International Municipal Lawyers’ Association
WEBINAR

Hot Topics in Local Historic Preservation Law

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Your Presenters

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Outline

• Background

• Hot Topics
  – The Hanna Case
  – Designation: Landmarking Delays
  – Designation: Interior Designations
  – Conservation/Preservation Restrictions

• Working with Advocacy Organizations

• Q&A
Background

• Q: How about some general background on how localities can regulate historic properties?
Local Law: Background

- Historic preservation ordinances govern private actions affecting historic resources
- Administered by local Historic Preservation Commissions
  - They grant/deny permits to change the historic property
  - They may advise in the designation of historic buildings
- Preserve primarily the *external* historic character of buildings/areas
Local Law: Background

- 3 main types of historic preservation ordinances
  - Restrictions on Demolition
  - Restrictions on Alteration
  - Restrictions on New Construction
Local Law: Demolition

• Review for “Appropriateness”
• Require Delays
  – 30 day to 2-year waiting period
  – Time to consider alternatives
• Require Maintenance
  – See, e.g., Washington, DC; Dallas

A 1920s era farmhouse in Chattahoochee Hills, Georgia recently scheduled for demolition. © Presonomics, Inc.
Local Law: Alteration

- Require Certificate of Appropriateness
  - Needed for major or material changes
  - Routine maintenance and some minor changes exempt
  - Usually applies to exterior

- Allow exception for “economic hardship”
  - Standards vary widely
Local Law: New Construction

- Applies to vacant lots in historic districts
- Review for “compatibility”
Hot Topics

• *Q:* What are some hot topics in preservation law that municipal attorneys should know about?
Hot Topic: *Hanna*

- One of the hottest topics in recent years was a case – *Hanna v. City of Chicago*, 907 N.E.2d 390 (Ill. App. 2009) – which threatened to undermine the basic powers of a local government to regulate historic properties, as just described.
Hot Topic: Hanna

- Plaintiffs challenged historic properties law for unconstitutional vagueness
  - Attacked qualifications of commissioners, “value” “critical,” “historic,” & “significant”
- Chicago’s ordinance is very typical
- An appellate court said that the plaintiffs had established a cause of action!
Hot Topic: *Hanna*

- … But breathe a sigh of relief!
- After remand, the appellate court upheld Chicago’s rules, saying:
  - “[A]n ordinance is not vague if it provides people of ordinary intelligence with the opportunity to understand what conduct is prohibited and if it provides law enforcement and the judiciary with a reasonable standard to prevent arbitrary and discriminatory legal enforcement”
Hot Topics: Designation

• Q: So now that the foundations of local historic preservation regulation aren’t in jeopardy, let’s hone in one of the powers of some local governments – the power to designate properties as historic in the first place.
Designation

• Preservation law only applies to properties that are designated historic on a register

• Criteria
  – Age (e.g., 50 years for National Register, 30 for NYC)
  – Type
  – Significance
  – Integrity
Hot Topics: Designation

• Type
  – **Building**
  – **District**
  – **Object**
  – **Site**
  – **Structure**
Hot Topics: Designation

• Significance
  – Persons | Architectural Style | Events | Information

Hot Topics: Designation

- Integrity: the ability of an historic resource to convey its significance

* 36 C.F.R. § 60.4.
Hot Topic: Landmarking Delays

- New York City Landmarks Preservation Commission (LPC) long delays
  - 5 individual buildings/districts deemed worth considering
  - Trial court said allowing requests for evaluation “to languish is to defeat the very purpose of the LPC and to invite the loss of irreplaceable landmarks. The LPC has utterly failed…”
  - BUT on appeal: “[T]here is no statutory requirement that the Commission adhere to a particular procedure in determining whether to consider a property for designation. … respondents have articulated reasonable bases for the Commission’s handling of the specific properties and districts cited in the petition, with an explanation for delays in the designation process.”
Hot Topic: Landmarking Delays

• *NY Times* Editorial, September 18, 2015:
  – “[T]here is a backlog of nearly 100 properties, most of which have been in limbo for more than 20 years, some going back nearly 50 years. The landmarks process should never be rushed. *But that is ridiculous.*”

• City Council Bill:
  – Deadline of 1 year for a building
  – Deadline of 2 years for a historic district

• Due process/fairness concerns?
Hot Topics: Landmarking Delays

• *Q:* What might happen if a landmark doesn’t get on the list fast enough?
Hot Topic: Landmarking Delays

• A brief tale, Two Columbus Circle, another architect’s palette.
Hot Topic: Interior Designations

• **Q:** Speaking of NYC, what about the dispute over the Four Seasons Restaurant interior? Not every locality can designate interiors.
Hot Topic: Interior Designations

- Four Seasons Restaurant
  - Designated 1989
  - Designed 1958 by Mies van der Rohe & Philip Johnson

- Proposal: remove a partition between bar & dining area, widen existing lobby to make room for a coat-check

- LPC: You can change the carpet, but not much else…

- Where does it end (on both sides)⁉

- More legal battles to come

Photo Credit: Toni Cenicola, NY Times, May 19, 2015.
Hot Topic: Interior Designations

- Lyman House, historic home built in 1778 and now located on 13-acre parcel
- Donated to the CT Trust for Historic Preservation
- In CT, localities cannot designate interiors
- An alternative to local designation would have been the Trust’s including interior features in a covenant restriction to subsequent owner
Hot Topic: Interior Designations

• Trust decided against imposing a covenant on the interior features
• These included historic oak floors, wainscot with molded baseboards and chair rails, original doors and hardware, stairs, windows and window trim, and more
• Will the interior features survive?
Hot Topic: Restrictions

• Q: That’s a great segue into the next hot topic: conservation and preservation restrictions. Can you tell us about these?
Hot Topic: Restrictions

• Conservation & preservation restrictions (or “easements”) are real property interests conveyed by a private property owner to a nonprofit or government agency to limit development or activity on the property in order to protect vital resources
Hot Topic: Restrictions

• What does this have to do with localities?
  – They can receive a restriction from a private property owner
  – They can create a restriction as a condition on a development approval (an “exaction”)

• RED FLAGS:
  – Don’t accept a restriction unless you can monitor compliance
  – Don’t create a restriction through an exaction unless it meets *Nollan/Dolan* rough proportionality/essential nexus tests
Hot Topic: Restrictions

- **CGS 47-42a**: “Preservation restriction,” whose purpose is to preserve historically significant structures.

- **CGS 47-42b**: If held by or assigned to a government body, charitable corporation or trust no requirement of privity of contract or estate where purpose includes preservation of buildings or sites of historic significance.

- **CGS 47-42c**: Interest in land, that is transferable and enforceable as such, including by injunction or equitable proceeding by governmental body, charitable corporation, or trust or Attorney General in public interest.

- **CGS 47-42d**: State or local land use permit applications as to restricted property require notice to holder, who may show “application will violate terms of restriction” as grounds for denial. Failure to comply mandates reversal of approval.
Hot Topic: Restrictions

- A “Room with a View,” the Philip Johnson Glass House

Philip Johnson Glass House.

Andy and Philip on Video.

A Room with a View.

Photos © C. Janson.
Hot Topic: Restrictions

The Overall Scheme, Map 7491, New Canaan Land Records.
Hot Topic: Restrictions


SCHEDULE B
Baseline Documentation

Preservation and Conservation Restrictions and Easement to
National Trust for Historic Preservation in the United States from
Raja Rajeswari Bhagavatula and Suryanarayana Bhagavatula

928 Ponus Ridge Road
New Canaan, Connecticut 06840

The Baseline Documentation consisting of maps, a site plan, a landscape plan, and photographs referred to as part of Schedule B of the Preservation and Conservation Restrictions and Easement granted to the National Trust for Historic Preservation in the United States from Raja Rajeswari Bhagavatula and Suryanarayana Bhagavatula is incorporated herein by reference. The photographs included in Schedule B are not recorded but are incorporated by reference into the Preservation and Conservation Restrictions and Easement. Both Grantee and Grantor have received an original set of the photographs, maps, site plan, and landscape plan.

The Baseline Documentation consists of the following:

1. Three (3) page Photograph Index;
2. One hundred and one (101) color photographs;
3. One (1) page Site Plan with Photograph Key (formatted in letter and tabloid sizes); and
4. One (1) page Landscape Plan.

All photographs of the property were taken by Greg Sages, Director, Finance & Operations, Philip Johnson Glass House.

In the event of any disparity between the sets of baseline documentation held by Grantor and Grantee, the counterpart held by the Grantee shall govern.
Advocacy Organizations

• **Q:** Seems like a lot of different parties were involved in the Glass House. Who are the historic preservation advocacy organizations, and how well do they work with municipal attorneys? Are they a hindrance or a help?
Advocacy Organizations

• Usually, a help!

• They include: the National Trust for Historic Preservation, various statewide groups, & local organizations

  – In CT, we have CT Trust for Historic Preservation (www.cttrust.org) & lobbyist CT Preservation Action (www.ctpreservationaction.org)

  – Local groups vary tremendously, some focusing on a single site or neighborhood, others focusing on an entire city
Advocacy Organizations

• How you work best with them depends on the issue:
  – Is the issue advocacy, legislation, a transaction or one masked as another?
  – What is the opportunity in the solution to the problem?
  – For a “disposition,” where is the money, which controls use or redevelopment, public/private partnership, or private end use, and return to the tax rolls?
  – Is the opportunity truly now, or never?
  – The “but for test”; But For … what is the consequence, the opportunity lost or gained? Who will step in otherwise?
Advocacy Organizations

• **Q:** Tell us about the National Trust, and key pointers for municipal lawyers working with the Trust?
Advocacy Organizations

- The National Trust for Historic Preservation in the United States, while Congressionally-chartered as a nonprofit, is (1) neither a government organization nor government funded by charter; and as a result is (2) not a “deep pocket organization” – Greg Sages, Executive Director, The Glass House, Oct. 15, 2015

- Attorneys very knowledgeable, interested in local issues
Advocacy Organizations

• *Q:* And what about some examples of collaboration between local governments and advocacy organizations?
Advocacy Organizations

• Sanford Bristol House, Milford, CT

Nothing Ventured, Nothing Gained.
Advocacy Organizations

- Andrews Olney House, Southington, CT

Nothing Ventured, Nothing Gained.

Montage, Courtesy: CTHP
Advocacy Organizations

Nothing Ventured, Nothing Gained.

Montage, Courtesy: CTHP
Advocacy Organizations

First floor North

Second floor South

First floor South

First floor North

Basement

Nothing Ventured, Nothing Gained.

Montage, Courtesy: CTHP
Resources

• National Trust for Historic Preservation, (www.savingplaces.org)
  – Hanan Nassau (hnassau@savingplaces.org, 202-588-6218) has tips on state/local organizations
  – Paul Edmondson, Chief Legal Officer (pedmondson@savingplaces.org, 202-588-6101) quarterbacks all legal issues for the NTHP

• State Historic Preservation Offices
  – National Conference of SHPOs maintains a SHPO directory (www.ncshpo.org)

• State & Local Organizations
Resources

Questions & Answers?

Professor Sara C. Bronin

Attorney Charles E. Janson

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Robinson+Cole