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Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs

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COMMENT

BEYOND THE TAKING ISSUE: EMERGING PROCEDURAL DUE PROCESS ISSUES IN LOCAL LANDMARK PRESERVATION PROGRAMS

I. Introduction

The United States Supreme Court in *Penn Central Transportation Co. v. New York City*,[1] upheld a municipality's use of the state's police power to designate and regulate historic districts and landmarks.[2] The Court ruled that such action did not effect a "taking"[3]

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1. 438 U.S. 104 (1978) (landmarks law prohibiting proposed development of air space over landmark structure Grand Central Terminal in New York City is not a taking).

2. *Id. Penn Central Transportation Co. v. New York City* has spawned extensive commentary on the status of historic preservation law. *See* Conrad & Merriam, *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail*, 56 U. DET. J. URB. L. 1 (1978); Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasse*, 7 ECOLOGY L. Q. 731 (1978); Samuels, *After Penn Central: A Look Down the Track at Constitutional Taking*, 8 REAL EST. L.J. 230 (1980); Comment, *Alas in Wonderland: The Impact of Penn Central v. New York Upon Historic Preservation Law and Policy*, 7 B.C. ENVT'L AFF. L. REV. 317 (1978); Comment, *Grand Central Terminal and the New York Court of Appeals: "Pure" Due Process, Reasonable Return, and Betterment Recovery*, 78 COLUM. L. REV. 134 (1978); Comment, Penn Central Transportation Co. v. City of New York: *Landmark Preservation Eludes the "Taking" Clause*, 14 NEW ENG. L. REV. 317 (1978); Note, *Constitutional Law-Historic Preservation by Means of Landmark Designation:* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), 30 S.C.L. REV. 825 (1979); Note, *Constitutional Law-The Taking Issue-Landmarks Preservation Law That Severely Restricts the Use of Individual Historic Structures Does Not Effect a Taking When There Remains a Reasonable Beneficial Use of a Property*—Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), 56 U. DET. J. URB. L. 141 (1978); Note, Penn Central v. City of New York: *A Landmark Landmark Case*, 6 FORDHAM URB. L. J. 667 (1978); Note, Penn Central Transportation Co. v. City of New York: *Landmark Designation, Legitimate Preservation or Unconstitutional Taking?*, 25 LOY. L. REV. 205 (1979). These articles either praise or deride *Penn Central Transportation v. New York City* as a landmark in historic preservation law. For a review of pre-*Penn Central Transportation Co. v. New York City* case law dealing with municipal preservation programs, *see* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969);

of a landowner's property without just compensation. Although *Penn Central* accorded landmark preservation full legal status,[4] it remains a

Lutheran Church v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). *See also* Roe v. Kansas *ex rel.* Smith, 278 U.S. 191 (1929) (upheld propriety of use of eminent domain power by state government to condemn and take historic properties); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896) (upheld propriety of use of eminent domain power by federal government to condemn and take historic properties). For a review of pre-*Penn Central Transportation Co. v. City of New York* scholarly commentary, *see* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

3. The fifth amendment provides, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In terms, the fifth amendment applies only to the federal government. The fourteenth amendment's due process clause, however, has been held to impose similar restrictions on the states. A state (or local government) is required to compensate an owner for taking private property for a public use. Chicago, B. & Q. R. R. v. Chicago, 166 U.S. 226, 239 (1896). The state (or local) government is prohibited from taking private property for a nonpublic (or private) purpose, regardless of whether compensation is paid. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). The problem which arises, especially in the regulation context, is whether a "taking" actually has occurred. For a review of Supreme Court cases delineating the parameters of this doctrine, *see* Agins v. City of Tiburon, 447 U.S. 255 (1980) ("open space" zoning ordinance not a taking); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding single-family zoning throughout an entire municipality held not to be an impermissible taking, despite severe restrictions on the use of property); Berman v. Parker, 348 U.S. 26 (1954) (allowed governmental appropriation of private property even where property was later to be turned over to a private developer based on an expansive reading of the "public use" concept; recognized "aesthetic" factors as a legitimate exercise of the police power); United States v. Causby, 328 U.S. 256 (1946) (rejected common law doctrine that ownership of land extended to the heavens-*cujus est solum ejus est usque ad coelum*); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upheld the constitutionality of use-type zoning regulations); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (overturned statute which limited mining rights where no compensation was provided the owner of the estate in land).

4. Landmark preservation law presently shares a status similar to that accorded zoning as a result of Village of Euclid v. Ambler Realty Corp., 272 U.S. 365 (1926) (upheld the constitutionality of use-type zoning). In the past fifty years, historic preservation laws, in some form, were enacted in all the states and a substantial number of municipalities. NATIONAL TRUST FOR HISTORIC PRESERVATION, A GUIDE TO STATE HISTORIC PRESERVATION PROGRAMS (1976); A NATIONAL TRUST FOR HISTORIC PRESERVATION, DIRECTORY OF LANDMARK AND HISTORIC COMMISSIONS (1976). Prior to *Penn Central*, many of these programs, while "extensive in official recognition," had "been largely tentative in implementation." Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 21 (1980). Since *Penn Central*, however, many municipal preservation commissions have taken bold steps towards attaining the results articulated in their own statements of purpose. In New York City, for example, "[t]he landmarks commission now regulates more that 15,000 buildings about 2 percent of the city's housing stock. Some encompass whole areas of the city such as the Gramercy Park Historic District or the Brooklyn Heights Historic District. Most recently the commission designated 1,044 buildings as the East Side Historic District." N.Y. Times, Sept. 20, 1981, at 56, col. 1. For a digest of local laws possibly affecting historic preservation, *see* Kellog, *Role of State and Local Laws and Programs in Historic Preservation*, 12 URB. LAW. 31, 40-41 (1980).

controversial area of the law because the decision left many questions unresolved. These include the application of the Court's holding on the taking issue to other factual situations[5] and the procedural due process requirements for local designation proceedings.[6] This Comment focuses on the issue of procedural due process because current

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5. 438 U.S. 104 (1978). A number of prominent scholars have suggested that the particular location and circumstances of Grand Central Station in New York City are unusual, and feel that as such the case probably will be distinguished on its facts. *See* Marcus, *Villard Preserv'd: or, Zoning for Landmarks in the Central Business District*, 44 BROOKLYN L. REV. 1 (1977) (suggests that Grand Central Station's status not only as a superb architectural feat, but as a public utility with nearby properties in common ownership easily susceptible to transferrable development rights had a great deal to do with the success of the New York City Landmark Commission in having this designation upheld). *Id.* at 12-13. Transferrable development rights, in the historic preservation context, exist where municipalities grant owners of designated properties, who by virtue of that designation are unable to fully utilize the airspace above their parcel, the right to develop a nearby property above the applicable zoning regulation. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972). ("The Grand Central decision, according to Mr. Costonis, has been 'overread' and was decided on the facts of the particular application," N.Y. Times, July 27, 1980, § 8, at 4, col. 4). (Mr. Costonis is a New York University Law Professor who has published numerous articles on the many intricacies of landmark preservation law).

Another important issue not dealt with in this Comment is the propriety, in light of the first amendment's mandate separating church and state, of designating, and hence restricting, the use of property held by religious organizations. The New York City provision, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981), places different burdens on commercial properties and those held for charitable purposes. Commercial properties unable to earn a reasonable return have available to them a real estate tax exemption which can mitigate any harshness resulting from the law. Charitable and religious organizations, already entitled to a tax exemption pursuant to N.Y. REAL PROP. TAX LAW § 421 (McKinney 1972), receive no such reciprocal effect. Society for Ethical Culture v. Spatt, 68 A.D.2d 112, 115, *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). In order to overcome the status of landmark designation, the charitable or religious owner must show that the facility in question no longer suits the physical facility needs of the organization, not that designation forbids the attainment of a lucrative real estate sale. *See* Lutheran Church v. City of New York, 35 N.Y.2d 121 (1974); Matter of Sailors' Snug Harbor v. Platt, 53 Misc. 2d 933 (Sup. Ct. 1967), *rev'd*, 29 A.D.2d 376 (1968). This issue is surely to arise in the impending legal struggle over the proposal by St. Bartholomew's Episcopal Church on Park Avenue in New York City to sell air rights to its property. Many feel this struggle will evolve into the *Penn Central* of the 80's. N.Y. Times Oct. 30, 1981, at 1, col. 3.

6. *See* Bonderman, *Constitutional Issues for Preservation Law*, 1 LEGAL NOTES AND VIEWPOINT Q. 109, 110 (May 1981). In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), the Supreme Court upheld the use of the police power to enact historic and landmark preservation laws at the local level against a facial due process attack. *Id.* However, because the plaintiff neither judicially reviewed the original landmark designation, *id.*at 118, nor availed itself of the opportunity to supplement the record offered to it by the New York Court of Appeals, 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1278, 397 N.Y.S.2d 914, 922 (1977), a variety of due process problems remain unanswered.

interpretations of the taking issue are too narrow to provide adequate protection to landowners seeking to challenge a landmark designation.[7]

In *Historic Green Springs, Inc. v. Bergland*,[8] the United States District Court for the Eastern District of Virginia set aside as a violation of procedural due process, a designation of a district as a National Historic Landmark by the Secretary of the Interior.[9] The court stated:

> [The] chief due process argument . . . is that without published rules of procedure and substantive criteria for qualification as a landmark, [the affected landowners] 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.[10]

This Comment examines the impact of *Historic Green Springs* on judicial attitudes toward municipal landmark preservation procedures. It focuses on the administration of the New York City landmarks law by the New York City Landmark Preservation Commission[11] for two reasons: first, the Supreme Court in *Penn Central*

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7. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) ("open space" ordinance not a taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmarks law prohibiting development of a plot containing historic structure is not a taking); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (zoning law preventing the filling of wetlands is not a taking). *See generally* Day, *A Land Retrenchment Policy for Energy and Resource-Short Times: A Modest Proposal*, 10 FORDHAM URB. L.J. 71, 77-80 (1981). A number of current news items support the belief that procedural challenges to the New York City Landmarks Law, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-82), will increase.

A recent study undertaken by a group appointed by the Committee of Religious Leaders in the City of New York has charged that the N.Y.C. Landmarks Preservation Commission frequently designates churches as landmarks regardless of historic or architectural merit. N.Y. Times, Mar. 4, 1982, at B3, col. 5, 6. It was pointed out that literally hundreds of churches and synagogues have been designated landmarks, and that at least one-third so designated objected to the classification. *Id.* The study alleges that the Commission has "willingly accommodated local groups in abusing the law by employing it for zoning purposes rather than for its lawful purpose of architectural preservation." *Id.* The study further points out that "[t]here are no discernible standards for designating architectural or historic landmarks." *Id.* For a similar critique *see* Richland, *The Case for Tightening the Reins on Landmarking*, N.Y. Times, Feb. 21, 1982, § 8, at 1, col. 3.

8. 497 F. Supp. 839 (E.D. Va. 1980).

9. *Id.* at 857. The court remanded the case to the Department of the Interior to develop and promulgate regulations setting out substantive criteria for historic significance and procedural guidelines for historic landmark designation under the Federal Historic Sites Act of 1935. *Id.*

10. *Id.* at 854.

11. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-82).

sanctioned the format of the New York City program;[12] and second, the New York City Landmark Preservation Commission has been aggressive in enforcing the New York City landmarks law.[13] The Comment argues that the procedural safeguards provided by municipal preservation ordinances, such as that found in New York City, are inadequate in light of the substantial burden landmark designation can place on a property owner.[14] In conclusion, this Comment recommends that municipal bodies adopt procedural safeguards which will protect landowners while ensuring that the public benefit obtained through landmark preservation programs is not jeopardized.

II. *Historic Green Springs, Inc. v. Bergland*

The administrative decision making process in a landmark preservation determination came under close scrutiny in *Historic Green Springs, Inc.* v. *Bergland.*[15] In 1973, the Virginia Historic Landmarks Commission nominated a 14,000 acre tract of farmland in Louisa County, Virginia, known as Green Springs (District),[16] to the National Register of Historic Places (National Register), pursuant to the National Historic Preservation Act of 1966 (1966 Act).[17] The

12. 438 U.S. 104 (1978).

13. For a discussion of the number of buildings presently regulated by the New York City Landmarks Preservation Commission, *see* note 4 *supra.*

14. For example, under the New York City Landmarks Preservation Law, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-82), a landowner may not only have to forego a lucrative real estate deal, *see, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), but is under an affirmative duty to "keep in good repair (1) all of the exterior portions [of the building] and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions . . . to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair." NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-10.0 (1976 & Supp 1981-82).

15. 497 F. Supp. 839 (E.D. Va. 1980). *See* Note, *Administrative Procedure and Historic Preservation Law:* Historic Green Springs, Inc. v. Bergland, 1981 DET. C.L. REV. 203.

16. An earlier state court decision ruled the designation of the Green Springs district to be beyond the scope of judicial review. Virginia Historic Landmarks Comm'n v. Board of Supervisors, 217 Va. 468, 474-76, 230 S.E.2d 449, 452-53 (1976). The state enabling legislation which established the Landmarks Commission, VA. CODE § 10-138 (1978), conveys mere advisory capacity upon the Commission. As the Commission had no authorization to promulgate rules and regulations, it was not an agency requiring judicial review. *Virginia Historic Landmarks Commission,* 217 Va. at 473-74, 230 S.E.2d at 452.

17. Historic Green Springs, Inc., v. Bergland, 497 F. Supp. 839, 842 (E.D.Va. 1980). The national register and the applicable provisions of the 1966 Preservation Act (1966 Act) can be found at 16 U.S.C. §§ 470(a)-470 + (1976). *See* Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. § 470 (1976) (entitled "Protection and Enhancement of the Cultural Environment"). For a thorough discussion of the history of the National Register of Historic Place (National Register),

nomination was approved by the Department of the Interior a few days later and, in 1974, the Secretary of the Interior designated the District[18] a National Historic Landmark pursuant to the Historic Sites Act of 1935 (1935 Act).[19]

The controversy arose after Historic Green Springs, Inc., a preservation group, brought suit to enjoin the Farmer's Home Administration from guaranteeing a loan to the defendant mining company, Virginia Vermiculite, Ltd. (VVL), unless the Farmer's Home Administration complied with certain protective provisions of the 1966 Act.[20] The loan was to be used to finance mining operations in the

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see Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976).

Properties may be listed in the National Register by one of four methods: (1) acts of Congress; (2) National Historic Landmark designation by the Secretary of the Interior; (3) state nomination; or, (4) federal agency nomination of federal property. National Register of Historic Places, 36 C.F.R. § 60.2(d) (1981). 36 C.F.R. § 60.15(a) (1981), provides for the following procedures to be taken by a state in nominating an area to the National Register: (1) survey by the State Historical Preservation Office, followed by notice to the affected property owners; (2) review by the State Review Board; (3) nomination by the State Historic Preservation Officer; (4) review of the nomination by the National Register staff, followed by notice to the affected property owners; and, (5) final decision by the Keeper of the Register. *See generally* Note, *Administrative Procedure and Historic Preservation, Law:* Historic Green Springs, Inc. v. Bergland, 1981 DET. C.L. REV. 202.

18. *Historic Green Springs*, 497 F. Supp. at 843.

19. 16 U.S.C. §§ 461-469h (1976) (1935 Act). While the Department of the Interior has promulgated extensive regulations and procedures in the administration of the 1966 Act, *see* 36 C.F.R. §§ 60-60.17 (1981) "[t]he 1935 Act is silent concerning the methods for these exercises of the Secretary's discretion." Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 851 (E. D. Va. 1980).

20. *Historic Green Springs*, 497 F. Supp. at 841. The National Register identifies areas unique to American history, and culture. The Secretary of the Interior is authorized to "expand and maintain" the Register pursuant to the 1966 Act, 16 U.S.C. § 470(a)(1) (1976). The legal effect of the Register is provided for in § 470(f), which requires:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such an undertaking.

Id. The term "undertaking" as used in this Act applies to any federally-assisted action, thus including the guarantee of the loan to Virginia Vermiculite, Ltd. Protection of Historical and Cultural Properties, 36 C.F.R. § 800. 2(c) (1981). Historic Green Springs objected to the forwarding of a loan by the Farmer's Home Administration unless these criteria were met. *Historic Green Springs*, 497 F. Supp. at 842-43.

District. VVL counterclaimed and entered a third party complaint, alleging that there was a notice defect in the nomination of the District to the National Register.[21] The Secretary of the Interior conceded that the state nomination was defective due to inadequate notice to affected landowners.[22] As a result, the entire federal landmark process as to the District was void.[23] Nevertheless, the Secretary of the Interior unilaterally redesignated the District a National Historic Landmark.[24]

While the court addressed numerous constitutional[25] and administrative law questions[26] raised by the Secretary of the Interior's actions, it emphasized the importance of ascertaining the requirements of procedural due process. The court was concerned with due process

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21. *Id.* at 841.

22. *Id.*

23. *Id.* at 844. Inter-departmental memoranda indicated that the Department of the Interior had recognized that the state nomination of the District to the National Register was defective and as a result, the District had been removed from such a listing. *Id.*

24. *Id.* As to the Secretary of the Interior's authority to grant the District historic site status pursuant to the 1935 Act, *see* note 17 *supra*. Properties designated as National Historic Landmarks under the 1935 Act are placed automatically on the National Register. 36 C.F.R. § 60.2(d)(2) (1981).

25. The plaintiffs argued that the Secretary's decisions were arbitrary and capricious and violated plaintiffs' rights under the fifth and tenth amendments to the United States Constitution. *Historic Green Springs*, 497 F. Supp. at 845. The court considered these in reverse order, first rejecting the tenth amendment argument, *id.* at 848, and then proceeding to a detailed consideration of the "taking" argument under the fifth amendment, *id.* at 848-50. Recognizing that the landmark designation subjected the plaintiffs' property to the purview of federal statutes which may restrict its future uses, *id.* at 849, the court nevertheless found no present taking, *id.* at 850. Although no title changed hands, the landmark status triggered the application of several federal statutes which could impede or discourage industrial and commercial development in the area. *Id.* at 849. There was testimony that the Department's activities had had a chilling effect on business and development in that county. *Id.* Yet the court, *citing* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), and Agins v. City of Tiburon 447 U.S. 255 (1980) (where no takings were found, albeit the impairment of unencumbered land use was substantial and cut severely into expected profit) found that there remained reasonable beneficial use of the property. *Historic Green Springs*, 497 F. Supp. at 849-50. The district court specifically found "[t]o date no type of development or industry within the District has been prohibited." *Id.* at 850. Given the right case, the court stated it would act, but on this record, there was no taking. *Id.*

26. The plaintiff's chief attack on the merits of the Secretary of the Interior's decision was under the "arbitrary, capricious, [or] an abuse of discretion" standard of § 706(2)(A) of the Administrative Procedure Act of 1969, 5 U.S.C. §§ 551-559 (1976) (APA). *Historic Green Springs*, 497 F. Supp. at 845. As to this argument, the court referred to the absence of a detailed statement of reasons or of clear formal standards concerning national historic significance but rather than requiring the Secretary to submit *post hoc* rationalizations for his decisions, the court remanded the case "for proper compliance with procedural due process." *Id.* at 851.

because the Department of the Interior had no fixed procedures, published in advance, which would have allowed landowners in the District to plan their response to the proposed designation.[27] It also noted that important information relied on by the Department of the Interior in rendering its decision, "was disclosed, if at all, in piecemeal fashion often after any opportunity for meaningful response had passed."[28]

The court gave four reasons for rejecting the Secretary of the Interior's contention that two agency publications contained rules of procedure governing the designation process and a list of criteria to be used in determining national historic significance.[29] First, the criteria proffered by the Secretary of the Interior bound an advisory board which could thereafter only recommend action to the Secretary.[30] Second, the procedures contained in the pamphlets specified that advisory board review would follow a public hearing, but in fact no such advisory board review was undertaken.[31] Third, the criteria contained in the agency publications were so vague and open-ended that there was no limit on the Secretary of the Interior's discretion.[32] Finally, the affected landowners were not informed of the criteria for determining historic significance contained in the pamphlets until two months after the public hearing had been held.[33] The court found that the failure of the Department of the Interior to promulgate or adhere to published standards for designating the District as a National Historic Landmark and listing in the National Register of Historic Places was a violation of due process.[34]

The determinations of the Department of the Interior were held to be outside the rulemaking and adjudication provisions of the Administrative Procedure Act (APA)[35] and certain requirements of the Na-

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27. *Id.* at 856.

28. *Id.* Furthermore, Department of the Interior officials who had made several "off the record," undisclosed recommendations to the Secretary of the Interior were not available for "on the record" questioning at the public hearing provided affected landowners. *Id.* Finally, the Secretary of the Interior failed to sufficiently detail the rationale underlying the designation decision itself. *Id.*

29. *Id.* at 855.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* "[T]he Department [of the Interior] neglected to make reference to the pamphlets in any public notice and mentioned the criteria contained therein only in a September 20, 1977 Federal Register announcement, nearly two months after the public hearing on the issue." *Id.* at 852.

34. *Id.* at 857.

35. *Id.* at 851. 5 U.S.C. §§ 551-559 (Supp. III 1979). Since the court found that these decisions did not constitute rules under § 551 (4) of the APA, *Historic Green*

tional Environmental Policy Act of 1969 (NEPA).[36] Instead, the determinations were characterized as being informal adjudications defined as "administrative decisions that are not governed by statutory procedures but which nevertheless affect an individual's rights, obligations, or opportunities."[37] As a result, the court attempted to discern for itself the minimal procedures owed the plaintiffs under the due process clause of the fifth amendment[38] and certain provisions of the APA.[39]

Springs, 497 F. Supp. at 851, the Department could not fail to follow the requisite rulemaking procedures under APA, § 553. *Id.* Nor did the court find the Department of the Interior governed by the APA's requirements concerning adjudicative procedure, 5 U.S.C. §§ 554-57 (Supp. III 1979). The court found that instead, this agency action, similar to that in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), fell through the cracks of the APA. *Historic Green Springs*, 497 F. Supp. at 851.

36. *Id.* 42 U.S.C. §§ 4321-4361 (1976); 42 U.S.C. §§ 4321-4369 (Supp. III 1979). The plaintiffs argued that the Department of the Interior erroneously failed to prepare an environmental impact statement as required under the NEPA for "the landmark designation, the acceptance of the Green Springs easements, the Department's overall plan for the District, and the proposed national easements acceptance program." *Historic Green Springs*, 497 F. Supp. at 851. The court, however, found "[t]he Department's negative declarations of environmental impact reasonably concluded that environmental impact statements were unnecessary," *citing* Conservation Council of N.C. v. Costanzo, 398 F. Supp. 653 (E.D.N.C.), *aff'd*, 528 F.2d 250 (4th Cir. 1975). *Id.* This aspect of the case was criticized as setting questionable precedent in both environmental and administrative law. Note, *Administrative Procedure and Historic Preservation Law:* Historic Green Springs, Inc. v. Bergland, 1981 DET. C. L. REV. 203, 221.

37. *Historic Green Springs*, 497 F. Supp. at 852, *quoting* Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 n.1 (1976). In such instances, "courts must often set the minimal procedural requirements for informal adjudications." *Historic Green Springs*, 497 F. Supp. at 852. The role of the court in discerning such requirements is not to "require correct or rational decisions," *id.*, *citing* Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519 (1978), but "to preserve the integrity of the decision making process." *Id.*, *citing* Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 923 (5th Cir. 1978). The procedures and standards followed by the Department of the Interior were found to be developed on an *ad hoc* basis as the decision making process went along. *Id.* at 855.

38. *Id.* at 852. The due process clause was triggered by the substantial interference with plaintiffs' property interests, "specifically their right to the use and enjoyment of their property" caused by designation as a National Historic Landmark (1935 Act) and being placed on the National Register (1966 Act). *Id.* at 852. "While the court found such interference of insufficient magnitude to constitute a taking under the fifth amendment the Secretary's actions do place substantial restrictions on plaintiff's property interest so as to require satisfaction of procedural due process." *Id.*

39. *Id.* at 855. "In addition to regulations establishing substantive criteria, the Department is required to promulgate rules of procedure to govern its landmark designation process. The source of this requirement is shared by the Due Process Clause and § 552 of the APA." *Id.* at 855.

In arriving at these minimum procedural safeguards, two interrelated principles used to determine due process rights in the field of administrative law were applied. The first principle identified was the familiar "interest-balancing approach" where the importance of a private interest is weighed against the government's interest in efficient decision making.[40] The court found that while the restrictions on the use of VVL's property were insufficient to constitute a taking under the fifth amendment, the restrictions were of sufficient magnitude to require satisfaction of procedural due process.[41] The court specified that a landmark designation process should include the "preparation of a departmental study report, opportunity for public comment and public hearing, review by a consulting committee and Advisory Board, prior to the final decision by the Secretary [of the Interior] . . . ."[42] The Secretary of the Interior had attempted to substitute a public hearing for advisory board review, but his actions in this regard were invalidated.[43]

The second principle which the court relied on for its holding is a relatively new concept which states that, "[j]udicial review [of agency action] must operate to insure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible."[44] In *Historic Green Springs*, the court, after acknowledging that the imposition of administrative standards[45] was a principle "still in its fledgling stage,"[46] remanded the controversy to the Department of the Interior, requiring that it promulgate both substantive and procedural standards.[47]

III. Procedural Due Process Under the New York City Landmarks Preservation Law

In 1965, New York City enacted a landmarks law creating the Landmarks Preservation Commission (Landmarks Commission).[48]

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40. *See* notes 83-84 *infra* and accompanying text.
41. *Id.* at 852.
42. *Id.* at 854.
43. *Id.*
44. *Id.* at 854, *quoting* Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).
45. For the purposes of this Comment, the term "administrative standards" is meant to include both the promulgation of substantive criteria as well as published rules and procedures.
46. Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 854 (E.D. Va. 1980).
47. *Id.* at 857.
48. This was accomplished by amendment to the charter and administrative code. NEW YORK, N.Y., ADMIN. CODE. ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-

The primary responsibility of the Landmarks Commission is to prevent the demolition of landmark structures and to police the types of alterations owners may make to buildings designated as landmarks.[49] In addition, the Landmarks Commission may include entire areas of the city within historic districts.[50] The New York landmarks law defines a landmark as:

> Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.[51]

While the landmarks law expressly provides for the promulgation of regulations by the Landmarks Commission,[52] no such regulations have been adopted to assist in its implementation.

Before the Landmarks Commission may designate a landmark,[53] or determine whether to allow a landowner to alter an already designated landmark structure,[54] a public hearing must be held.[55] The Landmarks Commission is required to publish notice of such hearings at least ten days in advance and to give direct notice to all affected property owners.[56] In addition, where the Landmarks Commission grants or denies permission to alter an historic structure, it is required to set forth the reasons for such determination.[57] A number of impor-

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82). The creation of the commission was the culmination of increasing concern over the destruction of such architectural monuments as the old Pennsylvania Station. N.Y. Times, Oct. 22, 1974, at 34, col. 1. The Landmarks Preservation Commission was created pursuant to N.Y. GEN. CITY LAW § 20, subdiv. (25-A) (McKinney 1968) (repealed Supp. 1982). This law provided for the control or acquisition of buildings which have a special character or aesthetic interest or value. The statute enabled the cities to adopt: "in any such instances such measures [which] if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose or if constituting taking of private property shall provide for due compensation which may include the limitation or remission of taxes." *Id.*

49. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-4.0 (1976 & Supp. 1981-82).

50. *Id.* § 207-2(-a.)(4).

51. *Id.* § 207-1.0n. This statute is very general compared with some preservation statutes which describe the external architectural features in considerable detail. *See, e.g.*, MASS. ANN. LAWS ch. 40c § 5 (Michie/Law. Coop. 1973).

52. NEW YORK, N.Y., ADMIN. CODE, ch. 8-A, § 207-18.0. (1976).

53. *Id.* § 207-2.0.

54. *Id.* § 207-5.0-6.0.

55. The landmarks commission is required to hold a public hearing before a landmark may be initially designated, *id.* § 207-2-a, and when determining a request for a certificate of appropriateness, *id.* § 207-7.0.

56. *Id.* § 207-12-a.

57. *Id.* § 207-14-a; *see* Matter of Equitable Funding Corp. (Spatt), N.Y.L.J., Feb. 8, 1978, at 10, col. 2 (Sup. Ct. Kings County 1978).

tant considerations qualify these procedural safeguards. The New York landmarks law expressly provides that the failure by the Landmarks Commission to give notice of public hearings will not invalidate any proceedings pursuant to the landmarks law.[58] At the public hearing, the Landmarks Commission is required to allow a reasonable opportunity to those desiring to be heard to express themselves, but reserves the right to consider evidence not presented at the hearing.[59] More importantly, the landmarks law does not set forth prehearing standards or provide for cross examination and an express burden of proof.

A landmark designation becomes effective immediately[60] and remains in effect until and unless disapproved or modified by the Board of Estimate[61] within ninety working days of the designation.[62] In contrast, zoning district regulation changes adopted by the City Planning Commission to which affected property owners object are subject to more elaborate procedures[63] and do not become effective until approved by a three-fourths vote of the Board of Estimate.[64] The

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58. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-12-a.

59. *Id.* § 207-12.b.

60. *Id.* § 207-2e.

61. *See* Richland, *The Case for Tightening the Reins on Landmarking*, N.Y. Times, Feb. 21, 1982, § 8, at 1, col. 3. A former Corporation Counsel of the City of New York, W. Bernard Richland, has criticized this aspect of the landmark designation process, specifying that in practice the Board of Estimate is shirking its duty to oversee the designation process. Mr. Richland points out that "among other things, the protesting property owner is often limited to a mere three minute statement before the Board of Estimate." *Id.* Mr. Richland suggests that the elected members of the Board of Estimate almost never attend the sessions, leaving that task to minor functionaries on the staff, and that the Board of Estimate has proven unwilling to overturn landmark designations due to the "sacred cow" status of the landmarks commission. *Id.* Mr. Richland's comments, however, were questioned by Mr. Ralph C. Menapace, the President of the Municipal Art Society. Mr. Menapace suggests that the frequency with which the Board of Estimate approves landmark designations "does not suggest tractability on the part of the Board [of Estimate] but rather the high standards used by the [landmarks] commission and its strict adherence to the criteria guiding its selection of landmarks." Menapace, *Landmark Authority is Wisely Applied*, N.Y. Times, Mar. 7, 1982, § 8, at 10, col. 6.

62. NEW YORK, N.Y., ADMIN. CODE, ch. 8-A,§ 207-2-g(2).

63. *See* note 64 *infra* and accompanying text.

64. NEW YORK, N.Y., ADMIN. CODE ch. 8, § 200.3 (Supp. 1981). *See* Richland, *The Case for Tightening the Reins on Landmarking*, N.Y. Times, Feb. 21, 1982, § 8, at 1, col. 3. Even without such objections, such changes do not become effective until they are either acted on by the Board of Estimate within sixty days, or the sixty days expire with no such action. NEW YORK, N.Y., ADMIN. CODE ch. 8, § 200.2 (Supp. 1981). Furthermore, certain of these zoning changes are subject to the Uniform Land Use Review Procedure, *id.* § 197-c-a (Supp. 1981), which involves consideration by the Community Planning Board as well as by the City Planning Commission, *id.* § 197-c.b (Supp. 1981), and the Board of Estimate, *id.* § 197-a.b (Supp. 1981). As a result, before a zoning district change, public input is provided for at three levels before such an amendment will even be voted on by the Board of Estimate. The City

protection of historic structures from possible destruction may justify that the landmark designation attach earlier in the overall proceeding than when zoning changes are made. However, the summary hearing afforded objecting landowners, provided under the landmarks law,[65] compares unfavorably with the elaborate procedural framework specified under the zoning law.[66]

Despite the absence of detailed criteria, procedural formalities, rules or standards, the statutory framework of the New York City landmarks program has been upheld,[67] even in the face of specific challenges that a designated building lacked historic[68] or aesthetic[69]

Planning Commission is required, before adopting any zoning resolutions, to hold a public hearing, *id.* § 200-a.1. (Supp. 1981). When such resolutions are within the purview of the Uniform Land Use Review Procedure, the community board involved is required to hold a public hearing, unless a waiver is permitted by another section of the Charter, *id.* § 197-c.c(3) (Supp. 1981). Finally, before the Board of Estimate approves or disapproves any plan submitted by the City Planning Commission, it must hold a public hearing. *Id.* § 197-a.b (Supp. 1981). Additionally, before any zoning change is adopted by the City Planning Commission, the public notice for the required hearing must set forth the nature of the proposed amendment and specify a place at which the entire amendment can be examined. *Id.* § 200-a.1.

65. *See* notes 58-62 *supra* and accompanying text.

66. *See* note 64 *supra*.

67. *See, e.g.*, Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914, *aff'd*, 438 U.S. 104 (1978); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966).

68. Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966). The designation of a home once occupied by Winston Churchill's mother was challenged by the landowners as "arbitrary and capricious" because the premises had no real historical value. *Id.* at 557, 273 N.Y.S.2d at 850. The landowner had voiced his opposition to the designation at a public hearing, and also submitted written objections. *Id.* at 558, 273 N.Y.S.2d 851. The Landmarks Commission, after discussing the matter at two intervening meetings, designated the property despite the landowner's objections. *Id.* The court summarily dismissed this aspect of the plaintiff's case, stating, "[a] hearing was held and the issues thoroughly aired. . . . The court may not substitute its judgment for that of the administrative agency." *Id.* at 559, 273 N.Y.S.2d at 851.

69. In Penn Cent. Transp. Co. v. New York City, 438 U.S.104 (1978), without fully addressing the procedural issues raised, the United States Supreme Court indirectly sanctioned the commission's discretion in designating aesthetically noteworthy buildings. The Court rejected plaintiff's argument that landmark designation was a "matter of taste" and thereby "inevitably arbitrary," finding that the right to subsequent judicial review, as in zoning cases, would protect against arbitrary determinations. *Id.* at 132-33. The court stated that the plaintiff's argument had a "particularly hollow ring" as the plaintiff had not sought judicial review of the designation itself or denials of the certificate of appropriateness. *Id.* at 132. It should be noted, however, that for the court to accept the proposition forwarded by Penn Central—that landmark designations are inevitably arbitrary as a matter of taste—would necessitate the striking of most aesthetic regulations. Had the plaintiffs challenged the original

merit. Although similar challenges in other jurisdictions have failed,[70] a number have been successful.[71] Underlying the New York decisions has been the reluctance of the courts to substitute the judgment of the judiciary for that of the Landmarks Commission. In the leading case of *Lutheran Church* v. *City of New York*,[72] the New York Court of

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designation, or more carefully channelled their argument on this issue, a more restrained and direct resolution of the issue might have occurred. In the more recent case, Society of Ethical Culture v. Spatt, 68 A.D.2d 112, 416 N.Y.S.2d 246, *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980), the appellate division affirmed the Landmarks Commission's designation of the Meeting House for the Society of Ethical Culture located on New York's Central Park West. The court granted broad discretionary powers to the landmarks commission, stating that:

> If the preservation of landmarks were limited to only that which has extraordinary distinction or enjoys popular appeal, much of what is rare and precious in our architectural and historical heritage would soon disappear. It is the function of the Landmarks Preservation Commission to ensure the continued existence of those landmarks which lack the widespread appeal to preserve themselves.

Id. at 117, 416 N.Y.S.2d at 250.

70. *E.g.*, Maher v. City of New Orleans, 516 F.2d 1051 (1975), *cert. denied*, 426 U.S. 905 (1976). Here, the plaintiff challenged the propriety of an ordinance of the City of New Orleans which regulates the preservation and maintenance of buildings located within the architecturally distinct historic Vieux Carre district (French Quarter) of that city. The plaintiff challenged the ordinance as both a taking without just compensation and a violation of due process claiming specifically that the ordinance provided no objective criteria to guide the commission. *Id.* at 1053. *See* Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973) (San Diego historic district ordinance upheld which required construction and alterations to buildings to use material and styles "in general accord with the appearance of structures built in Old San Diego prior to 1981." *Id.* at 423, 106 Cal. Rptr. at 337). City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (Santa Fe historic district ordinance upheld which regulates window sizes as one detail of the overall historic style.). *See also* Young v. Mellon, 93 Cal. App. 3d 1001, 156 Cal. Rptr. 165 (1979) (refusing to overturn action of state's historic preservation officer for lack of guidelines in administering the National Historic Program, and stating that appellant had no liberty or property interest in obtaining a nomination to the National Register).

71. South of Second Associates v. Town of Georgetown, 196 Colo. 89, 580 P.2d 807 (Colo. 1978); Askew v. Cross Key Waterways, 372 So. 2d 913 (1979); Jarrell v. Board of Adjustment, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1962); Southern Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229 (Tex. Civ. App. 1979); Texas Antiquities Comm. v. Dallas County College Dist., 554 S.W.2d 924 (Tex. 1977).

72. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). The plaintiff, a religious corporation, succeeded in invalidating the designation of a building which had formerly been the home of famous financier J.P. Morgan's son. The building had been used by a religious corporation for its own offices. The corporation wished to demolish the structure and errect a modern office tower for its use on the site. *Id.* at 124-25, 316 N.E.2d at 307, 359 N.Y.S.2d at 10-11. The court of appeals declared that in this instance the "landmark designation" amounted to a void and unconstitutional confiscation of the corporation's property. *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17.

Appeals determined that landmark designations clearly are administrative and not quasi-judicial in nature and, therefore, would be reviewable under the reasonableness standard, and not the substantial evidence test.[73] Thus, the New York decisions vest broad discretion in the Landmarks Commission in its determination of historic or aesthetic significance. In few cases have courts questioned the historical or aesthetic merit of individual properties to which the landmarks law is applied.[74] Objecting landowners, precluded from meaningful response at the administrative level and also subject to the court's sanction of very broad discretion in the Landmarks Commission, have an almost insurmountable burden in establishing that the Landmarks Commission acted arbitrarily in its designation proceeding.

The New York Court of Appeals does, however, continue to express concern for the landowner's right to meaningfully respond to administrative action where the economic impact of a land use regulation is at issue. For example, in *Penn Central Transportation* v. *City of New York*,[75] the court rejected the plaintiff's claim that the designation of Grand Central Terminal as a landmark denied it a reasonable economic return on its investment. The court achieved this result, in part, by excluding from the terminal's investment base, the newly accepted "social increment" of value accruing to the terminal by virtue of heavy governmental investment.[76] Judge Breitel acknowledged that "fair-

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73. *Id.* at 128 n.2, 316 N.E.2d at 309 n.2, 35 N.Y.S.2d at 13 n.2. The court stated that:

> Landmark designations are clearly administrative and not quasi-judicial in nature and as such would be reviewable under CPLR 7803 (subd. 3), where error of law, arbitrariness or capriciousness or abuse of discretion (i.e., reasonableness) defines the scope of review. The public hearing provided for in the Landmarks Law is not the sort of adversary hearing involving cross-examination and the making of a record as is contemplated under CPLR 7803 (subd. 4) where the substantial evidence test is set forth.

Id.

74. Matter of Equitable Funding Corp. (Spatt), N.Y.L.J., Feb. 8, 1978, at 10, col. 2 (Sup. Ct. Kings County 1978). The court suggested that the commission "needs to balance the perpetuation of the historic district against the preservation and enhancement of the neighborhood itself, both of which are essential purposes of the Landmarks Law as set forth in section 205-1.0.b." *Id.* Here, the building in question was vacant and located in a rundown neighborhood. The court felt that development of the property might enhance the neighborhood without violating the purpose of the Landmarks Law. *Id.*

75. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

76. *Id.* at 336, 366 N.E.2d at 1278-79, 397 N.Y.S.2d at 922 (1977). The court cited specifically the railroads and connecting public transportation without which the court found the terminal property would be worth a fraction of its current economic value. *Id.* at 333, 366 N.E.2d at 1276, N.Y.S.2d at 919.

ness" required that the parties be granted leave in order to meaningfully respond to the newly accepted "social increment theory of value."[77]

Similarly, in *Spears* v. *Berle*,[78] a decision dealing with the economic impact of the Freshwater Wetlands Act[79] to an individual property owner, the New York Court of Appeals remitted the case to the lower court, directing that a supplementary evidentiary hearing be held. The purpose of this hearing was to afford the petitioner the opportunity to show how the act effected a taking of his property.[80] The court found that on the record presented, the commissioner had not disclosed the full spectrum of permissible uses[81] for which the property owner would be allowed to develop his land. The court stated that unless the landowner was informed of such permissable uses he would not know "the full spectrum of possible uses to which his evidentiary proof [should] be addressed."[82]

IV. Analyzing the Fairness of Local Landmark Designation Proceedings

In *Historic Green Springs*, the court found that while the restrictions on the use of the private property at issue were insufficient to constitute a taking under the fifth amendment, the restrictions were of sufficient magnitude to warrant procedural due process. The court applied the "interest-balancing" approach and the administrative standards approach which, together, provide a procedural due process framework for evaluating the fairness of local landmark designation proceedings.

A. The Interest-Balancing Approach

The interest-balancing approach was adopted by the United States Supreme Court in a series of cases beginning with *Goldberg v.*

77. *Id.* at 337, 366 N.E.2d at 278-79, 397 N.Y.S.2d at 922 (1977).
78. 48 N.Y.2d 254, 397, N.E.2d 1304, 422 N.Y.S.2d 636 (1979).
79. N.Y. ENVTL. CONSERV. LAW § 24-0101 (McKinney Supp. 1981).
80. *Id.* at 263 n.4, 397 N.E.2d at 1308 n.4, 422 N.Y.S.2d at 640 n.4.
81. The court found that under the Freshwater Wetlands Act, the statute contains a catalogue of land uses permitted as of right, and also allows the Commissioner to issue permits for other uses. 48 N.Y.2d at 260, 397 N.E.2d at 1306, 422 N.Y.S.2d at 638. The court specified that in such instances, "[w]hile the property owner should not . . . be relieved of his heavy burden of proof [on the taking issue], he should be afforded a reasonable opportunity to obtain notice of the uses, if any, for which the commissioner would issue a permit." *Id.* at 263 n.4, 397 N.E.2d at 1308 n.4, 422 N.Y.S.2d at 640 n.4.
82. *Id.*

Kelly.[83] Courts utilizing this approach weigh the importance of the private interest at issue against the government's concern for an efficient decision-making process.[84]

Most local preservation statutes, including the New York City landmarks law, provide the procedural requirements which *Historic Green Springs* specified as necessary pursuant to the "interest-balancing" approach.[85] Nevertheless, the procedures set forth in local pres-

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83. 397 U.S. 254 (1970) (welfare benefits termination proceeding); *see also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Goss v. Lopez, 419 U.S. 565 (1975).

84. Mathews v. Eldridge, 424 U.S. 319 (1976). In *Mathews*, the Supreme Court articulated the three pronged interest-balancing test:

> [the] identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (1976). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-06 (1978); Friendly, *Some Kind of Hearings*, 123 U. PA. L. REV. 1267 (1975); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.—C.L.L. REV. 449 (1974); Summers, *Evaluating and Improving Legal Process—A Plea, for "Process Values,"* 60 CORNELL L. REV. (1974); Tribe, *Structural Due Process*, 10 HARV. C.R.—C.L.L. REV. 269 (1975); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

85. *See* discussion of the procedures required in Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va.), at notes 42, 43 *supra* and accompanying text. The New York landmarks law provides for notice, a public hearing, a written description of the factors relied upon by the landmarks commission, and subsequent approval by the Board of Estimate. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 207-12-0, 207-14-0 (1976). In the District of Columbia "Historic Landmark and Historic District Protection Act of 1978" the landmark ordinance also provides for a public hearing, a written description of the factors relied upon by the Historic Preservation Review Board and subsequent approval by the Mayor of Washington, D.C. Historic Landmark and Historic District Protection Act of 1978 §§ 3(e), 8(d), 13, as appearing in PRACTISING LAW INSTITUTE, HISTORIC PRESERVATION LAW 77-93. Similiarly, the Loudoun County, Virginia historic preservation ordinance provides for a public hearing, a statement of reasons for such approval or denial, and subsequent review by the Board of Supervisors "Historic Site Districts/Historic and Cultural Conservation Districts" §§ 750.10, § 750.7, as appearing in PRACTISING LAW INSTITUTE, HISTORIC PRESERVATION LAW 95-110.

ervation ordinances are not necessarily sufficient. For instance, under the New York City landmarks law, the landmark designation hearing lacks many elements of a fair trial.[86]

The "interest-balancing" approach in other circumstances has been used to require procedural formalities which allow an individual to fashion a more informed response to administrative action than provided for by the New York City landmarks law.[87] For example, the United States Supreme Court, while not prohibiting the use of *ex parte* evidence by administrative agencies, has held on due process grounds that the reliance on such evidence must be disclosed at the hearing.[88] The right to a hearing itself has been held to be meaningless where an individual does not know the contrary evidence he must meet.[89] Similarly, the right to present evidence is of little value when an individual does not know what evidence must be presented.[90]

New York courts have not used "interest-balancing" to require similar procedures for landmark determinations. Traditionally, the requirement that a hearing be held and the form of the hearing were contingent on whether the controversy in question dealt with adjudicative or legislative facts.[91] If the controversy dealt with an adjudicative fact, a comprehensive hearing similar to a full trial was required. If the determination were more closely aligned to a legislative or administrative act, something substantially less would suffice.[92] New York courts do not require comprehensive hearings perhaps because the landmark designation process has been characterized as an administrative, as opposed to a quasi-judicial or adjudicative function.[93]

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86. *See* notes 53-62 *supra* and accompanying text.

87. *See* notes 88-90 *infra* and accompanying text.

88. *See* Morgan v. United States, 304 U.S. 1 (1938). *See also* Hot Shoppes, Inc. v. Clouser, 231 F. Supp. 825 (D.D.C. 1964); Allen v. Donavan, 43 Del. Ch. 512, 239 A.2d 227 (1968). Cf. Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (Welfare Termination Proceeding). *Accord* Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937).

89. *See* Wolf v. McDonnell, 418 U.S. 539, 564 (1974) (Prison Disciplinary Hearing).

90. *Cf. Goldberg*, 397 U.S. at 270 (Welfare Termination Proceeding).

91. Friendly, *supra* note 84, at 1268. Professor Davis has suggested that legislative facts answer questions of law, policy or discretion while adjudicative facts concern the "what, when, and why" of particular situations and can be used to determine whether a given situation fits within a certain law or rule. Professor Davis contends that adjudicative facts present the specific questions of truth which render a trial type hearing valuable. I.K. DAVIS, ADMINISTRATIVE LAW Treatise § 7.02, at 413 (1958). *See* Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971); Kahn, *infra* note 94, at 1029.

92. Friendly, *supra* note 83, at 1268.

93. Lutheran Church v. City of New York, 35 N.Y.2d 121, 128 n.2, 316 N.E.2d 305, 309 n.2, 359 N.Y.S.2d 7, 13 n.2 (1974). For other New York decisions discussing the legislative adjudicative distinction, *see* Matter of Kew Gardens Sanitarium v. Whalen, 55 A.D.2d 226, 228, *aff'd*, 43 N.Y.2d 675, 371 N.E.2d 827, 401 N.Y.S.2d 65

The legislative-adjudicative distinction for determining due process has been criticized in its application to zoning because it fails to take into account many of the subtle realities of regulating land use.[94] Much of this criticism has equal validity in the historic preservation context.[95] A more suitable approach for both historic preservation

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(1977); Matter of Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y.2d 400, 407, 248 N.E.2d 855, 301 N.Y.S.2d (1969); Urban Dev. Corp. v. Vanderlex Merchandise Co., 98 Misc. 2d 264, 273, 413 N.Y.S.2d 982 (1979). For a discussion of the scope of appellate review of administrative action where such action is characterized as quasi-legislative, *see* 1 N.Y. JUR., ADMINISTRATIVE LAW §§ 178, 185; *See also* Staten Island Edison Corp. v. Malthie, 270 A.D. 55, 58 N.Y.S.2d 561, (1945) (Forster, J., dissenting).

94. Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1028, (1979). The basis for denying due process to legislative acts has two distinct foundations. First, in Bi-Metallic Inv. Co. v. Board of Equalization, 239 U.S. 441, 445 (1915), Justice Holmes distinguished between acts which apply to many citizens and those which only apply to a few. In terms of due process protections it was reasoned that there would be less opportunity for corruption where many individuals are concerned and that to provide hearings to all involved would create a much greater administrative burden. Hence, such acts were deemed to require little in the way of due process protections. *Id.* at 1028-29. *Accord* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 167 (1951) (Frankfurter, J., concurring). Secondly, courts look to the nature of the decision making body. Where a legislature is concerned, "[I]f a decision is 'democratically inaccurate,' then the decisionmakers will be removed from office. There is no need for notice and hearing since the legislature is generally subject to public scrutiny and acts only upon adequate knowledge and after full consideration." Kahn, *supra* at 1029, *citing* Southern Ry. Co. v. Virginia, 290 U.S. 190, 197 (1933); Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 889 (1975). When the deference accorded legislative acts is accorded zoning agencies, however, these factors seem particularly ill suited to determine the due process rights of affected landowners. First, zoning changes often involve only a few landowners and hence the administrative burden in providing beter procedures is not large. Secondly, where rezoning involves only a few landowners these citizens are almost powerless to remedy an adverse decision at the polls. Kahn, *supra* at 1031, *citing* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 778 (1976). While the deference accorded acts of Congress or state legislatures is understandable, it is uncertain whether this deference should also be accorded municipal bodies. Kahn, *supra* at 1029.

95. In the historic preservation context, the basis of the legislative-adjudicative distinction also is unsuited for the type of a determination being made under preservation ordinances. *See* note 94 *supra*. First, historic preservation, at least in comparison to the situation found in welfare, public housing or other social legislation, presents the government with a relatively finite number of administrative determinations. The government seriously cannot claim a burdensome administrative expense in the context especially considering that rather than distributing proceeds from the public treasury, they are attaining a substantial public benefit. Furthermore, affected landowners are particularly ill suited to remedy an adverse decision at the polls. In many cases, the public benefits in question are priceless but the impact of non-compensatory regulation on the landowner devastating. It therefore is hard to imagine that the minority of citizens could muster the support necessary among the general public to repeal such ordinances when the majority is receiving a tax free benefit.

and zoning decisions can be found in a number of recent zoning decisions.[96] These decisions hold that the formulation of a comprehensive zoning ordinance or any major amendment thereto is legislative, but where a municipality rezones a small parcel of land, affecting just a few owners, the action is quasi-judicial.[97] Applying this reasoning to the preservation context, the initial inventory of historic buildings or the creation of large historic districts would retain a legislative character and, hence, require less procedural protection for affected landowners. However, where a small historic district or individual landmark designation was at issue the affected landowners should be afforded procedural protections more closely patterned on the judicial model. In North Carolina, for example, reported decisions have mandated that historic district commission hearings be conducted "in accordance with generally accepted fair trial standards."[98]

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96. Kahn, *supra* note 94, at 1030, *citing e.g.*, Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976); Donovan v. Clarke, 222 F. Supp. 632 (D.D.C. 1963); Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975); O'Meara v. City of Norwich, 167 Conn. 579, 356 A.2d 906 (1975); City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

97. Kahn, *supra* note 94, at 1030-35.

98. Johnston, *Legal Issues of Historic Preservation for Local Government*, 17 WAKE FOREST L. REV. 707, 727 (1981). *See* Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974); Jarrell v. Board of Adjustment, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1962) (quoting Branche v. Board of Trustees, 141 N.Y.S.2d 477, 478 (Sup. Ct. 1955). At commission hearings, property owners may cross-examine witnesses, offer evidence, inspect any documents and rebut unfavorable evidence. Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 470, 202 S.E.2d 129, 137. The commission also may not render a decision where facts crucial to a determination were the result of unsworn statements. *Id.* Findings of fact, unsupported by competent, material, and substantial evidence are similarly invalid. *Id.* Finally, any *ex parte* evidence considered by the commission in reaching a decision must be placed on the record during the course of the public hearing. *Id.* at 468, 202 S.E.2d at 136. Commission decisions are reviewable by the board of adjustment and thereafter by a superior court. N.C. GEN. STAT. § 160-A 397 (Supp. 1981). Historic commissions are required to present a reviewing body with a written record. Jarrell v. Board of Adjustment, 258 N.C. 476, 480, 128 S.E.2d 879, 883 (1962). *See* N.C. GEN. STAT. § 150A-37 (1978), which must "state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the Court, what induced its decision." Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974). The standards of review rests in the reviewing bodies' finding that facts in evidence reasonably support the commission's decision. Johnston, *Legal Issues of Historic Preservation for Local Government*, 17 WAKE FOREST L. REV. 707, 728 (1981). *See In re* Pine Hill Cemeteries, 219 N.C. 735, 15 S.E.2d 1 (1941).

Regardless of whether state courts sufficiently recognize the adjudicative characteristics inherent in the designation of landmarks, there exist a number of independent considerations which support the imposition of greater procedural safeguards in the landmark process. First, despite certain unresolved questions which historic preservation presents,[99] land remains at the core of traditional notions of property.[100] Second, as a result of the narrow protection provided by the taking clause under current interpretation,[101] and the broad definition of landmark found in preservation statutes,[102] wide discretion is being exercised by landmark commissions. Proceedings before such commissions, therefore, often involve crucial determinations of property rights. Given these factors, the courts should be particularly careful in addressing the procedural safeguards due individuals appearing before landmark commissions.

B. The Administrative Standards Approach

Federal courts, reviewing agency determinations, have attempted to limit the discretion of administrators by requiring that substantive and procedural standards be provided affected parties before impor-

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99. Professor Costonis has stated that underlying many of the historic preservation decisions is the broader difficulty of deciding "what the entitlements of private land ownership should be." Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 408 (1977). Professor Costonis further points out that legislatures have been reluctant to grapple with the underlying conflicts surrounding historic preservation and other land use legislation. As a result, courts will be forced to continue to pass upon the "taking" questions raised by preservation programs without legislative guidelines and decide individual cases while leaving "untouched the underlying conflicts that make these cases so troublesome." *Id.* at 409.

100. Kahn, *supra* note 94, at 1038 *citing* 1 H. TIFFANY, THE LAW OF REAL PROPERTY 1-2 (3d ed. 1939). *See also* Philbrich, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938). In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court stated that "the property interests protected by procedural due process extend well beyond actual ownership of real estate." *Id.* at 571-72. "Thus, ownership of land remains protected under the [*Board of Regents v.*] *Roth* text for entitlements; certainly the law of every state recognized interests in real property." Kahn, *supra* note 94, at 1015.

101. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) ("open space" ordinance not a taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmarks law prohibiting development of a plot containing historic structure is not a taking); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (zoning law preventing the filling of wetlands is not a taking). *See generally* Day, *A Land Retrenchment Policy for Energy and Resource-Short Times: A Modest Proposal*, 10 FORDHAM URB. L.J. 71, 77-80 (1981).

102. *See* notes 50-52 *supra* and accompanying text.

tant private interests may be infringed upon.[103] Perhaps the most important case in the development of the administrative standards requirement is *Environmental Defense Fund v. Ruckelshaus*,[104] which was cited in *Historic Green Springs*. In *Environmental Defense Fund*, the plaintiffs were successful in their efforts to suspend the Secretary of Agriculture's federal registration of allegedly harmful pesticides.[105] The Secretary of Agriculture had refused to suspend the registration of a pesticide despite a statute which permitted such suspension to "prevent an imminent hazard to the public."[106] The court remanded for a new determination requiring that standards be formulated and that a statement of findings and reasons be provided showing how the standards were applied.[107]

Professor Davis has suggested that, in light of *Environmental Defense Fund*, courts may substitute the imposition of administrative standards for the requirement of statutory standards imposed under the nondelegation doctrine.[108] The nondelegation doctrine, which prohibited the standardless delegation of legislative power, had been applied extensively in the zoning context.[109] The nondelegation doc-

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103. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26 (2d ed. 1979). State courts also have evaluated the exercise of administrative discretion from this viewpoint. *See* Herrera v. Jamieson, 124 Ariz. 133, 602 P.2d 514 (1979) (general assistance proceeding); Elizondo v. State Dep't of Revenue, 194 Colo. 113, 570 P.2d 518 (1977) (license revocation proceeding); Commission on Gen. Educ. v. Union Township School, 410 N.E.2d 1358 (Ind. 1980) (student transfer case); Indiana State Bd. of Health v. B & H Packing Co., 391 N.E.2d 620 (Ind. 1979) (invalidated Board of Health's arbitrary reduction of inspection days at meat packing plant); Podgor v. Indiana Univ. 381 N.E.2d 1274 (Ind. 1978) (in-state v. out-of-state tuition status at state university proceeding); Pennsylvania Human Relations Comm'n v. Norristown Area School Dist. 473 P. 334, 374 A. 2d 671 (1977) (Human Relations Commission must provide published guidelines before validly attempting to desegregate schools); Athway v. State Dep't of Business Regulation, 626 P.2d 965 (Utah 1981) (Utah committee which licensed psychologists required to adopt published standards as to necessary educational requirements); Best v. State Dep't of Transp., 99 Wis. 2d 495, 299 N.W.2d 604 (1980) (standards required to validly suspend driver's licenses).

104. 439 F.2d 584 (D.C. Cir. 1971).

105. *Id.* at 596.

106. *Id.* at 597.

107. *Id.* at 597-98.

108. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26, at 130 (2d ed. 1979). Professor Davis noted that while the United States Supreme Court had never accepted such a revised non-delegation doctrine the opinions of the only three justices ever to have referred to it spoke of it with "seeming approval." *Id.* at 131 *citing* McGautha v. California, 402 U.S. 183, 273, 274 (1971). In Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the court suggested that a standards requirement would be "a suitable replacement for the old non-delegation doctrine." *Id.* at 598 n.55.

109. Kahn, *supra* note 94, at 1053. "This doctrine was upheld by the Supreme Court in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), and

trine is now "virtually dead at the federal level and slowly dying in the state courts as well."[110] In its wake, a number of zoning decisions have required published standards in the determinations of local zoning boards.[111] Considering the similarities between the power to designate historic landmarks and the power to zone land,[112] the continuing application of the administrative standards requirement in zoning decisions probably will add impetus to judicial inquiry into the procedural fairness of preservation ordinances.

Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)." *Id.* at n.233. The doctrine apparently is based upon U.S. CONST. art 1, § I which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." State court decisions not covered by this provision of the constitution have phrased the nondelegation principle in due process terms. *Id.* at 1054. Furthermore, the doctrine had been used to strike delegations to city legislative or administrative bodies. *Id.* at 1053-54 *citing* 1 K. DAVIS, TREATISE, ADMINISTRATIVE LAW TREATISE § 2.09 (1958); 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 18.08, 19.09 (2d ed. 1976); 5 N. WILLIAMS, JR., AMERICAN PLANNING LAW § 129.04 (1975); Annot., 58 A.L.R. 2d 1083 (1958).

110. Kahn, *supra* note 94, at 1054. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:14 (2d ed. 1979).

111. Hartnett v. Board of Zoning, 350 F. Supp. 1159 (D.V.I. 1972). Here, a Virgin Island zoning board's decision was overturned on due process grounds due to the board's failure to articulate decision-making standards. *Id.* at 1161. In Metropolitan Bd. of Zoning Appeals v. Shell Oil Co., 395 N.E.2d 1283 (Ind. App. 1979), the Indiana court of appeals held that the zoning board, regardless of the expertise it possessed in land use matters, could not escape the requirement that administrative decisions be "in accord with previously stated, ascertainable standards." *Id.* at 1286-87 *quoting* Podgor v. Indiana Univ., 381 N.E.2d 1274 (Ind. 1978). In Citizens against Lewis and Clark Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921 (Iowa 1979), individuals appealed the approval of a conditional use permit for the operation of a sanitary landfill which was to be located near their property. In a decision bearing significant parallels to *Historic Green Springs*, the court held that the Board's failure to adopt procedural rules invalidated the grant of the permit, despite the fact that the Iowa Administrative Procedure Act did not apply. *Id.* at 923-24. The court found "it difficult to permit other governmental agencies, even though not covered by the statute [Iowa Administrative Procedure Act], to operate with *no* rules and without established procedural guidelines." *Id.* at 924 (emphasis in original). The court was careful to point out that its inquiry was concerned with procedural rules only and not substantive standards. *Id.* at 923. Having found this issue dispositive of the case, the court found it unnecessary to pass upon some of the specific objections raised by the plaintiffs; but did hold nonetheless that future boards of adjustment would be under a duty to make written findings in such determinations. *Id.* at 925. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.95 (2d ed. 1979); E. MCQUILLIN, 8A MUNICIPAL CORPORATIONS § 25.272 (3d ed. 1976); E. Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA L. REV. 50, 54-57 (1974); Note, *Board of Zoning Appeals Procedure—Informality Builds Contempt*, 16 SYRACUSE L. REV. 568, 580-81 (1965).

112. *Compare* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmarks law prohibiting proposed development of air space over landmark structure is not a taking) *with* Agins v. City of Tiburon, 447 U.S. 255 (1980) ("open" space zoning ordinance is not a taking). *See generally* Day, *A Land Retrenchment Policy for Energy and Resource-Short Times: A Modest Proposal*, 10 FORDHAM URB. L.J. 72, 77-80 (1981).

Two decisions also cited in *Historic Green Springs* support an administrative standards requirement based more squarely on due process grounds than the *Environmental Defense Fund* decision.[113] In *Holmes v. New York City Housing Authority*,[114] the New York City Housing Authority's procedures for admission of tenants to low rent public housing projects was challenged. The plaintiffs alleged that the Housing Authority, which processed approximately 90,000 applications for 10,000 houses, did not process the applications chronologically or in any other systematic manner.[115] Affirming a denial of the city's motion to dismiss, the court held that in light of the potential for abuse of uncontrolled agency discretion, "due process requires that selections among applicants be made in accordance with 'ascertainable standards.' "[116] Similarly, in *White v. Roughton*,[117] welfare recipients challenged the termination of their benefits under a general township asistance program. The court found that the administrator's use of personal unwritten standards for eligibility was violative of due process and required that he "establish written standards and regulations."[118]

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113. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26, at 131 (2d ed. 1979). Professor Davis alludes to four methods under which greater administrative standards can be required. The first, *see* notes 104-08 *supra* and accompanying text, is based on replacing the non-delegation doctrine. The second, embraced by Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) and White v. Roughton, 530 F.2d 750 (7th Cir. 1976), is based on the fact that "in some circumstances the lack of rules or standards is so unreasonable that due process is denied." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26, at 131 (2d ed. 1979). The third is analagous to the "void for vagueness" doctrine in the criminal law, and the fourth has for its basis "evolving common law or equitable considerations, based on judicial understanding of fairness and propriety." *Id.*

114. 398 F.2d 262 (2d Cir. 1968).

115. Holmes v. New York City Hous. Auth., 398 F.2d 262, 264 (2d Cir. 1968). The plaintiffs also complained that applications expired automatically at the end of two years and that many applications were never considered at all. A further allegation was that determinations of uneligibility were not reported to the applicants (except where excessive income was the grounds for ineligibility) and that decisions were unsupported by reasons. *Id.*

116. *Id.* at 265, *citing* Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964).

117. 530 F.2d 750 (7th Cir. 1976).

118. *Id.* at 754. The court found that the program administrator, not bound by any eligibility requirements other than those found in the state general assistance statute, was still required "to administer the program to ensure the fair and consistent application of eligibility requirements. *Id.* at 753-54. *See also* Silva v. Secretary of Labor, 518 F.2d 301, 311 (1st Cir. 1975); Mobil Oil Corp. v. Federal Power Comm'n., 483 F.2d 1238 (D.C. Cir. 1973); Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976); Smith v. Ladner, 288 F. Supp. 66, 70-71 (S.D. Miss. 1968).

Requiring landmarks commissions, particularly those patterned after the New York City landmarks program,[119] to control discretion through substantive and procedural safeguards is a due process approach well suited to meet the valid claims of objecting landowners to fair procedures. As one federal district court for the Virgin Islands recognized in an analgous decision

> The problems are . . . apparent when one's ability to get approval from a board . . . cannot be predicted because no hint is ever given either prior to or after application as to when the board will give such approval and when it will withhold it. The problem is basically one inimical to ad hoc, standardless decisions. . . . [A]gency attempts to control any form of behavior should be governed by standards for decision which are stated in advance and given wide circulation. . . . For due process reasons, these standards should be publicly promulgated and written precisely enough to give fair warning as to what the standards for decision will be.[120]

A number of jurisdictions have required administrative standards where landmark preservation ordinances were at issue.[121] A 1979 decision by the Texas Civil Court of Appeals[122] overturned a portion of the City of Austin's preservation ordinance, as applied to a downtown hotel, finding it a standardless delegation of legislative authority.[123] The Austin ordinance provided that any chairman, vice-chairman, or executive secretary of the Austin Landmark Commission could, in his individual capacity, place property on the landmark commission agenda.[124] The court found that the application of the Austin ordinance unlawfully vested ultimate legislative authority in the members of the landmark commission in their individual capacity.[125]

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119. *See* notes 48-60 *supra* and accompanying text.

120. Hartnett v. Board of Zoning Subdivision & Bldg. Appeals, 350 F. Supp. 1159, 1161 (D.V.I. 1972).

121. *See* note 71 *supra.*

122. Southern Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229 (Tex. Civ. App. 1979).

123. *Id.* at 238-39.

124. *Id.* at 233. The ordinance further provided that once a property was placed on the Landmark Commission's agenda, that full gamut of preservation protections would apply. *Id.* at 237-38.

125. *Id.* The court also addressed the issue of whether appropriate standards guided individual commission members. The court, *citing* Texas Antiquities Comm. v. Dallas Community College Dist., 554 S.W.2d 924 (Tex. 1977), found the Austin Ordinance to be in "power over property of landowners . . . which must be harnessed by appropriate standards and guidelines." Southern Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229, 239 (Tex. Civ. App. 1979). The court also found the ordinance defective in its complete lack of standards. *Id.*

Similarly, a 1977 decision by the Texas Supreme Court found the Texas Antiquities Code unconstitutionally vague and without standards to guide those empowered with its administration.[126] The court concurred with Professor Davis' view that in the absence of statutory standards, published rules or regulations would suffice.[127] Having found neither statutory standards nor administrative rules or regulations, the court was constrained to hold the statute void.[128] The Texas legislature has since amended the applicable provisions of its Antiquities Code[129] and added more specific criteria for the identification of landmarks.

In a Colorado decision specifically involving an historic district ordinance,[130] the court found the ordinance at issue to be void for vagueness.[131] The court, while rejecting the plaintiffs' claim that the language of the ordinance was overly broad,[132] held the ordinance

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126. Texas Antiquities Comm. v. Dallas Community College Dist., 554 S.W. 2d 924, 927-28 (Tex. 1977). The court reviewing the language of the Texas ordinance stated:

> There has been called to our attention no case in Texas or elsewhere in which the powers of a state board are more vaguely expressed or less predictable than those permitted by the phrase in question. The word "building" comprehends all structures; "historical" includes all of the past; "interest" ranges broadly from public to private concerns and embraces fads and ephemeral fascinations. All unrestorable structures ordinarily hold some nostalgic tug upon someone and may all qualify as "buildings . . . of historical. . . .interest.

Id. at 927. The court expressly refused to discard the non-delegation doctrine, stating that "[s]ound reasons support the rule that some reasonable standard is essential to the constitutionality of statutory delegation of powers to state boards and commissions." *Id.*

127. *Id.* at 928.

128. *Id.*

129. TEX. NAT. RES. CODE ANN. §§ 191-92 (Vernon 1978 & Supp. 1981).

130. South of Second Assocs. v. Georgetown, 196 Colo. 89, 580 P.2d 807 (Colo. 1978).

131. *Id.* at 93, 580 P.2d at 811. Here, the Georgetown, Colorado, Board of Selectment had amended the existing zoning law by including the entire municipal limits of Georgetown within a preservation district. *Id.* at 90, 580 P.2d at 808. "Georgetown is a municipal corporation created by the Colorado territorial legislature in 1868. The town and surrounding area are rich in the culture and history of early Colorado." *Id.* The plaintiffs, owners of undeveloped real property within the municipal limits, challenged the denial of a requested "certificate of appropriateness" which would have allowed them to construct townhouses on their vacant land. *Id.* at 91, 580 P.2d at 809.

132. *Id.* at 93, 580 P.2d at 810. The court based its finding that the language in the ordinance was sufficiently definite on what it termed a "consensus of those courts which have considered similar provisions. . . ." *Id. citing* Figarsky v. Historic Dist. Comm'n of the City of Norwich, 171 Conn. 198, 368 A.2d 163 (1976); Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968);

void for failing to specify which areas within the historic district were entitled to preservation. The ordinance had the effect of vesting "unreviewable discretion in the Commission,"[133] because a landowner could not "reasonably ascertain which architectural designs would entitle him to a certificate of appropriateness."[134]

While administrative standards often have been required by the judiciary, they may be set forth in enabling state legislation as well. In North Carolina, for example, the state enabling legislation requires local preservation commissions to promulgate and adopt rules of procedure before they may take action infringing on property rights.[135]

V. Conclusion

The procedural safeguards provided under landmark preservation programs, similar in format to that found in New York City, are inadequate in light of the substantial burden landmark designation can place on a landowner. Given the narrow judicial interpretation of the taking issue, it is increasingly important for landowners to be afforded the opportunity to challenge such designations at the administrative level. In those jurisdictions which have required greater procedural safeguards, the valid goals of landmark preservation have not been compromised.[136] For these reasons, landmark preservation commissions should be required to promulgate substantive standards for determining landmark significance and to adopt detailed rules of procedure to govern the designation process.

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Town of Deering v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557) (1955). The court stated that, "[m]ost municipalities which have established similar historical preservation districts . . . specifically delineate those areas which possess such a unique character as to be entitled to preservation." South of Second Assocs. v. Georgetown, 196 Colo. 89, 94, 580 P.2d 807, 811 (1978). The landmark commissioners could not arrive at any consensus in their testimony on the boundaries or areas within the district and hence, no published boundaries were part of the public record. *Id.*

133. *Id.* at 94-95, 580 P.2d at 811.

134. *Id.*

135. N.C. GEN. STAT. § 160A-397 (Supp. 1981).

136. For example, North Carolina, which requires comprehensive procedural safeguards, also has one of the more active preservation programs in the country. *See* Johnston, note 98 *supra.*