

APPENDICES: **Legal Basis for Historic Preservation**

Constitutionality of Historic Preservation Regulation

Historic preservation regulation should be considered as one part of zoning and land use law. It is based on the police power of a community. Ordinances dealing with historic preservation have been found constitutional if they are well written. In *Penn Central Transportation Co. v. New York*, which was a precedent-setting court case in 1978, the U.S. Supreme Court found that communities could protect their historic resources as long as property owners had a reasonable use of their property left open to them and that their property rights were not violated by this action.

Senate Bill 847, signed into law in 1979, made Illinois the first state in the nation to legislatively adopt the *Penn Central* rule. Under this amended law, a municipality making the historic designation may not have to compensate a property owner, unless the designation denies the property owner of all reasonable use of the property.

Common Court Challenges to Historic Preservation

There have been many challenges to the legality of local preservation ordinances. These challenges have revolved around the “takings issue” or condemnation without just compensation, police power, and due process.

Condemnation without just compensation - The United States Constitution provides in the Fifth Amendment that “no private property be taken for public use, without just compensation.” However, if government regulations do not preclude all reasonable use of private property (i.e., a taking), then the courts have upheld regulations that restrict use of private property without formal transfer of title to the government.

Any ordinance that might restrict the use of private property needs to consider the taking question. A regulatory taking might be found by the courts due to a number of factors, including:

- assuming that a land use regulation has a legitimate state interest, the regulation does not substantially advance that interest; or
- the advancement of a legitimate state interest places the disproportionate burden of securing a benefit upon a single landowner when it is more properly borne by the general community; or
- reasonable investments were made prior to general notice of the regulatory program; or
- the economic effect of the regulation deprives the landowner of all, or substantially all, beneficial use of the property, and there are no offsetting reciprocal benefits.

Other cases related to land use have been considered by the U.S. Supreme Court in the last fifteen years. These include the following:

First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 1987. According to the Court, even a temporary regulatory taking requires payment of compensation.

Nollan v. California Coastal Commission, 1987. This case decided the test of a rational nexus between the public purpose and the regulation. A regulation or prohibition must substantially advance a legitimate state interest.

Lucas v. South Carolina Coastal Commission, 1992. A landowner successfully argued that a state law, as applied to his beachfront property, was a taking and denied his right to build on the property. The Supreme Court upheld the ruling.

Dolan v. City of Tigard, 1994. A rough proportionality between a condition of permit approval and a development's potential harm must be shown by a city, according to the Court. The Court also found that even if a relatively small portion of a property was used, such as for a bike path or flood way easement, that was enough to call into question the "taking" of property rights. The whole use of a property was not required to be used.

Takings claims can be headed off by backing up regulations with research and clear rationale; demonstrating how an ordinance, that restricts property rights to some extent, seeks to avoid potential harm to the same extent; and establishing variance procedures for property owners caught under a changing ordinance. The issue of such variance procedures is closely related to due process.

Police power - As given by the state, a community's right to pass laws and ordinances to preserve public order and tranquility and to promote the public health, safety, and morals and other aspects of the general welfare is called "police power." In *Santa Fe v. Gamble-Skogomo Inc.* (1964), the court considered architectural style and preservation of a historic area a proper use of police power and the enforcement of the City's preservation ordinance was accepted.

Due process - The United States Constitution, in the Fourteenth Amendment, prohibits government action that robs "any person of...liberty or property, without due process of law." This amendment enjoins that administrative and quasi-judicial decision-making meet minimal standards of fairness, while also applying to states the taking clause. Preservation ordinances that are poorly written may still be found unconstitutional. Therefore, such legislation must be competently written. The three due process issues of Designation, Design Review, and Notice and Appeals must have careful and adequate attention in any historic preservation ordinance.

Designation - A local landmark commission must uniformly employ standards in designating historic properties and districts. It must not appear that certain properties were marked for special treatment in designation with no consideration for like treatment of properties with similar characteristics of age, use and location. A fairly applied designation process, using clear and comprehensive standards, is not analogous to spot zoning according to the Supreme Court in the *Penn Central* case and is constitutional. Accordingly, an ordinance may designate individual landmarks, but designation standards must be clear, comprehensive, and fairly applied.

Design Review - Designated Illinois properties may be reviewed by preservation commissions for alterations and demolitions. However, a preservation ordinance must specifically grant this power to the commission and must clearly spell out the scope of such review powers. *Pacesetter Homes v. Village of Olympia Fields*, 1968 (Illinois) held that a non-historic architectural review ordinance was invalid. In this case, while the theory of the ordinance was correct, the procedures used by the municipality to review design changes were not proper.

Thus it is important that design criteria are fairly and uniformly applied in any well-written historic preservation ordinance. Specific authority must be given to the commission to review design changes and design review criteria must be specified in the ordinance. It should also be clear, in the ordinance, whether the commission's determinations are only advisory or are declaratory. To insure fair and objective application of standards to each case reviewed by the commission, there should be concrete and well-written standards.

Notice and Appeal - Respect for due process, for all parties concerned, must be addressed in a preservation ordinance. The ordinance must also provide that affected property owners are notified of decisions by the landmark preservation commission. Owners should be told of the decision and have a reasonable time to appeal. Procedures for appealing (where appeals are to be filed and who is allowed to file an appeal) must be included in the ordinance.

By undertaking such due process considerations, the ordinance insures that all competing interests have a chance to be heard and thus protects both the property owner and the preservationist. In addition, it may be advisable that a public record of all historic property or district designations be maintained by the city's building department and the county recorder in addition to the local preservation commission.

Fairness is the keyword in procedural due process. Any ordinance that fairly protects notification and participation of all of the parties involved in designating and maintaining historic properties is likely to meet a due process requirement.

Illinois Enabling Legislation

Each state has its own legislation which enables communities to regulate designated local landmarks and historic districts. In Illinois, the Illinois Historic Areas Protection Act (65 ILCS 5/11-48.2) states that municipalities "shall have the power to provide for official landmark designation by ordinance of areas, places, buildings, structures, works of art, and other objects having a special historical value" and allows for the regulation of those designated properties. The Illinois Zoning Enabling Act (65 ILCS 5/11-13) includes a provision that allows municipalities "to insure and facilitate the preservation of sites, areas, and structures of historical, architectural, and aesthetic importance." Regulatory authority is additionally provided by the Zoning Act. Home rule units of government, as defined in the Illinois Constitution as having more than 25,000 residents, may use that authority to enact local legislation. The Illinois County Preservation Act was passed in 1983, giving counties the authority to establish preservation programs. In such cases, the county may have authority over unincorporated areas, and over any incorporated areas which choose to be regulated by the county historic preservation commission.

References

Home Rule Authority - Article VII, Section 6(a) of the 1970 Constitution of Illinois.

Historic Areas Preservation Act - Chapter 24, Section 11-48.2.1-7 of the Illinois Revised Statutes.

Illinois Zoning Enabling Act - Chapter 24, Section 11-13.1-20 of the Illinois Revised Statutes.

Pomerance, Philip Lindsay. "Are Preservation Ordinances Legal?" Produced by the Northern Illinois Regional Planning Commission. Illinois Historic Preservation Agency, Local Government Services Files.

Urbana Historic Preservation Plan, Ordinance No. 9798-111, An Amendment to the Comprehensive Plan of the City of Urbana, Illinois.