Legal Basics
For Historic Preservation Commissions

Susan M. Garrett, J.D.
Deputy City Attorney, City of Atlanta
Adjunct Faculty, Georgia State Univ.
Heritage Preservation Program
The views expressed in this presentation and accompanying oral commentary are those of the author only and in no way reflect the policies of the City of Atlanta, Georgia State University, or any other organization with whom the author is affiliated.

Any discussion of legal issues is intended for general information only and should not be construed as legal advice. Attendees should consult their own attorneys for individual legal guidance.
Part I: Constitutional Foundations and Legal Background

Constitutional Rights
- Eminent Domain
- Regulatory Takings
- Due Process
- Equal Protection
- First Amendment

State Laws
- State Historic Preservation Act
- State Sunshine Laws
- State and Local Ethics Laws
Property Rights: The “Bundle of Sticks”

- Property owner can convey partial rights in property without losing ownership (e.g., through leases, easements, etc.)

- Government regulation may also deprive owner of a portion of rights
Constitutional Foundations

Property Ownership Rights:

- No person shall... be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

*U.S. Const. Amend. V* (applies to federal government)
Constitutional Foundations, cont’d

• “…nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV
Constitutional Foundations, cont’d

State and Local “police powers”

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

_U.S. Const. Amend. X._
The Balancing Test

Governmental power
- to take property for a public purpose
- to regulate property to promote the public health, safety, welfare

Property Owner’s rights
- Due process
- Equal protection
- Compensation if property taken
Eminent Domain

- Government may **take** private property to devote to public purpose as long as it pays just compensation
But what is a legitimate public purpose?

*Kelo v. City of New London* (economic development may justify taking of property to be turned over to private party)
Property Regulation
Local Land Use Ordinances

- **Zoning ordinance** regulates how property can be used, by district
- **Development code** regulates subdivision process and development standards
- **Building code** regulates structural requirements; requires permits for building and demolition
- **Sign ordinance** regulates size, placement, appearance of signs
Property Regulation, cont’d

- Government may subject private property to reasonable regulation to promote the public health, safety, welfare.

- BUT if the regulation goes too far it will become a regulatory taking.
Due Process

- **Procedural** due process requires notice & opportunity to be heard before decision is made.

- **Substantive** due process protects against unlawful taking, requires compensation for taking.
Just Compensation

Required IF

- the owner is dispossessed of the property through eminent domain

OR

- is deprived of all reasonable use of property through *regulatory taking*
The Equal Protection Clause

• “...nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV
Equal Protection Requirements for Regulatory Laws

General Rule:
Individual or class cannot be *singled out* for different treatment without a rational, non-discriminatory basis for doing so.
Preservation Laws

Limit the free use of property
- By imposing architectural and aesthetic standards
- By limiting demolition

Promote the public welfare
- by preserving historic and cultural resources
- by respecting aesthetic values
Due Process Requirements
For Preservation Ordinances

- The ordinance must be clearly written so that citizens will know how to comply
- The standards must be sufficiently detailed so that decisions will be predictable, not arbitrary
Procedural Requirements: Due Process and State Law

Notice to public
- Before approving ordinance
- Before designating districts

Notice to affected property owners:
- Before making decisions affecting them

Hearing
- Public hearing on district designation
- Public hearing on individual applications
- Opportunity to comment and present evidence (both for and against)
Scope of Preservation Regulation
(Substantive Due Process)

Regulation is NOT a “taking” as long as it
- Is substantially related to promotion of general welfare (must promote legitimate preservation interest)
- does not deprive owner of all beneficial use of the property
Property Regulation, cont’d

Regulation to promote the public health, safety, welfare includes regulation designed to preserve aesthetic, cultural, historic resources.

(Penn Central v. NYC)
May a Preservation Ordinance Impose Maintenance Requirements?

Yes, a local preservation ordinance may require owners to spend money if the purpose is legitimate, the means reasonable and not excessively burdensome.

(Maher v. City of New Orleans)
Equal Protection Requirements for Preservation Ordinances

- Ordinance should have general application to an appropriately defined district or class of properties.

- District or class must be defined in a manner that is rationally related to legitimate preservation interests.

- Similarly situated properties should be treated equally.
Historic Preservation Laws and the First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. Const. Amend. I.

Does enforcement of an historic preservation ordinance result in a substantial burden on the church’s free exercise of religion?
Georgia Historic Preservation Act
O.C.G.A. § 44-10-20, et seq.

- Authorizes local governments to designate properties and districts, establish design review process, and create local preservation commission (NOTE: some local preservation ordinances, such as Atlanta’s, predate the GHPA.)

- Grants preservation commission authority to recommend designation of districts/properties, to regulate changes in the exterior appearance of historic properties and to take other actions to enforce local ordinance

- Imposes requirements for composition of local commission, meetings, quorum, terms of office, filling of vacancies, appeals
Historic Preservation Act, cont’d

- Requires notice (to public and to affected individual property owners) and public hearing prior to recommendation on proposed designation; establishes standard for designation

- Requires notice and public hearing prior to decision on COA application; establishes standard for grant or denial of COA.

- Requires Commission to adopt rules of procedure and design standards

- Provides for appeal of Commission decisions to local governing authority (City Council/County Commission)
Legal Challenges to HP Ordinances

- Ordinance exceeds scope of lawful HPC jurisdiction under state statute
- Ordinance was not properly enacted by local governing authority (council/commission)
- District was not properly approved
- Guidelines were not properly adopted
- HPC has failed to establish procedural rules
- HPC member(s) should have been disqualified
- HPC not properly constituted
The commission **shall approve** the application and issue a certificate of appropriateness if it finds that the proposed material change in appearance in making this **would not have a substantial adverse effect on the aesthetic, historical, or architectural significance and value of the historic property or the historic district.**

O.C.G.A. § 44-10-28(b)
Defensible Decision Checklist

1. Describe application and establish HPC jurisdiction (e.g., is a COA required? Why?)
2. Make factual findings as to each of the ordinance criteria for COA, citing specific evidence in the record.
3. State conclusion in terms of ordinance standard (e.g., has applicant shown that requirements are met for COA approval?
4. Are any conditions necessary? Why?
5. State decision, including any condition.
6. Decide similar matters in a consistent manner.
Federal Historic Preservation and Related Laws

DO NOT directly affect local preservation regulation (NEPA, Section 106, Section 4f)

Exception: RLUIPA
"NEPA"

- requires review of environmental impacts of federally funded or authorized projects
- may include review under § 106 or § 4f where applicable
“Section 106”


(Federally funded or authorized projects must identify, avoid or mitigate effects on historic, archaeological and cultural resources)
“Section 4f”

National Transportation Act of 1966, 49 U.S.C. § 1653f

(USDOT transportation projects must avoid or minimize harm to federally protected park land and historic sites)

Government may not implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, a religious assembly or institution, unless the government can demonstrate that the burden

- promotes a **compelling governmental interest**; AND
- is the **least restrictive means** of furthering that compelling governmental interest.
RLUIPA, cont’d

- Applies to local land use decisions such as the grant or denial of a COA.

- Means that Preservation Ordinance may not be applied in a way that limits the exercise of religion unless the compelling interest/least restrictive means test is met.

- Does NOT mean that religious properties can never be regulated.
Part II: Commissioners as Public Servants

“Sunshine” Laws
- Open Meetings
- Open Records

Ethics Laws
Georgia Open Meetings Act
O.C.G.A. § 50-14-1, et seq.

- requires that meetings of government agencies be open to the public
- applies to preservation commissions whenever a quorum gathers to conduct official business
- requires advance written notice of meeting
- violation invalidates action taken
- possible civil and criminal penalties for violations

- Provides the public with broad access to governmental records
- Gives citizens the right to inspect, and copy all public records as defined in the Act
- Requires disclosure unless records fall within specific exemption
- Possible civil and criminal penalties for violation
Georgia Sunshine Law Resources

Office of the Georgia Attorney General
https://law.ga.gov/law

Georgia Ethics Laws

- O.C.G.A. § 36-30-6 (improper and illegal for member of a municipal council to vote on any question brought before the council in which he is personally interested)
- O.C.G.A. § 16-10-6 (prohibits sale of real or personal property by public officer to subdivision of government in which s/he serves.)
- O.C.G.A. § 36-67A-2 (zoning decisions only: must disclose interest in writing; financial interest requires recusal; failure to recuse voids decision.)
Local Ethics Codes

- Local (city and county) Ethics Codes apply to elected officials, appointed officials, and employees.

- These local Ethics Codes set the standard of conduct and the consequences for violation.

- May be based on GMA Model Code:
CONFLICT OF INTEREST

(a) A city official may not participate in a vote or decision on a matter affecting an immediate family member or any person, entity, or property in which the official has a substantial interest.

(b) A city official who serves as a corporate officer or member of the board of directors of a nonprofit entity must disclose their interest in said entity to the mayor and council prior to participating in a vote or decision regarding funding of the entity by or through the city.

(c) Where the interest of a city official in the subject matter of a vote or decision is remote or incidental, the city official may participate in the vote or decision and need not disclose the interest.

If you, any member of your immediate family, or any business in which you have a substantial interest will be materially affected by a Commission decision, you should **recuse** yourself, refrain from participating in the decision, and leave the meeting room.

If there may be an appearance of a conflict, but you are sure there is no actual conflict, disclose and explain on the record before participating.

When in doubt, recuse yourself and refrain from participation.