

The Legal Framework of Historic Preservation

Lancaster Preservation Summit

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Our Agenda for this morning

- Introductions
- Legal Basis for Historic Preservation
 - Equal Protection
 - Due process
 - Takings
- Types of Preservation Ordinances in Pennsylvania
- The Defensible Ordinance
- Why Good Decisions Matter
- Discussion and Questions

* Nothing in this presentation is intended to constitute legal advice. You are advised to consult with the Municipal Solicitor or other legal counsel for official interpretation of applicable laws and policies.

The Major Players

Federal

National Park Service

Advisory Council

State

State Historic
Preservation Office
(PHMC)

Other State Agencies

Local

Elected Body

Planning Commission

Historic Architectural
Review Board?

Historical
Commission?

Community Groups

Local Preservation vs. the National Register Program

The National Register of Historic Places

- **Recognizes** the importance of that building, structure, object, or district for its importance to local, state, or national history
- **DOES NOT: Prevent** the demolition of historic properties by federal, state, local, or private development
- **Encourages** preservation of historic properties by documenting their significance
- **DOES NOT: Restrict or regulate** the maintenance,
- **Facilitates** SHPO review of state or federally funded projects
- **DOES NOT: Automatically** invoke local historic district zoning or landmark designation
- **Provides** information for planning purposes

Local Designation

- **CAN: Locally** designate historic resources
- **CAN: Regulate** the demolition and relocation of historic properties
- **CAN: Restrict or regulate** the maintenance, repair, or restoration of historic properties
- **CAN: Review** new construction
- **CAN: Protect** designated historic resources

The United States Constitution

- The 10th Amendment to the U.S. Constitution delegates to States all powers not reserved for the Federal Government
- Includes “police power” – the right to enact laws that protect the health, safety, and general welfare
- Interpreted to allow regulation of the activity of the individual



The Pennsylvania State Constitution

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Article I, Section 27, Pennsylvania Constitution

Authority of Police Power

Common Examples of the Police Power

- Public health regulations
- Building codes
- Zoning ordinances
- Subdivision regulations
- Sign regulations
- Pollution controls
- Environmental regulations
- Historic preservation ordinances

Limits to Police Power

- Must be for the public good
- Doesn't single out individuals or individual parcels of land
- Not clearly arbitrary & unreasonable

Equal Protection

- Equal protection
 - Prohibits discrimination in application of law
 - Similarly situated property should be treated similarly under the law
 - Different treatment of similar property will be upheld **if reasonable grounds exist for the disparity**

Due Process & Equal Protection

- Two important components of equal protection
 - Substantive Due Process
 - protects a person from being deprived of life, liberty or property for **arbitrary** reasons
 - Procedural Due Process
 - means adequate notice and opportunity for affected parties to be heard fairly

The Concept of Takings

- What is a taking?
- Based on the 5th Amendment to the US Constitution
- In historic preservation/land use/zoning context, primarily looking at regulatory takings

Penn Central Transportation Company v. New York City

- 1978 landmark case decided by the United States Supreme Court
- Supreme Court upheld the legality of the regulation of historic properties through designation
- Determined that denying the 50-plus story addition was a reasonable restriction
- Has served as the basis for State's decisions regarding historic preservation and takings



Pennsylvania's Enabling Legislation

- Enabling legislation describes the requirements and limitations on municipalities when exercising police powers in historic preservation ordinances
- Historic preservation in Pennsylvania is enabled by two statutes
 - Municipalities Planning Code
 - Historic Districts Act
- Municipalities with home rule charters have some additional options

Historic Districts Act

- Commonly referred to “Act 167”
- Passed in 1961 and it allows municipalities to designate historic districts and appoint “Boards of Historic Architectural Review”
- Requires PA SHPO certification
- Requires property owners to obtain Certificate of Appropriateness for various activities
- Makes governing body the decision-makers; HARB is advisory
- Limits review to exterior work that is visible from a public way

Municipalities Planning Code (MPC)

- Enables municipalities to create special zoning ordinances for historic properties and enact certain benefits and restrictions on those properties
- Allows for the designation of individual properties, in rural or suburban settings, provides special consideration of historic preservation when reviewing variance, subdivision, and special exception applications, and opportunities for development incentives that protect important characteristics of historic properties that are undergoing changes or development.

Local Designation Options

The Historic District Act of 1961

- Focus on concentrated historic resources to create a historic district
- Greater structure built into the legislation
- Requires PHMC (PA SHPO) certification

Municipalities Planning Code

- Ability to protect dispersed historic resources through individual designation
- Less structure and guidance regarding the structure of the ordinance

PA SHPO can provide technical assistance to develop either type of ordinance.

United Artists' Theater Circuit, Inc. v. City of Philadelphia

- Does the designation of a property without the consent of an owner constitute a taking?
- Heard by the Pennsylvania Supreme Court...twice
 - 1991 Decision—designation without owner consent constituted a “taking”
 - 1993 Rehearing—reversed the decision regarding designation constituting a “taking”
- Key Take Aways

The Park Home v. City of Williamsport

- The Park Home Trustee's Arguments
 - The decision was arbitrary and capricious
 - The building was structurally unsound
 - The ordinance constituted a "taking"
 - "Void for vagueness"
 - The ordinance should not apply to them
- City Council had to rehear the case
- Key Take Aways

The Key Take Aways

- Legal framework is by-in-large flexible
 - Allows communities to tailor ordinances to their resources, wants, and needs
- Your ordinance is only as good as your ability to defend it and how it is administered
- Utilizing best practices has a purpose

The Defensible Ordinance

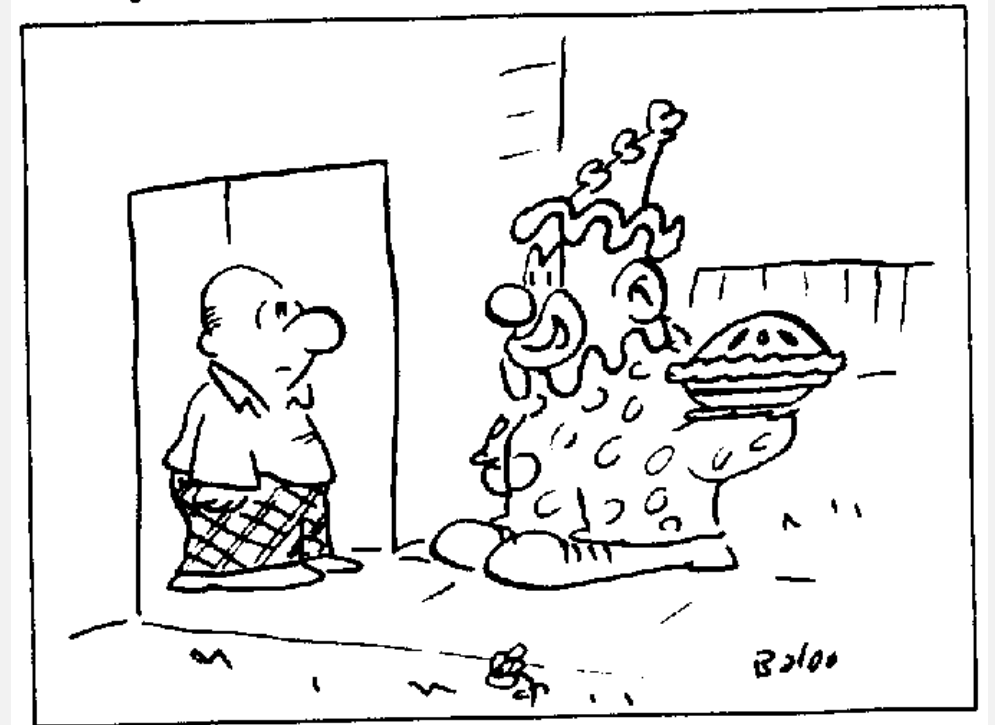
- Utilizes a clear & simple approach
- Treats all properties equally
- Establishes the legal authority
- Includes criteria for designation of historic resources/districts
- Creates a preservation review body & defines their roles & responsibilities
- Establishes clear review procedures & administration
- Includes economic hardship

Treating All Properties Equally

- Procedural Due Process Issues
- Substantive Due Process Issues
- These two types of due process issues can make municipalities susceptible to legal action
- Doesn't mean that all properties are the same
 - Purpose of the ordinance
 - Contributing versus non-contributing resources
 - Different properties have different circumstances

Good ordinances also require good administration

- HARBs/Commissions are government entities
- You have an obligation to afford equal protection to applicants



"Hi! I'm from the government, and I'm here to help you!"

Good decisions rely on training

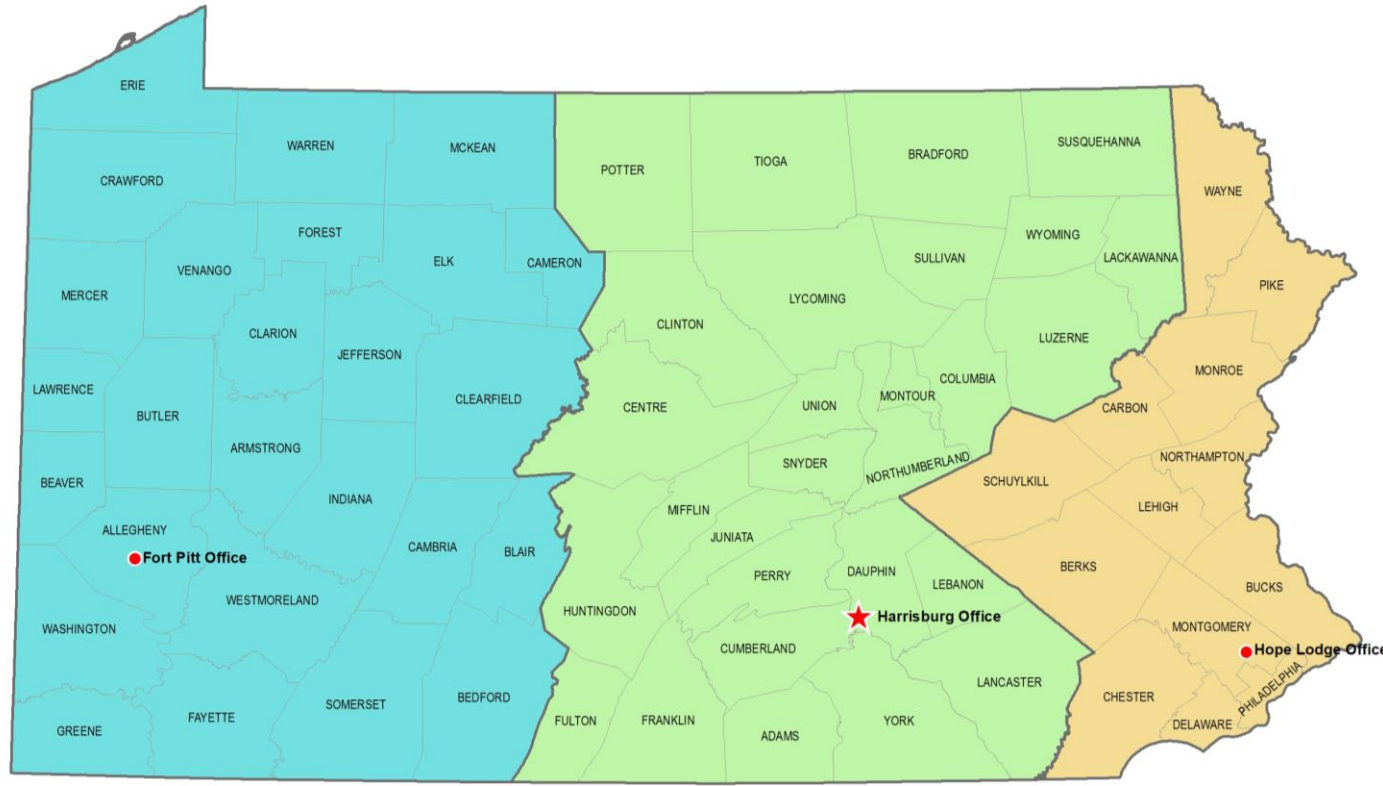
- Regular training helps keep HARB/Historical Commissions fresh on critical issues
- SHPO offers trainings on a variety of topics:
 - Defensible decision making
 - How to interpret your ordinance
 - How to implement design guidelines

Why you should care

- HARBs/Historical Commissions serve in an expert advisory capacity to governing body
- Legal frame-work leaves flexibility, which can include bad or ineffective practices
- Defensible ordinances and defensible decisions protect the public interest and the municipality
- Conducting meetings in a professional, legal, and ethical manner makes your ordinance defensible
- Understand and respect an individual's rights to due process and fair and equitable treatment under the law



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#PreservAtionHappensHere!

