

PRESERVATION COMMISSIONS AND THE CONSTITUTION FIVE CONTINUING MYTHS - PART ONE

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This is the first in a two part article by Richard J. Roddewig based on a presentation he gave to the Illinois association of historic preservation commissions in Chicago in the fall of 2010. The second part of the article will appear in a subsequent issue of The Alliance Review. Richard is both a land use attorney and a real estate appraiser. He is a past board member of the Illinois Historic Preservation Agency as well as a past member of the Illinois Historic Sites Advisory Council. He was the principal author of the 1987 comprehensive revision of the Chicago landmarks ordinance, and the author of Preparing a Historic Preservation Ordinance published by the American Planning Association.

"One of the biggest problems facing historic preservation at the local level today is the blustering lawyer who claims that recent ... (court) decisions have fundamentally changed the rules of the 'preservation game.' ... " The typical landmark commission, when confronted by an attorney who incants a litany of case names, usually does not know how to respond (and) may not have the experience necessary to face up to the frontal attack and call the bully's bluff. And most of the time, it is just that—a bluff. The legal rules of the preservation game are the same today as they were ten years ago..."

Historic Preservation and The Constitution:
Preservation Forum, July/August 1993

Those words from *Preservation Forum* are still as true in 2010 as they were in 1993 and even in 1983. The legal rules continue to be the same today as they were in the 1980s or '90s, and preservation is as constitutional today as it was then.

But given some recent court decisions, it is time to reexamine some of the common misconceptions about preservation law and the Constitution. The five most common myths about state and federal constitutions and how they apply to the activities of landmarks and historic preservation commissions can be briefly stated as follows:

- Myth 1: Historic preservation laws are unconstitutionally vague
- Myth 2: Historic preservation laws violate a citizen's right to "due process"
- Myth 3: Historic preservation laws violate the equal protection clause of federal and state constitutions
- Myth 4: The 1st Amendment prohibits historic preservation laws that regulate religious properties
- Myth 5: Historic preservation laws are an unconstitutional taking of private property rights

None of those myths are true. But the reasons why need to be better understood by preservation commission members.

Myth One: Historic Preservation Laws Are Unconstitutionally Vague

It has been well settled for more than 30 years...at least until the last two years...that this myth is not true. Courts in more than 25 states have over the years upheld the customary criteria for landmark and historic district designation. However, two new vagueness challenges in the past few year, the *Hanna* case in Chicago and the *Conner* case in Seattle, have challenged the long settled case law.

The plaintiff in the *Hanna* case makes two claims. The first claim is that the designation criteria in the Chicago landmarks ordinance are unconstitutionally "vague." The second

claim is that the qualification requirements for Chicago Landmarks Commission members are also unconstitutionally vague.

Among the criteria (and specific words) for designating a historic district in Chicago that are being challenged as "vague" are the following:

- Its "**value**" as an example of an architectural, cultural, economic, or historic aspect of the city of Chicago, the state or the United States;
- Its location as a site of a "**significant**" historic event or as the work of an architect, designer, etc. whose work is "**significant**" in history;
- Its embodiment of an architectural type or style distinguished by "**uniqueness**" or "**overall quality**" of design, materials, craftsmanship, or its "**unique**" location or "**distinctive**" physical appearance or presence representing an established and familiar visual feature

The *Hanna* challenge alleges that all of those highlighted words are "vague."

The Illinois trial court that first heard the case dismissed the case out of hand. However, an Illinois appellate court reversed and ordered the trial court to proceed with the merits of the challenge. The Illinois Supreme Court refused to hear the city's appeal from the appellate court decision.

So the appellate court ruling sending the case back to trial court for further proceedings still stands. The appellate court decision says the terms "**value**," "**important**," "**unique**," and "**significant**" are "vague, ambiguous and overly broad." The court says those words are vague because persons "of ordinary intelligence must necessarily guess at their meaning and differ as to their application."

The appellate court rejected the City of Chicago's argument to the appellate court that members of Chicago's landmarks commission are "professionals" in various disciplines such as history, architecture, planning, historic preservation, real estate, etc. That equips the Commission, the city's attorneys argued, to "apply the commonly understood terms" *Hanna* complained about.

In rejecting the city's argument, the appellate court held that the requirements for qualification of Commission members are also vague and do not guarantee any level of expertise. The City has "no criteria by which a person of common intelligence may determine" what those requirements for membership actually mean.

After the *Hanna* decision, preservation commission members in Illinois and elsewhere are beginning to hear claims echoing *Hanna* that all preservation laws are unconstitutionally vague. In Illinois, some are arguing that the Illinois Supreme Court has "upheld" the *Hanna* appellate court decision, and, as a result, Illinois preservation commissions cannot legally designate any more landmarks or districts.

However, such claims about the implications of the *Hanna* decision are false. When those claims are made to preservation commission members in Illinois or elsewhere, the proper response is as follows:

- Final decision in the *Hanna* case is years away;
- All that the appellate court has done is send the case back for further proceedings at the trial level; and
- The fact that the Illinois Supreme Court did not accept an appeal at this point in

the case history does not foreclose the likelihood that it will hear the case at a later time.

On remand, the trial judge has now split the remanded case into two parts. The original challenge to the landmark law itself has been put on hold. The trial judge is now focusing on the validity of the designation of the two landmark districts themselves. Proceedings are ongoing.

Another part of the proper response to those who invoke the *Hanna* decision is as follows:

- There have been 42 other decisions in 24 other states over the past 30 plus years that have upheld preservation laws from similar "void for vagueness" attacks;
- The two most recent decisions (the Colorado *Castle Rock* case in 2008 and the Washington *Conner* case in 2010) upheld preservation laws from similar vagueness claims; and
- As a result, the *Hanna* decision is an aberration

Preservation commission members also must make clear to those who invoke the *Hanna* decision that the Illinois Supreme Court did not "uphold" *Hanna*—procedurally, it simply indicates that the Supreme Court believed it was too early in the case for it to get involved. The *Hanna* case is still back in trial court. It will work its way back to an appellate court and eventually to the Illinois Supreme Court. Most importantly, commissions should emphasize that the City of Chicago continues to designate landmarks and districts and review alteration requests just as it did pre-*Hanna*.

Another important point to make is that the appellate court decision in the *Hanna* case conflicts with other very important federal court decisions likely to be invoked by the Illinois Supreme Court if and when it ever has to decide the merits of the *Hanna* charges.



The *Hanna* decision conflicts with U.S. Supreme Court decisions. Grand Central Terminal (New York; 1913, Reed and Stern, Warren and Wetmore, architects)
Photo courtesy of the author

The *Hanna* decision conflicts with U.S. Supreme Court decisions—especially the *Penn Central* decision involving Grand Central Terminal in New York City. In *Penn Central*, the U.S. Supreme Court dismissed as "without merit" the argument that landmark designation "is inevitably arbitrary or at least subjective, because it is basically a matter of taste." The *Penn Central* decision goes on to say that the following legal point is "not in dispute":

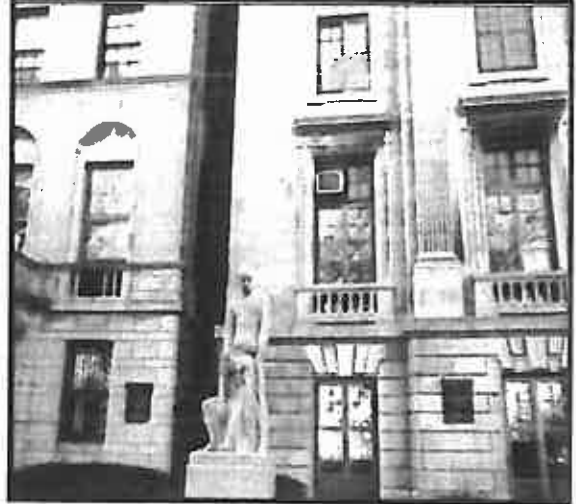
"Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city...preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible goal."

The *Hanna* decision also conflicts with the 1998 Seventh Circuit Court of Appeals decision in the *International College of Surgeons* case involving a proposed demolition of the organization's headquarters in Chicago. The Seventh Circuit in its decision (upheld by the U.S. Supreme Court) called the designation criteria in Chicago landmarks ordinance so "clear" that it "does not require persons of common intelligence to guess at its meaning."

So preservation commissions around the country need to wait for the Illinois Supreme Court to reconcile these various decisions that contradict the *Hanna* decision.

And the basis for the Hanna appellate court's decision, that is, "persons of ordinary intelligence" cannot understand the meaning of the allegedly vague words in Chicago's landmarks law, is itself quite questionable. The words "persons of ordinary intelligence" in the *Hanna* decision itself are as vague—if not more vague—than the words in the Chicago preservation law challenged by Mr. Hanna. Where is the easily understood and common definition of "ordinary intelligence"? If that is the judicial standard, how does a court or a city council enacting or amending a landmarks law—or indeed any law—decide who is a person of "ordinary intelligence? Whom do we use to measure "ordinary intelligence"?

The Chicago City Council and the mayor of Chicago have understood and applied the criteria for decades. Isn't that significant in and of itself? The key to understanding the meaning of words in landmarks designation and membership criteria are in the pattern of interpretation and application of those criteria in the past—the traditional rule has always been that "persons of ordinary intelligence" can look to the pattern of past designations by their preservation commission and determine the likelihood of a proposed designation.



*The Hanna decision also conflicts with the 1998 Seventh Circuit Court of Appeals decision in the International College of Surgeons case
 Photo courtesy of the author*

One final point about the *Hanna* decision and why it is highly likely that more sound legal reasoning will prevail—the rationale cited by Mr. Hanna is equally applicable to thousands of other laws of various types all across the country. More than 25 other Illinois state laws involving things other than preservation contain words such as "aesthetic value," "aesthetic utility," "aesthetic design" and "aesthetic perceptions," etc. A computer search of statutes in just eight states (Colorado, Maryland, New York, Texas, Vermont, California, Illinois, and Florida) found words "special" and "unique" within 20 words of each other in 990 separate laws. More than 1700 state laws in the same eight states contained the words "community value" or similar terms.

The recent *Conner* case in Washington involved many of the same issues as the *Conner* case and portends the likely outcome of *Hanna*. The Washington Supreme Court ruled that due process does not require a law to meet "impossible standards of specificity." It also stated that "because each landmark has unique features and occupies a unique environment, it is impractical for a single ordinance to set forth development criteria or standards that could apply to every landmark." The Washington Supreme Court went on to note that "as many other courts have noted, such a requirement (that commission members be experts in relevant disciplines) provides additional protection against arbitrary enforcement of the law."

Myth Two: Historic Preservation Laws Violate Fundamental Due Process Rights
 This is another claim frequently heard by preservation commissions. It too is not true.

When thinking about due process responsibilities, it is important for preservation commission members to remember that "lay members of our historic district and landmarks commissions must often-times act like lawyers and judges, like it or not, qualified or not." That statement from *Procedural Due Process in Plain English*, published by The National Trust for Historic Preservation more than 20 years ago continues to be true today.

Detailed procedural rules are an essential first step to assure due process. Procedures can be included in the preservation ordinance itself or procedural rules can be adopted by a preservation commission (so long as the community's preservation ordinance gives the commission the authority to adopt such rules.).

Once procedural rules have been adopted, it is absolutely essential to follow them during both the designation process and the review of alteration/demolition/hardship applications.

There are three essential elements of procedural due process:

- Notice
- Right to be heard
- Fair and informed decision making

With respect to notice requirements—key questions for preservation commissions include the following:

- What are the sources for deciding what notice is required?
- Who should receive notice?
- What type of notice is required?
- How much advance notice is necessary?

There are four sources that determine the appropriate notice that must be provided. The first is the community's historic preservation ordinance itself. The second is the commission's formally adopted procedural rules. The third is state statutes, especially state enabling laws for historic preservation commissions and such similar land use laws as state zoning enabling acts. Finally, case law on procedural due process issues is also important.

State statutes are very important in understanding the types of notice that should be provided. For example, the Illinois historic preservation enabling act simply says "No action...directing a private owner to do or refrain from doing any specific thing, or refusing to permit a private owner to do some specific thing...shall be taken by the municipality except after due notice to such owner and opportunity for him to be heard at a public hearing..." No additional detail is provided, however, on the meaning of "due" notice or what kind of "opportunity" should be provided owners at hearings.

The Illinois zoning enabling act, by contrast, provides much more detail about the notice required for various types of decision making. Newspaper notice not more than 30 days or less than 15 days before a hearing on a new zoning code is required. Newspaper and individualized notice to all property owners within 250 feet is required before hearings on zoning variations and special uses. Most detailed notice provisions in local historic preservation laws have emulated notice procedures from the zoning realm since those zoning-based notice procedures have been routinely upheld by the courts for many decades.

Who should be given notice? That depends upon the type of proceeding. The following is a short checklist of the typical variations in notice possibilities for various types of local preservation commission activities.

Designation hearings

- Give notice to property owners

- Optional – give individual notice to adjacent and nearby owners when designating individual landmarks
- Provide public notice through newspapers and other means

Alteration/demolition hearings

- Give notice to the applicant
- Optional – give individual notice to adjacent and nearby owners
- Provide public notice – good to do to generate public support/comment

Hardship hearings

- Give notice to the applicant
- Optional – give individual notice to adjacent and nearby owners (use zoning variance notice provisions as a model)
- Provide public notice – good to do to generate public support/comment

What type of notice should be provided?

Traditionally, there have been three typical types.

- Individual mailed notice
- Posted notice on the property
- Public notice in newspapers

Individual mailed notice is typically provided to property owners (the owner of record) in designation proceedings as well as provided to adjacent property owners in landmark designation proceedings. In alteration, demolition and hardship hearings, individual mailed notice is typically provided to both the applicant as well as adjacent owners. Many smaller communities are beginning to explore individualized notice through the use of email.

Posted notice on the property is typically utilized before hearings on proposed landmarks and many commissions do the same before hearings on certificate of appropriateness, demolition and hardship. The model for such posted notice requirements is the long history of similar types of posted notice in zoning proceedings.

The traditional type of public notice is in newspapers of general circulation. Newspaper announcements have long been used by preservation commissions to provide public notice of pending designation proceedings and demolition applications. Some commissions also provide such public notice before alteration and hardship hearings.

More recently, preservation commission/city/village websites and public access cable stations have also been utilized to provide public notice.

What content should be in the notices?

Procedural Due Process in Plain English summed up the minimum content requirement as follows:

"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."

There has been controversy in some communities about how to handle new or related matters at hearings "noticed up" on a narrow issue. *Procedural Due Process in Plain English* recommends the following: "ensure that the initial notice is sufficiently detailed to permit a member of the public to understand what will be addressed at the hearing but not so limited in scope that it can be read to exclude consideration of related matters."

How far in advance must notice be provided?

The first rule, of course, is to follow the requirements in a community's preservation ordinance and implementing regulations. In some states, the enabling legislation authorizing establishment of local preservation commissions may have requirements. In some states, such as Illinois, there is no such specific language in the state statutes related to preservation commissions. Once again, in states with no specific enabling act stipulations concerning advanced notice, look to the state zoning enabling act as a model.

What does due process require when holding a hearing?

Issues related to hearings typically relate to one of the following:

- Timing of the hearing
- Type of hearing—presentation of "evidence" and expert testimony
- Making of a record
- Voting and reasoned decisions based on the record



Timing of designation hearings has created issues in some communities. For example, owners wishing to demolish a landmark or building in a district may use the notice they receive of a proposed designation to immediately file for a demolition permit before the hearing begins. Some cities, such as Chicago, have addressed this issue by requiring demolition applications on pending landmarks to be heard in a combined proceeding with the designation proposal.

Most commissions prefer to make their hearings as informal as possible. They would like to avoid swearing of witnesses and cross examination. In today's litigious American legal landscape, this is not always possible. And in some states, statutes or case law may require that witnesses be sworn and cross examination allowed.

Most commissions prefer to make their hearings as informal as possible.
Photo courtesy of the author

But is the right to cross examination a fundamental element of constitutional due process?

Not necessarily. It may depend on state case law. For example, in 2002, the Illinois Supreme Court in *Klaeren v. Village of Lisle* ruled that zoning hearings concerning "special use" applications are quasi-judicial and therefore the right to call witnesses and cross examine witnesses must be provided. An extension of the *Klaeren* rule to other land use approval situations, including historic preservation proceedings, has been recommended by the Home Rule Attorneys Committee of the Illinois bar.

The safest course to avoid litigation over cross examination issues is to allow cross examination upon request of an attorney for an affected property owner in either a

designation, alteration, or hardship hearing. But a commission can impose reasonable procedural rules related to cross examination such as pre-registration of those wishing to cross-examine witnesses, limiting cross-examination to those who have a special interest beyond that of the public at large, limiting it to relevant issues, and limiting time devoted to cross-examination.

It is also important to have clear hearing procedures on such things as

- Written submissions
- Presentation of a staff report
- Presentation by the property owner(s)
- Presentations by other "witnesses" and "interested parties"
- Time allotted for each presentation
- The number of witnesses who may testify on behalf of the same organization

Perhaps the most important thing for commission members to remember about public hearings is that they must act in a judicial-like manner.

Photo courtesy of the author

Perhaps the most important thing for commission members to remember about public hearings is that they must act in a judicial-like manner. This requires, at a minimum, the following:

- Not expressing an opinion until all evidence has been presented
- Asking questions rather than making statements
- Reading the entire record if they miss a portion of the hearing
- Making decisions based on the record
- Giving reasons for the decision based on criteria in the law and NOT personal preferences
- Following past precedents and explaining why a prior decision may not be a precedent when seemingly departing from past decisions.



In light of all of these due process issues that can arise, the most professional preservation commissions should take the time every now and then to do a "procedural due process" check up on their ordinance and procedural regulations and hearing and decision making practices.

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