Historic Preservation Regulation and Procedural Due Process

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I
INTRODUCTION

In *Penn Central Transportation Co. v. New York City*, the United States Supreme Court held that the New York City Landmarks Preservation Commission's prohibition of construction of an office tower atop Grand Central Station was not a "taking" under the fifth and fourteenth amendments and did not require compensation. However, only addressed whether historic preservation regulation violates the "taking" clause of the fifth amendment as incorporated into the fourteenth amendment. Although the Supreme Court alluded to the requirement of "standards, controls, and incentives," the Court did not address the procedural due process that must be given to parties under a landmarks preservation program.

Although the "taking" question has not been completely settled by

* J.D. 1981 The American University. The author wishes to express his gratitude to Stephen N. Dennis, Associate Chief Counsel for Landmarks and Preservation Law, National Trust for Historic Preservation, for his helpful comments and assistance. Responsibility for the views herein, however, lies solely with the author.

2. Id. at 123-38. This validation of New York City's Landmarks preservation law, N.Y.C. ADMIN. CODE, ch. 8-A, § 205 (1976), as a proper exercise of the city's police power to regulate private property for the preservation of historic values was immediately hailed as the "Euclid" of historic preservation law (referring to Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), a case in which the Supreme Court upheld the validity of zoning as an exercise of the police power). See, e.g., Marcus, The Grand Slam Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse, 7 Ecology L.Q. 731 (1979); Note, Penn Central v. City of New York: A Landmark Landmark Case, 6 Fordham Urb. L.J. 667 (1978).
3. The fifth amendment provides that "[N]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment, to which this Comment is principally addressed, similarly provides: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. The Supreme Court had held the fifth amendment applicable to the states through the fourteenth amendment in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).
the *Penn Central* decision, that decision may have made historic preservation regulation far less susceptible to challenge on "taking" grounds. Future challenges to historic preservation regulation, however, may be based on procedural deficiencies of historic preservation regulations and decisions. Several procedural challenges to some of the 600 county and municipal historic preservation ordinances, as well as various state and federal landmark designation statutes, are already being heard by courts.5

Procedural due process challenges can pose a significant threat to local and federal historic preservation regulation. For example, a federal district court recently invalidated the Federal Government's National Historic Landmark program because the program failed to provide due process protections to affected property owners.6 Also, many local programs have been deemed to contain widespread procedural deficiencies.7 One commentator believes that "perhaps ninety percent of all the decisions of all historic district commissions in North Carolina ... would instantly be overturned by a court on appeal for procedural defects alone."8 The number of local historic preservation programs has recently expanded,9 and procedural defects may continue to present significant problems if the new programs do not contain adequate procedural safeguards.

Historic preservation agencies should be aware of the basic procedural requirements imposed on them by the Constitution and the courts. Courts, however, have failed to articulate clear procedural requirements based on a careful analysis of the nature of historic preservation regulation. Rather than clarify the procedural requirements, courts have often confused the requirements even further.10

Courts usually address procedural due process problems by classifying a particular government action as "adjudicative" or "legislative." Judicial or quasi-judicial actions must fulfill due process requirements, but due process standards are not applied to legislative actions. Courts have noted that the nature of legislative action provides protection against arbitrary government action, and due process requirements are not necessary.

Judicial use of the legislative-adjudicative test, however, has evolved into an almost mechanical process in which the focus of the due process inquiry, if there is a focus, is centered on the identity of the decisionmaking body, rather than on the decisionmaking process. An emphasis on the type of decisionmaker rather than the type of decision means that historic preservation actions may be mischaracterized and result in both an absence of needed procedural safeguards and imposition of unnecessary safeguards.

This Comment is concerned largely with characterizing historic preservation actions for due process purposes, to avoid mechanical application of the legislative-adjudicative test. The extent to which historic preservation actions affect private interests and the procedural safeguards that must be applied to the actions will be examined, as characterization of the governmental action should be the most important factor in determining whether procedural safeguards must be judicially imposed. This Comment also examines the nature of historic preservation regulation in light of the social goals of procedural due process safeguards.

After establishing a framework for determining the procedural due

12. See notes 83-89 infra and accompanying text.
15. Fasano v. Board of County Commissioners, 264 Or. 574, 580, 507 P.2d 23, 26 (1973). Variances and special exception granted by zoning boards are an exception to the general judicial practice of declaring decisions by elected bodies to be inherently legislative. See note 102 infra and accompanying text.
16. The New York courts, for example, have been inconsistent in their characterization of landmark designation as either legislative (requiring limited procedural protection and reviewed under an arbitrary and capricious standard) or quasi-judicial (requiring an evidentiary hearing and reviewed under a substantial evidence standard). Compare Lutheran Church in America v. New York City, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) with Manhattan Club v. Landmarks Preservation Comm’n, 51 Misc.2d 556, N.Y.S.2d 848 (1966).
process requirements for different historic preservation actions, this Comment defines some of the minimal procedural protections required. Rather than attempting an exhaustive study, this Comment makes some general observations concerning the type of notice needed, the restrictions that may be placed on properties before a hearing takes place, the nature of the hearing required, and the standards that should control a regulating decision.

II

HISTORIC PRESERVATION REGULATION

An understanding of the due process requirements of historic preservation regulation requires some knowledge of regulatory structures commonly used in preservation programs. Although federal preservation programs are important, a great deal of historic preservation regulation is carried out by state and local governments. These state and local programs are implemented by a variety of administrative schemes.

17. One of the oldest federal historic preservation programs is authorized by the Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979). The Act permits the Secretary of the Interior to acquire any historic site, building, or object of national significance on behalf of the government, by gift, purchase, or otherwise. See 44 Fed. Reg. 74,826 (1979). Although the program has long been in effect, implementing procedures were only recently promulgated, and codified at 36 C.F.R. § 1205 (1981). If property designated as a National Historic Landmark is not acquired by the government, the only protections afforded to the property are through "federal involvement" restrictions. See, e.g., 16 U.S.C. § 1908 (1976). These restrictions usually consist of statutes and executive orders that have the effect of discouraging federal involvement in any activities that may affect designated sites. See, e.g., id. The owner's tax status may also be affected by National Landmark designation. See notes 76-80 infra and accompanying text.

based on powers granted in state enabling acts.\textsuperscript{18}

Under these schemes, sites are designated as historically or culturally significant and are managed accordingly.\textsuperscript{19} Individual structures may be identified as landmarks, or entire historic districts may be recognized.\textsuperscript{20} Once designation has taken place, and certain restrictions placed on the property to preserve it, the restrictions are administered, typically by a special commission.\textsuperscript{21}

Structures may be designated as historic sites in two ways. Designation may occur simultaneously with the creation of the preservation statute or ordinance. For example, a statute or ordinance may be passed naming a specific area as a historic district and placing certain restrictions on structures within that district.\textsuperscript{22} Alternatively, a statute may simply set out historic preservation policy and establish an administrative structure to implement that policy. This more general type of statute usually sets up a historic preservation commission and establishes the standards and procedures under which the commission will operate.\textsuperscript{23} The commission then designates historic sites and carries out the general policies established by the original law.\textsuperscript{24}


\textsuperscript{19} Although many local historic preservation programs include protection of non-structural (e.g., archaeological) sites, the primary emphasis of such programs is on preservation of historic structures. That emphasis is reflected in this Comment. Archaeological sites are largely protected by restrictions on federal and state involvement in activities that may damage sites, see, e.g., National Historic Preservation Act, 16 U.S.C. § 470f (1976); Minn. Stat. Ann. § 116D.02(2)(d) (West 1977). While problems relating to procedures and standards are common to regulation of both types of sites, the protection of archaeological sites raises other issues beyond the scope of this article. See generally Symposium, Legal Protection of America's Archaeological Heritage, 22 Ariz. L. Rev. 675 (1980).


\textsuperscript{21} Designation is not necessarily synonymous with the attachment of restrictions. For example, a tentative designation could be made by an administrative body, but restrictions not placed on the property until the designation is approved by the local legislative body. Compare Nev. Rev. Stat. § 384.100 (1979) (designation by historic district commission) with V.I. Code Ann. tit. 29, § 281 (1976) (designation by planning board for approval by legislature).


\textsuperscript{24} In some cases, the enabling statute may also require that designation be made by the local governmental body. See, e.g., Idaho Code § 67-4615 (1980); S.D. Compiled Laws Ann. § 1-19B-38 (1980).
Restrictions imposed on designated sites are commonly administered by a special commission. The commission's principal administrative tool is the "certificate of appropriateness" or an equivalent. An owner wishing to alter or demolish property that is subject to a historic preservation regulation must first apply to the preservation commission for a certificate of appropriateness. In this document the commission certifies that the proposed change will not affect the historic values of the district or landmark. Alteration or demolition of a designated structure without commission approval through a certificate of appropriateness may result in civil or criminal penalties.

III
HISTORIC PRESERVATION AND DUE PROCESS: THRESHOLD CONSIDERATIONS

A governmental action must affect an interest protected by the Constitution before procedural protections must accompany the action. Additionally, the nature of the action must be such as to require that procedural protections be afforded to those affected. This last requirement is particularly important in land use regulation and is traditionally applied as a distinction between legislative and adjudicative actions since procedural due process is only a requirement of the latter. This section examines the interests at stake in historic preservation actions and the possible interferences with these interests. The next section discusses the classification of historic preservation actions in more depth.

25. Not all preservation ordinances involve restrictions on designated sites. Some ordinances are merely nominal and only provide mechanisms for commissions to encourage owners of designated properties to preserve such properties, without potential sanctions. See generally J. Morrison, Historic Preservation Law (1965).

26. The certificate of appropriateness procedure is not the only way to protect historic sites. For example, some ordinances simply require that owners wait a specified period after applying for a permit before altering or demolishing designated property. This allows the state or local body to acquire the property if need be. See, e.g., Philadelphia Code § 14-2008 (1965), reprinted in 4 R. Anderson, American Law of Zoning § 30.85 (2d ed. 1977). See also Tinkcom, The Philadelphia Historical Commission: Organization and Procedures, 36 Law & Contemp. Prob. 386 (1971).

27. The mayor may also have authority to issue certificates. See D.C. Code Ann. §§ 5-1003, 5-1005.


29. Id. at 127-32.


31. Id. at 571.

A. The Interest Affected

Procedural due process requirements apply only to acts that infringe those interests encompassed by the fourteenth amendment's protection of liberty and property. An interest in property arising from a legitimate claim of entitlement based upon an independent source, such as the common law, constitutes such a protected interest.

Some of the interests that may be affected by a historic preservation regulation are clearly protected by due process requirements. The common law recognizes that landowners are normally entitled to use their property in any way that does not cause a nuisance, and this entitlement creates a property interest in the free use of land. While this interest in property is subject to the restrictions of the state's police power, courts have long recognized that "any legitimate use is properly within the protection of the Constitution." Accordingly, in the

34. 408 U.S. at 577.
38. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). Justice Rehnquist proposed a limitation on this broad principle in his plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). In Arnett, Justice Rehnquist found that the entitlement involved (an employment right) had been created by statute, and the procedural safeguards protecting the entitlement could be limited by the same statute. Id. at 152-155. A majority of the Court, however, rejected this approach and found that the safeguards were not limited by statute. Id. at 211. See also Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 CORNELL L. REV. 445 (1977).

The Rehnquist position reappears as dictum in Chief Justice Burger's majority opinion in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). In Eastlake the Supreme Court held that a zoning ordinance requiring that rezoning actions be approved by a 55% referendum vote was a proper reservation by the people and therefore did not violate due process. Id. at 675. Chief Justice Burger's opinion implied that no procedural protections were required, as the plaintiff had no property interest in a new zoning classification other than that created by the then-existing classification. Id. at 679 n.13.

It might be argued under this approach that once any property is made subject to the state's police powers, the landowner's interest in a change in the status of that property is subject to any procedural limitations incorporated into the police power regulation. See Kahn, In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions, 6 HASTINGS CONST. L.Q. 1011, 1015-20 (1979). Applied to historic preservation regulation, this approach means that once a property is properly designated as a historic site, the landowner's property interest in obtaining a certificate of appropriateness approval may be subject to limited procedures created by the historic preservation ordinance. Under this view, as long as the minimum statutory requirements contained in the certificate of appropriateness procedures are met, there has been no deprivation of a property interest.

Even in the event that Rehnquist's approach is expressly adopted by a majority of the Court, however, application of this approach to historic preservation regulation does not
context of land use regulation, the courts have not seriously questioned the protected status of a landowner's interest where the land is subject to a regulatory decision. Thus, in designation and certificate of appropriateness proceedings, the due process clause protects the owner's interest in the property that is the subject of the proceedings.

It is less clear whether the interests of third parties in historic preservation actions are protected by the due process clause. Interested third parties include adjoining landowners, more distant neighbors, historic preservation groups, and neighborhood associations. The most common third-party interest is probably the economic one of diminution in value. Such an interest reflects the potential loss of various uses of a property resulting from governmental restrictions placed on the property of another. Another commonly asserted third party interest is an expectation of a particular neighborhood character.

It is likely that reviewing courts will apply due process standards to the economic interest of an adjoining landowner whose land is suffering from diminution in value due to a historic preservation regulation, as this same interest has been afforded due process protection in zoning decisions. In zoning cases, changes in the status of a particular parcel of land often have a profound effect on economic interests of neighboring landowners. Courts have recognized that adjoining landowners are affected by zoning decisions. Although the interest of

require the Eastlake result. The property interest in development of a particular parcel of land or modification of its external features is not derived from the historic preservation ordinance, but from common law property rights. The state may, of course, restrict those rights through enactment of historic preservation and zoning ordinances. However, by offering an opportunity to seek a change in the exterior of a property, the state does not create a new property right; it merely affords protection to a recognized interest in the legitimate use of property. See City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 682 (1976) (Stevens, J., dissenting). Thus, the procedural limitations of the historic preservation ordinance may not themselves diminish the protected interests of the landowner, because those interests are derived from the common law.

40. See, e.g., Scott v. City of Indian Wells, 6 Cal. 3d 541, 548, 492 P.2d 1137, 1141, 99 Cal. Rptr. 745, 749 (1972) (proposed development would affect value and usability of plaintiff's land). Economic value actually reflects a number of distinct property interests, including the right to develop or put the land to its highest use, the ability to continue a property's current use, and the right to sell for value. See Kahn, supra note 38, at 1021; 1 R. Anderson, AMERICAN LAW OF ZONING §§ 3.23-3.25 (2d ed. 1977).
41. See notes 46-53 infra and accompanying text.
42. See, e.g., Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1149, 156 Cal. Rptr. 718 (1979).
43. Id. A zoning change or special exemption that permits the opening of a sanitary landfill or the construction of high rise apartments, for example, certainly affects a neighboring landowner.
44. Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967). See, e.g., Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (adjoining landowners deprived of due process even though their property was outside of the municipality).
adjoining landowners is theoretically protected in the historic preservation context, it is unlikely that historic preservation actions interfere with neighboring landowners so significantly that due process standards are required.\textsuperscript{45}

A neighboring landowner's expectation of a certain type of neighborhood may be an interest protected by due process standards.\textsuperscript{46} In general, no landowner has a right to a particular zoning pattern.\textsuperscript{47} However, several courts have held that persons who have relied on a particular property classification have some type of property interest in that classification.\textsuperscript{48} The source of this property interest is the land use regulatory system itself which creates an entitlement to a neighborhood whose character may only be altered through the land use regulatory system.\textsuperscript{49} Thus, when a change in a neighborhood is made under a government's police power, third party landowners may have a property interest in the existing character of the neighborhood sufficient to trigger some due process safeguards, even though the change does not interfere with the use and enjoyment of their own property.\textsuperscript{50} However, even if this interest is protected by due process in the historic preservation context, the interference with the interest may be too small for the application of due process standards.\textsuperscript{51}

This argument is equally true for an initial designation and a certificate of appropriateness application after designation. Initial designations of historic property, especially if an entire district is designated, may severely constrict neighboring landowners' expectations. If a historic district is created in a downtown area, the business uses of property may be restricted. Neighboring landowners may fear that their property will be the next to be designated as historic and redevelopment of the property will become less profitable. In certificate of ap-

\begin{itemize}
\item \textsuperscript{45} See text accompanying notes 55-59 infra.
\item \textsuperscript{46} See, Developments in the Law-Zoning, 91 Harv. L. Rev. 1427, 1517 (1978).
\item \textsuperscript{48} See Allen v. Coffel, 488 S.W.2d 671, 678-79 (Mo. App. 1972); Burns v. City of Des Peres, 534 F.2d 103, 110 (8th Cir.) cert. denied, 429 U.S. 861 (1976) (quoting Allen).
\item \textsuperscript{49} See Perry v. Sindermann, 408 U.S. 593, 601 (1972) (interest in a benefit is a constitutionally protected "property" interest if there are rules or understandings that support the claim of entitlement). See also Developments in the Law-Zoning, 91 Harv. L. Rev. 1427, 1517 & 1518 n.81 (1978).
\item \textsuperscript{50} This interest is probably better described as an entitlement to rely on a governmental promise that the character of a regulated (i.e. zoned) neighborhood will not be changed without cause. This interest may be reflected in economic terms. One example would be when a purchaser of land pays a premium to live in a neighborhood with a particular character. When a change is made in the neighborhood, the resale value of the land may be diminished even though no diminution of use and enjoyment has occurred. This is distinct from loss caused by cessation of neighboring uses. See note 40 supra and accompanying text.
\item \textsuperscript{51} See text accompanying notes 60-62 infra.
\end{itemize}
propriateness proceedings, an inapt alteration of a historic property may lower all neighboring land values.

Historic preservation groups that are not neighboring landowners may also assert a general interest in the character of a particular neighborhood. Such an interest, however, is not an entitlement protected by the rules and regulations of a land use system designed to protect property owners. Similarly, such groups have no protectable economic interest in the specific neighborhood. Thus, third party interests of historic preservation groups are not afforded due process protections unless, of course, those groups or their members are neighboring landowners.

B. Nature of the Interference

A second requirement for the application of procedural due process safeguards is that government action actually interfere with the interest asserted by the property owner or adjoining neighbor. Not all historic preservations necessarily affect even a protected property interest enough to warrant procedural protections, and it seems unlikely that historic preservation actions will be found to interfere with the interests of adjoining neighbors or third parties. Courts may, however, prove more willing to find interference with property interests as the number of historic preservation actions continues to grow.

Historic preservation actions generally should not be labelled as interfering with the property interests of third parties, even if the third party is an adjoining landowner, because the actions have no effect on the use and enjoyment of their land. This is particularly true when a

52. See note 50 supra.
53. Neighborhood Development Corp.—Butchertown, Inc. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980). See also Kahn, supra note 38, at 1023. A number of ordinances, however, recognize that neighborhood and preservation groups assist and inform the owners and neighbors who do possess due process rights. These ordinances provide for the inclusion of such groups in both notice and hearing procedures. See, for example, the Massachusetts historic preservation enabling statute, MASS. GEN. LAWS ANN. ch. 40C, § 11 (West 1979).

Creation of a statutory right to notice, however, does not necessarily mean that other rights are given to the organization such as the right to initiate an appeal. Springfield Preservation Trust, Inc. v. Springfield Historical Comm’n, Mass. Adv. Sh. 725, 402 N.E.2d 488 (1980). In short, the issue of whether organizations of this kind have due process rights based on a property interest protected by the Constitution is distinct from the issue of whether such organizations have standing to sue under federal or local historic preservation laws. See Vardaman, Standing to Sue in Historic Preservation Cases, 36 LAW & CONTEM. PROB. 406 (1971); Comment, Historic Preservation Cases: A Collection, 12 WAKE FOREST L. REV. 227, 270-72 (1976).

54. See generally Board of Regents v. Roth, 408 U.S. 564, 569 (1972).
55. At least one court has held that the granting of a certificate of appropriateness did not affect a constitutionally protected property interest of adjoining landowners within a historic district. Zartman v. Reisem, 59 A.D.2d 237, 399 N.Y.S.2d 506 (1977) (certificate of appropriateness to build tennis court).
Historic area is designated, because this often maintains the status quo of the current land use and may even increase the value of neighboring property. The same also may be true of certificate of appropriateness proceedings. A certificate of appropriateness often deals with minor changes in architectural features such as the use of vinyl siding to replace wood, or wood paneling to cover brick. Although such minor changes might be of concern to preservation-minded neighbors, they can hardly be construed to interfere with use and enjoyment of a neighbor's own property. Hence, it is probable that procedural protections are not required in cases involving modest physical alterations.

Historic preservation actions may interfere with a third party interest in the character of the neighborhood. Even minor changes in a historic property's exterior, authorized by a certificate of appropriateness, could directly affect a third party landowner's interest in the character of the district. This indirect interest may be too distant or minimal, however, to require the application of due process protections.

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make historic designations of structures, and they are not intended or empowered to interfere with property interests, courts may still find that a historic preservation action interferes with the interests of the owner of the land that is the subject of the preservation action. Some early commission designations identified historic areas merely to encourage their protection by local jurisdictions. At least one court, though, has held that this type of designation did not interfere with protected property interests and did not require due process safeguards.

A recent federal district court decision indicates that even ostensibly nominal designations may affect protected property interests and require due process protection. In *Historic Green Springs, Inc. v. Bergland,* the federal government set aside a 14,000 acre district in Virginia as a National Historic Landmark and enrolled the district in the National Register of Historic Places. The Court held that the designation violated the due process rights of landowners within the district. The Department of Interior argued unsuccessfully that National Landmark designation and National Register listing did not affect property interests of area landowners and that any potential effects on property interests were merely speculative.

would not be affected by the change, but who also has a minor interest in the character of the neighborhood created by the historic preservation regulatory system. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).


64. See Virginia Historic Landmarks Comm’n v. Board of Supervisors, 217 Va. 468, 230 S.E.2d 449 (1976) (“hortatory” designation of 14,000-acre district). The 14,000-acre district involved in this case is the same one whose designation as a National Historic Landmark was struck down in *Historic Green Springs, Inc. v. Bergland,* 497 F. Supp. 839 (E.D. Va. 1980). See notes 65-74 infra and accompanying text. It is not clear whether the court in *Virginia Historic Landmarks Comm’n v. Board of Supervisors* would reach the same result today, considering the tax consequences of even state and local historic designation. See notes 75-80 infra and accompanying text.


66. Although *Green Springs* considered only federal historic designation, the same due process considerations may also apply to state and local designations that purport to be only nominal. In fact, the procedural due process problem for federal historic designation may be somewhat alleviated by the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987. These amendments, enacted after *Green Springs,* require that notice of proposed designation be given to affected landowners. *Id.* § 201(a) (to be codified at 16 U.S.C. § 470a(a)(6)). Also, NHPA amendments may have resolved the specific designation at issue in *Green Springs* by legislatively reaffirming all National Landmark designations made prior to the Act. *Id.*, § 201(a) (to be codified at 16 U.S.C. § 470a(a)(1)(B)).


68. *Id.* at 853. The court noted that National Landmark designation triggers the protections of the Mining in the Park Act. (The Mining in the Park Act is at 16 U.S.C. §§ 1901-1912 (1976)). 497 F. Supp. at 849. The Mining in the Park Act provides minimal protection
The *Green Springs* court found that the two governmental actions, National Landmark designation and National Register enrollment, constituted separate and concurrent interferences with property interests of area landowners. National Landmark designation "targets" the property for acquisition by the power of eminent domain. Further, listing of a site in the National Register of Historic Places triggers the "federal involvement" restrictions of section 106 of the National Historic Preservation Act. Application of this provision may result in the delay or denial of federal assistance to land development projects such as urban renewal, in some cases effectively precluding such projects entirely. Although a landowner has neither an entitlement to

69. 497 F. Supp. at 856-57.

70. *Id.* at 853. 16 U.S.C. § 462 (1976) provides that:

> The Secretary of the Interior . . . , for the purpose of effectuating the policy expressed in section 461 of this title [to preserve historic sites, buildings, and objects of national significance], shall have the following powers and perform the following duties and functions:

> (d) [A]cquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein . . . .

In Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939), this section was interpreted to authorize the use of eminent domain to acquire property for commemorative purposes. 101 F.2d at 297-98. Because the Secretary's power to acquire property arises from an intent to preserve historic property of national significance, only properties that have been designated as historic are eligible for acquisition. Although the court's use of the term "targeted" in the *Green Springs* case is questionable, 497 F. Supp. at 853, the threat of acquisition that is created by designation would appear to be sufficient to interfere with the owner's interests in the property. Compare *Green Springs with City of Austin v. Teague*, 556 S.W.2d 389 (Tex. Civ. App. 1977), *rev'd on issue of damages*, 570 S.W.2d 389 (Tex. 1978) (municipality's denial of waterway permit constituted a taking of plaintiff's property without compensation when municipality had intended to acquire property for a scenic easement).

A number of state historic preservation statutes also specifically authorize the use of the power of eminent domain to acquire property designated as historic, or to acquire conservation easements in designated property. See, e.g., MD. ANN. CODE art. 78A, § 14B(a) (Mitchie Supp. 1980); NEV. REV. STAT. § 407.063 (1979); PA. STAT. ANN. tit. 71, § 1047.1e(a)(12) (Purdon Supp. 1980) (preservation easements). See also Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 182-83 app. II (compilations of state statutes authorizing acquisition of historic sites and those authorizing same through use of eminent domain).

71. 16 U.S.C. § 470(f) (1976). Again, a number of state statutes have similar provisions regarding state government undertakings. See, e.g., MINN. STAT. ANN. § 116D.02(2)(d) (West 1977); WIS. STAT. ANN. § 44.22 (West 1979).

72. *Cf.* Wisconsin Heritages, Inc. v. Harris, 476 F. Supp. 300 (E.D. Wis. 1979) (direct suit against the Department of Housing and Urban Development for improper administration of urban renewal funds). The 1980 NHPA amendments do not change this potential blockage of funds. Because the Secretary may determine a property to be "eligible" for National Register inclusion regardless of the owner's wishes, the citizen-veto provision con-
nor a protected property interest in the federal development assistance itself, the court recognized "the extent of federal involvement in private and public land development of any magnitude." 73 Because of this federal involvement in private land development, the court decided that the denial of federal assistance may effectively preclude private uses to which a property owner might otherwise be entitled. 74

National Register designation may also affect the tax status of a property owner. 75 Under the Tax Reform Act of 1976, 76 an owner of a property listed in the National Register who demolishes that property cannot deduct from taxes either the amount expended for the demolition or any loss sustained because of the demolition. 77 An owner would otherwise be entitled to these deductions. 78 A taxpayer may also not use an accelerated depreciation deduction for any structure replacing the demolished historic structure. 79 The consequences of the Tax Reform Act are not restricted to those properties designated as historic by the federal government or listed in the National Register. The same provisions apply to designations under state or local statutes that are certified to contain standards meeting substantially all of the National Register criteria. 80

The Department of the Interior, however, has maintained that the...
"National Register was designed to be and is administered as a planning tool without restraint upon private property interests. . . ."81 Undoubtedly a number of state and local jurisdictions also believe that their historic preservation statutes and ordinances do not restrain private property interests. It is clear from Green Springs, however, that even nominal designation may interfere with the use and enjoyment of a landowner's property.82 State and local preservation statutes and ordinances, even though intended to be nominal in nature, may also substantially interfere with property interests through the medium of the federal tax laws.

Green Springs illustrates the problems of assuming that because a historic preservation statute or ordinance is not intended to affect the property interests of landowners, no procedural protections are required. As concern with historic preservation continues to increase, however, it is likely that fewer designation statutes and ordinances will be truly nominal in nature and not affect property interests.

IV
THE NATURE OF HISTORIC PRESERVATION ACTIONS

The characterization of a government action may be the most important factor in determining whether due process will be afforded to those persons whose interests are interfered with by the action.83 Due process protections have traditionally been afforded only in "adjudicative" or "quasi-judicial" actions.84 Actions determined to be "legislative" in nature do not require further procedural safeguards.85

81. 36 C.F.R. § 1202.2(c).
82. In Green Springs, for example, there was evidence that designation resulted in delays in local vermiculite mining operations, and had even caused a steel company to abandon plans to locate a mill in the area. Historic Green Springs v. Bergland, 497 F. Supp. 839, 849 (E.D. Va. 1980).

The legislative-adjudicative distinction is also important in terms of the type of judicial review to be applied. There is a presumption of validity given to legislative actions. Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); Scull v. Coleman, 251 Md. 6, 246 A.2d 223 (1968); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed 409 U.S. 1003 (1972). Because of this presumption, review of legislative actions is generally less stringent than that of quasi-judicial or adjudicative actions. Compare Rosedale-Skinker Improvement Ass'n v.
Unfortunately, judicial application of the legislative-adjudicative distinction has often been formalistic and mechanical. Specific categories of governmental actions are too often classified by the courts as legislative or adjudicative without an examination of whether the classification in the particular case fulfills the policies underlying the classification scheme. When these policies are examined, however, the distinction becomes a useful framework for determining the procedural due process requirements of historic preservation regulation.

A. Determining the Nature of the Governmental Action

The primary goal of due process is to safeguard individuals from arbitrary governmental action. The legislative-adjudicative distinction is based on the theory that because legislative action affects large numbers of individuals, the electoral process protects against arbitrary government action by providing a check on government power at the voting booth.

Apart from the basic due process goal of protecting against arbitrary action, commentators also have isolated a number of subsidiary goals to be served by due process. As it is often difficult to determine whether a land use decision is legislative or adjudicative, it may be useful to examine these subsidiary goals in characterizing land use de-

Board of Adjustment, 425 S.W.2d 929, 936 (Mo. 1968) (variance, as quasi-judicial, reviewed under substantial evidence test) with Stratakis v. Beauchamp, 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973) (rezoning, as legislative, reviewed under arbitrary and capricious standard). See note 100 & accompanying text infra. This mechanical application is also true of zoning cases. See generally Coon, supra note 83 at 125. According to Coon, application of the distinction requires an examination of the reasons behind it, since "[t]he labels quickly become empty or misleading if one loses sight of the reasons for applying them." Id. The Supreme Court articulated the reasons for the legislative-adjudicative distinction in Londoner v. Denver, 210 U.S. 373 (1908) and Bi-Metallic Inv. Co. v. Board of Equalization, 239 U.S. 441 (1915). Examinations of this type have become more commonplace as more and more courts are reexamining the basis of the distinction, particularly for rezoning actions. See Fasano v. Board of County Commrs, 264 Or. 574, 507 P.2d 23 (1973).

There have been calls for the elimination of the legislative-adjudicative distinction in the zoning area. Horn v. County of Ventura, 24 Cal. 3d 605, 620-21, 596 P.2d 1134, 1142-43, 156 Cal. Rptr. 718, 727 (1979) (Newman, J., concurring). See also Kahn, supra note 38, at 1033-37 (advocating incorporation of the distinction into a due process balancing test, with purely legislative acts as a "de maximus" cut-off for the application of due process).

See text accompanying notes 88-96 infra.


See Kahn, supra note 38, at 1028-29. Also, because of the inherent protection of the legislative process and because large numbers of individuals are typically involved, evidentiary hearings would be unnecessary and burdensome. Bi-Metallic Inv. Co. v. Board of Equalization, 239 U.S. 441 (1915).

See, e.g., Kahn, supra note 38, at 1023-27. These subsidiary goals are often referred to as "process values." See id.

Rezoning is the best example of a governmental action that the courts have had major difficulties in characterizing. See Harris, Rezoning: Should It Be a Legislative or Judicial Function?, 31 BAYLOR L. REV. 409 (1979).
cisions for due process purposes. Three such subsidiary goals have been identified: efficiency, acceptability, and dignity. Efficiency is the goal of formulating procedures which produce accurate results, from a factual and political standpoint, within acceptable limits of time and expense. The goal of acceptability incorporates the legitimizing effect of individual participation that allows those affected to question the scope and application of substantive rules and makes those rules more acceptable to the affected population. The goal of dignity recognizes that one purpose of due process is "to convey to the individual a feeling that the government has dealt with him fairly." Where these three goals are sufficiently served by the decisionmaking process of the governmental action, no further procedural protections should be necessary.

The legislative-adjudicative test has been applied in at least three different ways. Each variation reflects to some degree one or more of the due process goals outlined above. Courts using the traditional approach examine the kind of governmental decisionmaking body that has taken action. A second approach focuses on the type of facts un-

94. See Codd v. Velger, 429 U.S. 624, 627 (1977) (hearing serves no useful purpose if no facts are in dispute). The form of decision must be optimally suited to the type of decision made. Efficiency appears to be the primary basis for requiring that different procedures be used to determine legislative and adjudicative facts. See notes 103-107 infra and accompanying text. See also Mackey v. Montrym, 443 U.S. 1, 21 (1979) (Stewart, J., dissenting).
96. Carey v. Piphus, 435 U.S. 247, 262 (1978). See Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 175-76 (1951) (process must generate feeling that justice has been done). See also Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1512 (1978) ("the greater the specificity of a governmental action ... the greater the threat to dignity interests and hence the need for extending individual procedural rights.").
97. Actually, most courts that characterize land use actions for due process or judicial review purposes do not expressly adopt any of these three approaches. Instead they resort to well-established labels, without ever adequately exploring the reasons behind the labels. For example, zoning and rezoning actions are traditionally labeled as legislative. Kahn, supra note 38 at 1029. See 1 R. Anderson, American Law of Zoning § 4.01 (2d ed. 1977), 3 id., § 1804. Variances and special exceptions are considered adjudicative. 3 id., § 20.01.
98. See, e.g., Shaw v. Burleigh County, 286 N.W.2d 792 (N.D. 1979).
derlying the subject of the governmental decision as the determining factor. A third approach, articulated by the Oregon Supreme Court in *Fasano v. Board of County Commissioners*, considers the number of persons affected by an action and whether the action applies or formulates policy, rather than considering the nature of the decisionmaking body.

The traditional approach distinguishes between legislative and adjudicative actions solely by the type of decisionmaking body. This approach is based on the assumption that actions by legislative bodies are generally subject to public scrutiny and are therefore politically accurate, thus generally achieving the goal of acceptability. In land use regulation, however, decisions by legislative bodies often affect only a small number of individuals. With its formalistic classifications, the traditional approach may not actually satisfy the goal of acceptability since low political accountability increases the chance of arbitrary action. Additionally, the limited procedural safeguards afforded by the legislative classification under these circumstances may not satisfy the goal of dignity for those affected, nor the goal of efficiency—accurate results within moderate administrative limits.

The second approach, focusing on a distinction between adjudicative and legislative facts, is more effective in testing whether the action accomplishes the goals of due process. Under this approach, where the facts underlying a given decision are legislative, concerning general questions of law and policy, parties acting as individuals have little or nothing to contribute to their determination. Where, however, the underlying facts are adjudicative, concerning specific parties, parties' activities, or parties' properties, they are "intrinsically the kind of facts

99. SEC v. Frank, 388 F.2d 486, 491-92 (2nd Cir. 1968). See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3 (2d ed. 1979). The underlying facts are usually classified as "adjudicative" facts, involving localized concerns that may be developed in an adversary proceeding, or "legislative" facts involving questions of broad social policy. See text accompanying notes 103-112 infra.

100. 264 Or. 574, 507 P.2d 23 (1973).

101. See note 98 supra.

102. See Kahn, supra note 38, at 1029. As a matter of theory, only a minority of jurisdictions use a strict nature-of-the-body determination. See, e.g., Shaw v. Burleigh County, 286 N.W.2d 792 (N.D. 1979); Board of Zoning Appeals v. Cedar Knoll, Inc., 217 Va. 740, 232 S.E.2d 767 (1977). This is indicated by the fact that most jurisdictions treat variance and special exception determinations as quasi-judicial, even when made by a local legislative body. See, e.g., Johnston v. Board of Supervisors, 31 Cal. 2d 66, 187 P.2d 686 (1947); Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 265 S.E.2d 379, rehearing denied, 300 N.C. 562, 270 S.E.2d 106 (1980); 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 18.04, 18.70 n.6, 19.10 n.20 (2d ed. 1977). In practice, however, most courts do take the traditional approach, in that they consider all decisions implemented by ordinance as legislative even though such actions are indistinguishable from others classified as quasi-judicial. See note 109 infra and accompanying text.

103. See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3 (2d ed. 1979).

104. Id.
that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them. . . .” 105 A legislative-adjudicative distinction based on the type of facts underlying a decision serves the goals of achieving efficiency 106 and promoting dignity. 107

Though few land use planning decisions have employed the underlying factual approach, 108 several post-Fasano decisions have taken a third approach, rejecting “nature-of-the-body” or other formalistic labeling techniques in order to focus on issues that are related to the nature of the underlying facts. 109 These decisions often turn on whether the action establishes policy or whether it applies policy, 110 and

105. Id.
107. Id.
109. E.g., Cooper v. Board of County Comm’rs, 614 P.2d 947 (Idaho 1980); Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). The Oregon Supreme Court’s decision in Fasano v. Board of County Comm’rs, 264 Or. 574, 507 P.2d 23 (1973), has been cited as the leading example of a recent series of cases re-examining the basis for the traditional label given to rezoning actions. See ABA Special Comm. on Housing & URB. Development L., Housing for All Under Law 268-73 (1978); Webster, The Fasano Procedures: Is Due Process Enough?, 6 Envt’l L. 139 (1975). The majority rule is that all rezoning decisions are legislative in nature. 264 Or. at 580, 507 P.2d at 26. If such actions involve small parcels, they become indistinguishable from other traditionally quasi-judicial actions. Rezoning thus has often been a source of confusion for the courts. Compare Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956) (rezoning as quasi-judicial) with In re Frank, 183 Neb. 722, 164 N.W.2d 215 (1969) (rezoning as legislative). In Fasano the Oregon Supreme Court recognized that the treatment of local governmental bodies as the equivalent of state and national legislatures is unrealistic. 264 Or. at 580, 507 P.2d at 26. Based on the specificity of small area rezonings, the court in Fasano recognized that zoning amendments may actually be a tool for implementation of or exception from previously-established legislative policy. The court held that small area changes were usually quasi-judicial acts regardless of the decision-making body, the form of the decision, or the label given to the act. Id. at 581, 507 P.2d at 26. See also Coon, supra note 83, at 121-38.


110. E.g., Cooper v. Bd. of County Comm’rs, 614 P.2d 947, 950 (Idaho 1980); Snyder v. City of Lakewood, 189 Colo. 421, 427, 542 P.2d 371, 374 (1975). See generally Kahn, supra note 38, at 1030. This is essentially a functional view of the factual distinction: a formulation of policy is an inquiry into broad social questions; an application of policy is an inquiry
inquiry similar to the factual one, as well as on whether the action affects a large or small number of individuals. The latter consideration can help achieve the goal of acceptability.

The number of goals adequately reflected by each of the three approaches helps to determine which approach should be used to characterize historic preservation actions. The traditional approach, because it achieves only the goal of acceptability, and does so unreliably, is a poor analytical tool. The factual approach, achieving the goals of efficiency and dignity, is an improvement. However, when inquiry into the underlying facts and an examination of the effects of the action in question combine, a court may serve each goal: efficiency, dignity, and acceptability. In applying the legislative-adjudicative distinction to historic preservation action, therefore, the discussion that follows will follow this combined approach.

B. Characterization Of The Historic Preservation Decision

The typical historic preservation format of designation and appropriateness-certification is roughly analogous to the format of zoning and variances or special exemptions, and courts appear to be applying the same terminology to both situations. However, an examination of historic preservation actions indicates that most such actions should be classified as quasi-judicial regardless of the decisionmaking body in light of the classification factors expressed in the post-Fasano rezoning decisions. The distinction, therefore, also reflects the efficiency and dignity goals. See notes 94-96 supra and accompanying text. A clear distinction, however, between legislative and adjudicative facts, or formulation and application of policy is often impossible to perceive. See 2 Davis, Administrative Law Treatise § 12.3 (2d ed. 1979).

111. E.g., Cooper v. Bd. of County Comm'rs, 614 P.2d 947, 950 (Idaho 1980); Snyder v. City of Lakewood, 189 Colo. 421, 427, 542 P.2d 371, 374 (1975). See also Coon, supra note 83, at 128.

112. Where, for example, a land use decision by a local legislative body affects only a small number of individuals, that decision may not be politically accurate, as "these citizens are almost powerless to remedy an adverse decision at the polls." Kahn, supra note 38, at 1030-31. Where such a situation exists, procedural due process may be essential to establishment of the legitimacy and dignity of the process. See text accompanying notes 95-96 supra.

113. See text accompanying note 102 supra.

114. See text accompanying notes 103-112 supra.

115. See, e.g., Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61 (Mo. Ct. App. 1980) (designation of landmark, like a zoning ordinance, is legislative); Lutheran Church in America v. City of New York, 34 N.Y. 2d 121, 316 N.E.2d 305, 359 N.Y.S. 2d 7 (1974) (designation by Landmarks Commission is not quasi-judicial, and therefore lower court's use of substantial evidence test was incorrect).

116. See note 109 supra.
1. The Certificate of Appropriateness

The certificate of appropriateness is relatively easy to classify.117 The relevant factors indicate that the certificate of appropriateness should be considered adjudicative regardless of the type of governmental body making the decision.118 Certificates of appropriateness typically involve individual properties and individual owners. As a result, there is no guarantee of politically accountable decisionmaking as in a traditional legislative action. Thus, in terms of the acceptability goal, due process may be required in certificate of appropriateness proceedings.119 Also, the certificate of appropriateness certifies that a particular use or alteration by a property owner complies with the policy set out by an ordinance.120 As such, it is an application of previously established policy.121 The underlying facts in each case pertain to specific individuals and their property and are thus primarily adjudicative in nature.122 Affording procedural protections, therefore, would be consistent with the goal of efficiency in due process. The affected individuals are relatively few and are in a good position to demonstrate facts to the court that would show the appropriateness or non-appropriateness of a proposed change.123 Allowing procedural safeguards and the right to participate in the decision would also preserve the dignity of the persons affected.124

2. Designation

An examination of landmark and district designation to determine the due process requirements yields a far less conclusive answer than an examination of certificates of appropriateness. There are two basic types of designation ordinances.125 In one type, a legislative body designates the district or landmark as a part of the historic preservation

117. See notes 25-29 supra and accompanying text.
118. Most historic preservation ordinances do provide for at least some notice and hearing protections for certificate of appropriateness actions. See, e.g., S. Dennis, supra note 28, at 79. A full evidentiary hearing, however, may not be required. See note 170 infra.
119. See notes 94-96 supra and accompanying text.
120. Some historic preservation ordinances also allow consideration of hardship on the owner. See, e.g., D.C. CODE ANN. § 5-1005(f) (1981) (no permit to issue unless necessary in public interest or if failure to do so would result in unreasonable hardship).
121. See note 110 supra.
122. Although general policy considerations may be considered in such decisions, the inquiry usually involves a change specific to a particular property. See, e.g., Sleeper v. Old King's Highway Historic Dist. Comm'n., No. 216 (Mass. App. Div., Mar. 13, 1981) (certificate of appropriateness for erection of radio antenna on residential property).
123. See note 94 supra and accompanying text.
124. See note 86 supra and accompanying text. To the extent that the ordinance allows consideration of hardship, the individual owner is in the best position to explain and argue facts showing such a hardship.
125. See text accompanying notes 22-24 supra.
ordinance itself.126 Alternatively, the legislative body may simply establish a policy for preserving valuable historic properties and create a commission to designate sites.127 Under the traditional approach of legislative-adjudicative classification, the first type of designation would be considered a legislative action, while the second would be either legislative or quasi-judicial, depending upon the type of body making the final decision.128 Realistically, the factual differences between designations made by original ordinance and those made later on a case by case basis are minimal, and thus the traditional approach to the legislative-adjudicative distinction is an ineffective way to test the degree to which a particular designation action satisfies the goals of due process. The type of underlying facts and the specificity of effect, the factors that courts should consider when applying due process standards, are the same for both types of designation.

All designations may be said to exhibit a mixture of both legislative and adjudicative characteristics. Both types of historic preservation ordinance apply a general policy established by the ordinance. The administering body is the only difference between the two types of ordinances. Conversely, application of the ordinance is not determined by broad policy factors that must be left to legislative discretion. Rather, application depends upon facts specific to the property involved: age, architecture, and historical significance. The underlying facts may become more specific as the number of individual parcels involved decreases. For example, although broad legislative policy considerations may play a role in the designation of an individual landmark, the decision is based primarily upon facts specific to the individual property involved. Participation by the affected party may be necessary to give the individual a chance to participate in the decision and thereby give the result greater legitimacy and perhaps improve its accuracy. Participation would also go a long way toward helping to preserve the individual's dignity and self-respect.129 By contrast, although the designation by an appointed commission of a large district may involve an inquiry into the significance of individual properties, the designation is based primarily on policy concerns affecting large numbers of people. In such a situation the number of those affected makes some political accounting likely and partially obviates the need for judicially imposed safeguards. Moreover, the goal of achieving efficiency militates against individual notice and hearing procedures since

126. See note 22 supra.
127. See note 23 supra.
128. See notes 101-02 supra and accompanying text. If the Commission were elected, then the designation would be legislative, and if the Commission were appointed, then the designation would be quasi-judicial.
129. See text accompanying notes 95-96 supra.
the time and expense involved would tend to discourage designations. Designation of a large district should thus be considered a legislative action regardless of the designating body.

The problem is one of line drawing: at what level of impact does a decision become legislative in nature rather than quasi-judicial? For due process purposes, the best initial determination of the nature of a historic preservation action may be one based on an inquiry into the number of persons directly affected by the decision. The issue of how many people are affected corresponds to the nature of the facts underlying the decision, and brings into sharp focus all of the goals of due process: efficiency, acceptability, and dignity. Conveniently, most designations involve individual landmarks, or fairly small districts. As a general rule, therefore, courts should presume that historic designation is quasi-judicial. As a corollary, the legislative label should be applied to deny procedural safeguards only when the action involves large numbers of individuals and when general facts rather than facts pertaining to specific property are to be considered.

Characterizing historic preservation designations as quasi-judicial, unless they are clearly legislative, ensures that due process safeguards, designed to achieve the three goals of efficiency, acceptability, and dignity, will be dispensed with only when judicially imposed procedures would add little to the accomplishment of these goals. Although this approach will have the effect of classifying borderline cases as adjudicative, it will not mean that the procedural protections afforded will unduly restrict the decisionmaking process. Instead, determining what safeguards must actually be provided may be done by balancing the interests of affected individuals against the government's interest in efficient decisionmaking.  A quasi-judicial classification, however, is necessary for such a balancing exercise to be made.

130. See note 94 supra.

131. Contrast this with the traditional zoning view, where the number of people affected by a zoning or rezoning action is irrelevant. This view is gradually changing, at least for rezoning actions in light of Fasano. It is significant that in Fasano and those rezoning cases following Fasano, the most important factors in characterizing a rezoning as legislative or quasi-judicial are the number of owners and size of property affected. Fasano v. Board of Comm’rs, 264 Ore. 574, 580, 507 P.2d 23, 26 (1973); Coon, supra note 83, at 128-30. The same two factors were also emphasized in the United States Supreme Court’s decision in Bi-Metallic Inv. Co. v. Board of Equalization, 239 U.S. 441 (1915), which is often cited as the original basis for the legislative-adjudicative distinction.

132. But see Virginia Historic Landmarks Comm’n v. Board of Supervisors, 217 Va. 468, 230 S.E.2d 449 (1976) (14,000 acres). See also note 60 supra.

133. The Supreme Court’s decision in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), is the clearest articulation of this balancing standard. See notes 157-169 infra and accompanying text.

134. This approach reaches the same result as that suggested in Kahn, supra note 38. Kahn suggests that the legislative-adjudicative distinction be abandoned in favor of a test that requires due process unless an elected body acts. Anything less than a clearly legislative
THE PROCESS DUE

Many historic preservation ordinances provide some measure of procedural protection to affected individuals. A few do so by reference to administrative procedure statutes. Most, however, call for “notice” and, occasionally, for a “hearing,” without further elaboration. These terms are usually interpreted by referring to zoning proce-

action requires some procedural safeguards. Kahn suggests that only actions carried out by state or national legislatures should qualify as “clearly legislative.” Under a balancing test, however, smaller interests, as measured by due process values, would require less stringent procedures. Id. at 1033-37.

The ABA Special Committee on Housing and Urban Development Law has made a similar suggestion:

The characterization of a local legislature’s response to individual requests for development permission as quasi-judicial actions can have a most beneficial effect in improving the quality of evidence presented to hearing bodies. Because such actions were [previously] viewed as legislative, the burden was on the opponent of the action to prove . . . that the action was contrary to public health, safety, and general welfare.

A quasi-judicial characterization can assist hearing tribunals by intimating an administrative law standard to determine the quality of evidence in contested cases.

ABA ADVISORY COMM. ON HOUSING & URB. GROWTH, HOUSING FOR ALL UNDER LAW 283 (1978) (citations omitted).

135. See, e.g., District of Columbia Historic Landmark and Historic District Protection Act of 1978, D.C. CODE ANN. § 5-1012(b) (1981) (proceedings in regard to alteration or demolition of designated properties must be conducted in accordance with the District of Columbia Administrative Procedure Act, D.C. CODE ANN. §§ 1-1501-1510 (1981)).

136. See generally S. Dennis, supra note 28, at 54-57, 79.

This is not to say, however, that guidance to preservation commissions on procedure is not available. See, e.g., id. One excellent example of specific guidelines made available to preservation commissions is a recent publication in North Carolina. R. LEARY & ASSOCS., LTD., A MANUAL FOR NORTH CAROLINA HISTORIC DISTRICT COMMISSIONS (1979) (prepared for Keep North Carolina Beautiful, Inc.) [hereinafter cited as N.C. HISTORIC COMM’N MANUAL]. That publication warns commissions of the need to afford procedural protections:

A historic district commission exercises a great deal of control over the property rights of owners within a historic district. This control must be exercised fairly and equitably. Fairness and equality of treatment are the basic requirements of two constitutional protections which are given to property owners: a United States citizen may not be deprived of his life, liberty, or property without due process of law and a citizen must be given equal protection under the law. Due process requires that a property owner be afforded certain procedural safeguards; the essential elements of due process are notice and an opportunity to be heard. Equal protection requires that property owners in a similar position be treated similarly.

Historic district commissions must follow the procedural rules which have been laid down as essential to due process and equal protection by the United States and North Carolina Supreme Courts. Failure to follow these rules exposes a commission to the possibility of having its actions invalidated. Indeed, a commission’s decision is more likely to be set aside by a court for procedural reasons than for substantive reasons.

Id. at 13 (emphasis in original). The manual also makes specific suggestions for providing such protections. For example, written notice should be mailed to all property owners within 100 feet of a property for which an application for a certificate of appropriateness has been filed. However no recognition is made of the need for procedural protections in the case of designation actions. Id. at 62. A sister publication for landmarks preservation com-
dures. This analogy, mechanically applied, fails to properly characterize many historic preservation decisions as adjudicative; as a result the procedural protections afforded to those affected are often inadequate.

Although the wide variety of administrative structures for historic preservation prevents a thorough examination of all the different procedural protections required for each situation, some general observations may be made outlining the basic constitutional requirements.

1. Notice

The fundamental due process right of an opportunity to be heard is meaningless unless proper notice allows an interested party to take advantage of that opportunity. The Supreme Court established the minimum requirements for form, content, and timeliness of notice in Mullane v. Central Hanover Bank & Trust Co. Mullane requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Applying an analysis that balanced competing private and governmental interests, the Supreme Court rejected notice by publication in favor of individual mailed notice in situations where the parties' names and addresses are readily available.

The principal question concerning the form that notice should take is whether notice by publication is sufficient for due process purposes. The legislative-adjudicative distinction is an important factor in how this question is answered, since notice of legislative action is traditionally not required. Characterizing the majority of historic preservations is also available. R. Leary & Assoc., Ltd., A Manual for North Carolina Historic Properties Commissions (1980).


See notes 125-134 supra and accompanying text.

The "opportunity to be heard" was first described by the Supreme Court as a fundamental due process right in Goldberg v. Kelly, 397 U.S. 254 (1970).


Mullane involved judicial settlement of trust accounts. The same principles have been applied to cases involving land use. See, e.g., Walker v. City of Hutchinson, 352 U.S. 112 (1956) (eminent domain action); Schroeder v. New York City, 371 U.S. 208 (1962) (partial condemnation).

339 U.S. at 314. The notice must "reasonably convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." Id.

Id. at 317-18.

tion actions as adjudicative allows the Mullane policies to be included in a balancing of private and governmental interests. In view of Mullane, written notice should be the rule for historic preservation actions. In all but the largest designation actions, parties affected by historic preservation actions can be easily identified and names and addresses of owners may be readily available to the local decisionmaking body. Written notice should be required for historic designation, in light of Mullane. Also, written notice should be provided by commissions for certificate of appropriateness proceedings, especially for those owners and neighbors with easily identifiable property interests.


145. The Supreme Court indicated in Mullane that there is no substantial governmental interest that can deny individual notice where the names and addresses of affected parties are easily identified. 339 U.S. at 317-18.

146. Even relatively large-scale designations might require individual written notice—the Court in Mullane required such notice for over one hundred interested parties. Id. at 317-18. Publication, however, may be sufficient for yet larger designations because of the costs involved in individual service, especially if the parties are unknown. Id. at 318. This result is consistent with the analysis of large-scale historic designation, since the action would probably be characterized as legislative. See notes 131-134 supra and accompanying text. At present, individually mailed notice for any type of district designation is a rarity, probably due to the perception of district-wide actions as legislative. For example, although the procedures of the District of Columbia Joint Committee on Landmarks provide for both mailed notice and publication for designation of individual landmarks, publication alone is considered sufficient for designation of historic districts, no matter how small. Joint Committee on Landmarks of the National Capital, Procedures for the Designation of Historic Landmarks and Historic Districts 3-2 (July 22, 1976). Even when individually mailed notice is required by a preservation ordinance, it is not always given. See, e.g., Southern Nat'l Bank v. City of Austin, No. 253-676 (Travis Co. Dist. Ct., Tex., March 13, 1978), aff'd on other grounds, 582 S.W.2d 229 (Tex. Civ. App. 1979).

147. Notice by publication would be appropriate for persons whose interests are not clearly defined. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950). The problem of identifying the parties entitled to individual notice parallels the question of determining who has a property interest affected by the action taken.

In historic preservation, in contrast to zoning regulation, a designation or certificate of appropriateness action may not have any cognizable effect on the property interests of a neighboring landowner. For example, the interest affected may not be the owner's interest in the use and enjoyment of his own property, which is clearly protected by the Constitution, but is rather the nearby owner's interest in the neighborhood character which is created by the regulatory scheme. See notes 55-62 supra and accompanying text. In such a case, although written notice would be required for the owner whose use and enjoyment is affected by designation, publication might suffice for owners near or adjacent to property subject to either designation or certification of appropriateness. Preservation commissions should combine publication with individually mailed notice to neighbors within a certain distance of the property proposed for designation or alteration, for protection against a potential challenge. See, e.g., N.C. Historic Comm'n Manual, supra note 136 at 62 (affected property owners within 100 feet on all sides of the subject property in case of certificate of appropriateness); Berkeley, Calif., Historic Preservation Ordinance § 4.1(a), reprinted in S. Dennis, supra note 28, at 145 (all property owners within 300 feet of subject property in case of designation proceedings).
The Supreme Court, in *Mullane*, noted that the content of the notice must reasonably apprise interested parties of both the pending action and the opportunity to object. Notice of a historic preservation action should contain a description of the action's effect, the property affected, and the location and date of any hearing, as is usual for notice in zoning cases.

2. Hearing

In *Board of Regents v. Roth* the Supreme Court provided the general rule that "some kind of hearing" is required prior to the deprivation of a protected interest. The questions of when in the process such a hearing must be held and what type of a hearing must be held were not, however, elaborated upon.

The general principal regarding the timing of a required hearing is that a hearing may be postponed until after the deprivation only in extraordinary situations involving a valid governmental interest. Applied to historic preservation, this principle requires that a hearing take place before the final action in a designation or certificate of appropriateness proceeding. Whether this would prevent the imposition of temporary predesignation restrictions on landowners wishing to demolish or alter sites proposed for designation is, however, a different matter.

A number of historic preservation ordinances provide for temporary restrictions on an owner's use of property while an application for designation is pending. Absent such provisions, the owner of a hist-

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150. 408 U.S. 564, 569 n.4 (1972).
151. *Id.*
154. The property is "frozen" until the application is acted upon. *See, e.g.*, La. Rev. Stat. § 25:758 (1975). These prehearing restrictions are generally made subject to specific time limits, after which, if no decision has been made, the restrictions are lifted. *See, e.g.*,...
toric property could moot a pending designation through demolition or alteration prior to the hearing. Temporary prehearing restrictions are thus needed to preserve the effectiveness of the entire ordinance.

The Supreme Court, in *Mathews v. Eldridge*, considered three factors in determining whether a hearing is required before restraints on property are imposed as a matter of due process: (1) the nature and weight of the private interest affected; (2) the governmental interest served by limiting normal procedural safeguards; and (3) the risk of an erroneous deprivation of the private interest as a consequence of the summary procedures used. In historic preservation, the private interest involved is that of the free use and enjoyment of land. Although this interest is generally favored in our legal system, it has long been subjected to police-power restrictions. There is a strong governmental interest in protecting historic structures, especially in cases where procedural delay would be likely to result in the destruction or alteration of such property. Finally, there is little danger of erroneous deprivation because procedural protections are commonly

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Berkeley, Calif. Historic Preservation Ordinance § 15, reprinted in S. Dennis, supra note 28, at 63 (180 days); D.C. Code Ann. § 5-1005(c) (1981) (120 days). Failure to require such reasonable time limitations may subject the pre-hearing restrictions to invalidation on constitutional grounds. See Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229 (Tex. Civ. App. 1979) (freeze imposed on property by placement on preservation commission agenda for landmark consideration may constitute taking of property without just compensation if not restricted by reasonable time limitations).

155. See, e.g., Don't Tear It Down, Inc. v. General Services Administration, 401 F. Supp. 1194 (D.D.C. 1975) (GSA, by a “Sunday sneak attack”, tore down subject property, thereby making issue of a National Historic Preservation Act violation a moot point.)

156. See S. Dennis, supra note 28, at 63. Compare this with zoning usage changes where there is no need for temporary prehearing restrictions on such changes because of the time required for construction, and because of the principle that a person may not create his own hardship as a defense to a zoning regulation. Zengerle v. Board of County Comm'r's, 262 Md. 1, 276 A. 2d 646 (1971). See 3 R. Anderson, American Law of Zoning § 18.56 (2d ed. 1977).

157. 424 U.S. 319 (1976) (a hearing after the termination of social security benefits is adequate).

158. Id. at 335.

159. See notes 35-36 supra and accompanying text.

160. See Kahn, supra note 38, at 1014-15.

161. See note 37 supra and accompanying text.

162. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). “[T]his 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 . . . .” Id. at 129.

incorporated into the designation application process itself. Thus, when the *Mathews* test is applied, temporary predesignation restrictions on property would appear to be constitutional.

In order to determine the type of hearing that is required by due process, the Supreme Court has balanced the government’s interest in efficiency and accuracy against the participant’s private interest. Generally, something less than a full trial-like hearing is required, even if the private interests are especially strong. In *Mathews*, for example, the Court stated that for termination of disability payments a full evidentiary hearing “is neither a required, nor even the most effective method of decisionmaking in all circumstances.” Instead, all that is necessary is “that the procedure be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’”

The concept of a “fair hearing” as something less than a full evidentiary hearing has been accepted and refined in zoning cases. Due

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164. For example, there are usually strict restrictions on who may submit an application for designation. Also, a filing fee may be required. S. Dennis, *supra* note 28, at 52-53.

165. Although *Mathews* involved the right to social security payments, the *Mathews* test has been applied in a number of situations. See Mackey v. Montrym, 443 U.S. 1 (1979) (upholding prehearing suspension of driving licence); Dixon v. Love, 431 U.S. 105 (1977) (same); see also *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (upholding temporary prehearing moratoria on opening of automobile dealership by manufacturer of competing franchisee protests).

166. *Constitutionality is aided if the hearing follows promptly from the application.* See, e.g., *Boston, Mass., Landmarks Ordinance* § 4, reprinted in S. Dennis, *supra* note 28, at 52 (hearing must follow application within 30 days).


The courts have indorsed . . . a degree of informality which is uncommon even to hearings conducted by administrative agencies. . . . [T]he courts have fixed their attention upon the basic purpose of a public hearing to afford to all interested parties a full and fair opportunity to be heard, and they have placed little emphasis upon rules of evidence, or other niceties of court procedure.

*Id.* at 505 (footnotes omitted). This informality appears to have been adopted by historic preservation commissions, as reflected in various guidelines and local ordinances. *See generally S. Dennis, supra* note 28, at 56-57, 79. It is unclear whether this informality is due to a failure to understand the significance of procedural due process at the local level, or simply a response to what one commentator has termed a “need for flexibility in the application of due process requirements to the land use planning setting . . . .” Wetzel, *Implementing Cooper: Due Process and Land Use Planning*, 17 Idaho L. Rev. 149, 153 (1980). Flexibility in the decisionmaking process, however, is not inconsistent with clearly-defined procedural standards. While historic preservation commissions may find such procedures uncomfortable at first, “it has been found that such a formal approach to its affairs will aid the commission in making sound decisions, providing the necessary record of its actions, instilling public confidence in its competence, and protecting the rights of the public and the individ-
to the fact that historic preservation decisions may involve a different mixture of legislative facts and adjudicative facts than zoning actions, the Mathews "balancing" may favor the government's interests in efficiency. Evidentiary rules may therefore be somewhat less strict.\textsuperscript{171}

There are two areas, however, in which the courts may be expected to require strict adherence to procedural safeguards due to the inherently arbitrary nature of local land use regulation.\textsuperscript{172} The two areas are the right to an impartial tribunal and a written judgment explaining the decision. An impartial decisionmaker has long been recognized as a requirement of due process.\textsuperscript{173} In historic preservation, prejudgment of an issue presents a greater problem than precuniary interest, often as a result of the placement of persons with historic preservation backgrounds on decisionmaking boards.\textsuperscript{174} Along with their expertise, these persons may bring certain philosophical views that may be reflected in their decisions. Any direct connection between the case at hand and the background of a board member may violate the "appearance of fairness" requirement.\textsuperscript{175}

A second procedural objection common to many historic preserva-
tion hearings is that they fail to provide a reasoned explanation of judgment, findings of fact, or reasons for a particular decision. The lower courts have consistently recognized such a requirement and have generally been strict in its application, though the requirement has only infrequently been articulated as a due process requirement by the Supreme Court. The requirement that reasons be given for a decision is particularly important in historic preservation decisions, as the standards for such decisions are, by their nature, often imprecise or unclear. Although a full statement of reasons is not always possible, enough information should be given to allow for proper administrative and judicial review.

3. The Problem of Standards

A set of "ascertainable" administrative standards is an additional requirement of procedural due process. Standards must be pub-

179. See notes 181-188 infra and accompanying text. The requirement adds to uniformity in decisionmaking. It also helps to satisfy both the goals of acceptability and dignity. See notes 95-96 supra and accompanying text.
180. As the number of legislative type facts relied on increases, decisions may become harder to articulate. Though this difficulty is particularly true in historic district designations, some statement of reasons is usually possible. A few courts have set up fairly rigid requirements. See, e.g., South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 21-23, 569 P.2d 1063, 1076-77 (1977), requiring that decisionmaking bodies describe (1) the facts relied upon; (2) the relevant criteria for the decision, including policy objectives; and (3) the way that the decision serves such policies.

The distinction between legislative and adjudicative actions plays a role here as well. Purely legislative acts are not subject to this requirement. They are, however, subject to other substantive doctrines. A statute or ordinance is void for vagueness, for example, when "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

Another such doctrine is the non-delegation doctrine, which prohibits the standardless delegation of legislative power to administrative bodies. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). See generally Peckinpaugh, Florida's Adherence to the Doctrine of Nondelegation of Legislative Power, 7 Fla. St. U. L. Rev. 541 (1979). The doctrine is considered to be dead at the federal level. See H. Linde & G. Bunn, Legislative & Administrative Processes 537 (1975). But see Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972) (arguing for its revival). It is, however, alive and well in a number of states, and has been used to strike down historic preservation enabling statutes that result in standardless delegations of legislative powers to historic commissions. See South of Second Assoc. v. Town of Georgetown, 196 Colo. 89, 580 P.2d 807 (1978); Texas Antiquities Comm. v. Dallas County Community College Dist., 554 S.W.2d 924 (Tex. 1977). But see A-S-P Assoc. v. City
lished and available to the participants before the hearing so that each party may present an adequate defense and concentrate on key elements of the decision's basis. A reviewing body or court must also have access to the standards and criteria for use in reviewing the decision.

Historic preservation and other types of aesthetic regulation have had problems with vagueness of applicable standards for many years. This may be because aesthetic regulation is more subjective than other types of regulation. The Supreme Court nonetheless has accepted the general validity of aesthetic standards. Thus, although historic preservation standards are still frequently invalidated on vagueness grounds, fairly broad criteria for determining historical significance have become generally accepted by the courts. For due process purposes, however, the sufficiency of standards and criteria used in historic preservation will be determined by whether property owners are given an opportunity to ascertain those standards and crite-


182. Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980). In Green Springs, a National Historic Landmark designation of a 14,000-acre district was overturned because, among other things, the federal government had never published designation regulations or criteria. Although certain guidelines were purportedly used, they were not considered to be binding by the agency, they were vague and "open-ended," and they were not made available to the plaintiffs until after the designation hearing. Id. at 855. Apart from the due process violation, the court also found that failure to provide the criteria violated the Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (1976). 497 F. Supp. at 855.


ria so that they can apply them in arguing for or against a particular action.\textsuperscript{188}

\section*{CONCLUSION}

Historic preservation regulation significantly affects the property interests of owners of historic property, as well as others nearby. Frequently, however, the procedural safeguards required by the Constitution are lacking in historic preservation programs. These procedural deficiencies are not merely an inconvenience to affected parties; they expose preservation actions to invalidation on procedural grounds, and thereby pose a significant threat to the success of historic preservation regulation.

Among the reasons for these procedural inadequacies is a failure of reviewing courts to independently analyze historic preservation regulation in procedural due process terms. Courts have instead treated historic preservation actions as either legislative or quasi-judicial, often by analogy with similar zoning actions originally characterized on the basis of the decisionmaking body. Courts reviewing historic preservation actions should avoid a mechanical application of the legislative-adjudicative test.

Most historic preservation actions should be characterized as adjudicative in nature, regardless of the decisionmaking body. The adjudicative characterization, in all but the largest historic district designations, best reflects the goals of procedural due process. This characterization, however, does not require that the strictest procedures be applied. Adjudicative characterization allows balancing of governmental and private interests; procedures may be formulated that allow meaningful participation by interested parties without ignoring the government's need for efficient decisionmaking. Such a balancing indicates that notice requirements should be fairly strict, yet the required hearing may occur after preliminary restrictions are placed on the structure involved. A full-blown evidentiary hearing is not required, but those affected must be guaranteed the right to an impartial decisionmaker, a reasoned decision with specific findings, and ascertainable standards to permit effective challenge and review. Such a combination of procedural protections should withstand constitutional challenge, yet allow the flexibility needed to ensure a manageable historic preservation program.

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Plaintiffs' chief due process argument, however, is that without published rules of procedure and substantive criteria for qualification as a landmark, they have been denied any meaningful opportunity for informal response to the proposed action and the Court has been precluded from meaningful review of the Secretary's decisions. The Court agrees.
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