias, institutional policy bias, prejudgment of a case, and personal animus, are discussed below.

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

Prejudgment of a case. Another form of bias is prejudgment of the facts of a case. Prejudgment may be alleged where members of a commission have made public statements regarding the importance of saving a particular structure prior to closing of the record for designation or permit review. To avoid allegations of prejudgment, commission members should always refrain from making statements regarding a particular matter outside of the commission meeting setting and prior to completing the decisionmaking process.

Personal animus. Extremely difficult to prove are allegations

tion are generally not required. Hearings should be **open to the public**, consistent with state “sunshine acts,” and managed in a way that permits a meaningful opportunity for interested parties to present their views and relevant information. Commissions may use **reasonable time limits** and other means to manage the conduct of the hearing, so long as these requirements are applied even-handedly to all parties. Above all, every participant in a public hearing has the right to be treated fairly, and with respect.

7. A preservation commission’s decision should adequately explain the **basis of the decision**, with specific reference to information in **the record** and the relevant **standards and criteria** included in the preservation ordinance.
8. The commission should carefully record its actions through **written minutes**. It is also advisable to maintain **an audio or video recording** of commission meetings and hearings, which can be transcribed as necessary (or as may be required as a standard procedure by local practice).
9. The tenets of procedural due process require decisionmaking by a fair and unbiased tribunal. Consequently, preservation commission members should avoid even the perception of **bias or prejudice** in their conduct, particularly by avoiding extraneous commentary during—or outside of—commission meetings. Commission members should also be careful to avoid **conflicts of interest**, or even the appearance of a conflict, due to a personal, financial, or professional interest in the subject matter of a proceeding (or with an interested party). Where a potential conflict exists, advice should be sought from a competent outside source, such as a city or municipal attorney. If a conflict is found to exist, a commissioner may not participate in the decisionmaking process.
10. A commission’s decisions should be made on the basis of information contained in the public record and available to all interested parties. **Ex parte contacts** (private communications between an interested party and a commissioner on an issue before the commission) should be prohibited.

commissioner would be well-advised to note—both publicly and early in the process—his or her relationship with the organization. It may also be advisable in such circumstances to ask the city attorney or outside counsel to give an opinion for the record about any potential conflict.

Personal Conduct. Generally, commission members can be expected to act in a professional manner, without any general directive from procedural rules or guidelines. Occasionally, however, a commission member will take some action, such as attending a commission meeting while under the influence of alcohol, that will be particularly embarrassing to a commission. Clearly, these instances should be avoided. However, commissions should have rules and regulations addressing personal conduct so that when problems do occur they can be handled promptly and appropriately.

Applicants and their representatives, witnesses, and others coming before the commission must be treated courteously and professionally even under contentious circumstances.

Another personal conduct matter is failure to attend meetings on a regular basis. Most preservation ordinances or rules and regulations address regular meeting attendance. Missing a pre-determined number of consecutive meetings may be automatic grounds for dismissal as a commissioner.

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

Applicants and others coming before the commission must be treated courteously and professionally even under contentious circumstances.

unrelated to the commission proceeding.

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

***Ex parte* contacts are contrary to the ideals of fairness encompassed within the concept of procedural due process, because interested parties cannot rebut or challenge the information.**

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

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

Ex parte communications, however, may not be fatal to a proceeding, particularly if disclosed at an early date. When an *ex parte* contact or communication has been made, the commissioner should disclose for the record the nature and character of the contact. Such disclosure will give the interested parties an opportunity to rebut or challenge the information.

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

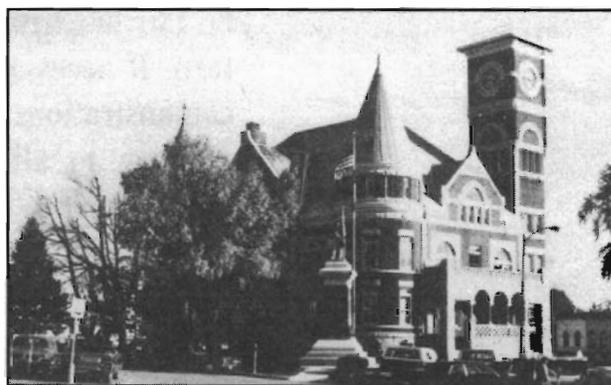
In the preservation context, while not common, some local

governments have established advisory commissions for each locally-designated historic district to provide input on preservation matters. It is strongly recommended that these advisory commissions establish and follow basic procedural due process guidelines, by providing proper notice of meetings, holding public meetings, conducting proceedings in a manner that provides interested parties a reasonable opportunity to participate, and making a decision within a reasonable time.

IV. TEN TIPS FROM THE CITY ATTORNEY



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



1. **Create and follow your own Rules of Procedure.**

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

2. **Treat every person fairly and impartially.** Treating a party fairly and impartially is more important than ruling in their favor. Parties frequently choose to appeal a commission decision less because they lost than out of a sense of unfair or biased treatment. As a practical matter, a large and legitimate part of due process is perception. Take your constitutional responsibility to provide a fair and meaningful hearing seriously:

- Treat everyone politely and with respect.
- Give every speaker your attention.

- Reciprocate courtesies—if you grant one party extra time, automatically extend that courtesy to the other parties.
 - Never express personal feelings about any individual.
3. **Always maintain control and decorum.** Usually the Chair bears this responsibility, but all members should assist. Be fair but firm. Never let speakers cross-talk or speak out of turn. If necessary, gavel them down. Do not allow clapping or demonstrations. It is unfair to others and a major perception problem to allow a public meeting to get out of hand or become disruptive.
 4. **Do not delay or compromise decisionmaking unnecessarily.** Avoid the human urge to delay every controversial decision in the hope that it will be resolved later, or to compromise every problem. Accept the fact that you will not be able to make everyone happy, and that you must make a decision that usually makes you the enemy to a substantial part of the public. Delay frequently takes a heavy toll on financial resources. Similarly, compromise always sounds good, but frequently backfires and is often directly contrary to the criteria you are required by the law to follow. If a tangible result is likely or further testimony necessary, deferral or compromise may be appropriate. Otherwise, take the plunge, make the difficult decision and move on.
 5. **Remember Ms. McGillicuddy.** If you encounter trouble deciding a thorny notice issue, it may help to imagine the existence of an unknown citizen—a Ms. McGillicuddy—who stays at home reading legal notices. Think about how she would react to your conduct. Focus on what she would know—not what you know. Would she be aware that you are taking up an issue you did not publish? How would she know that you decided to delay the meeting until tomorrow night? When in doubt, defer the meeting to ensure proper notice. Try to remain objective by keeping your focus on the unknown public when dealing with notice questions.

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

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

8. **Listen to your legal counsel.** Every commission needs legal counsel on occasion. If you anticipate a difficult hearing, ask your attorney to attend. If you ask a legal question, follow the advice given. The worst posture for legal counsel is to answer a question, only to have the client make a contrary

decision on the record—such inconsistencies are difficult to defend in court. If you are not prepared to follow advice, do not ask the question.

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

- 10. Follow your criteria.** Though not always framed in procedural terms, this point is critical. Read and understand the criteria in your ordinance. Listen to the evidence. Determine the facts. Then apply those facts to the applicable criteria. By tying your decision to the criteria with a very tight knot, you are treating all parties fairly while providing a sound foundation in case of an appeal.