

"New Challenges, New Solutions"
Annual Historic Preservation Commissions Workshop
Quincy Arts Center, 1515 Jersey, Quincy, Illinois

September 11, 2009

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**New Challenges - Can Preservation Withstand
Its Second Great Challenge from
Hanna v. City of Chicago?**

- I. The Hanna decision--everything you heard is true.
- II. There are two constitutional challenges to Historic Preservation movement. One was resolved in 1978 and the other is beginning.
- III. The first Challenge was under the Fifth Amendment: "Nor shall private property be taken for public use, without just compensation."
 - A. Preservation is a public Purpose: Unites States Supreme Court in *United States v. Gettysburg Ry.* 1896.
 - B. Zoning power approved by *Village of Euclid v. Ambler Realty* 1926.
 - C. Approval of district designations for tourism purposes, e.g., Santa Fe, Charleston, New Orleans (La. Constitutional provision).
 - D. Federal Antiquities Act of 1906.
 - E. Creation of National Trust for Historic Preservation in 1949.
 - F. Illinois Historic Preservation Act of 1963.
 - G. "With Heritage so Rich" and Enactment of National Historic Preservation Act of 1966.
- IV. Challenge resolved--Penn Central Transportation Co. v. City of New York 1978.
 - 1. And see Justice Brennan's comments on specificity: "Equally without merit is the related argument that the decision to designate a structure as a landmark 'is inevitably arbitrary or at least subjective, because it is basically a matter of taste.'"
- V. The National Register Standards for listing on the National Register 36 CFR Sec. 60.4.
 - A. The criteria applied to evaluate properties (other than areas of the National Park System and National Historic Landmarks) for the National Register are listed below. These

criteria are worded in a manner to provide for a wide diversity of resources. The following criteria shall be used in evaluating properties for nomination to the National Register, by NPS in reviewing nominations, and for evaluating National Register eligibility of properties. Guidance in applying the criteria is further discussed in the "How To" publications, Standards & Guidelines sheets and Keeper's opinions of the National Register. Such materials are available upon request.

- B. National Register criteria for evaluation.** The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and
- a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
 - b) that are associated with the lives of persons significant in our past; or
 - c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.
- C. Criteria considerations.** Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria of if they fall within the following categories:
- a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
 - b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
 - c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.
 - d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
 - e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
 - f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

- g) A property achieving significance within the past 50 years if it is of exceptional importance. This exception is described further in NPS "How To" #2, entitled "How to Evaluate and Nominate Potential National Register Properties That Have Achieved Significance Within the Last 50 Years" which is available from the National Register of Historic Places Division, National Park Service, United States Department of the Interior, Washington, D.C. 20240.

VI. The Illinois Standards 65 ILCS 5/11-48.2-2.

- A. The corporate authorities in all municipalities shall have the power to provide for official landmark designation by ordinance of areas, places, buildings, structures, works of art and other objects having a special historical, community, or aesthetic interest or value . .

VII. The Illinois home rule standards.

VIII. The second constitutional challenge.

- A. "As-applied" vs. "on its face."

IX. The Chicago designation standards at issue (two required for designation):

- A. 1. [Critical Part of City's Heritage] Its value as an example of the architectural, cultural, economic, historic, social, or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States.
- B. 2. [Significant Historic Event] Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements.
- C. [Significant Person] Its identification with a person or persons who significantly contributed to the architectural, cultural, economic, historic, social, or other aspect of the development of the City of Chicago, State of Illinois, or the United States.
- D. 4. [Important Architecture] Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials, or craftsmanship.
- E. 5. [Important Architect] Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, the State of Illinois, or the United States.
- F. 6. [Distinctive Theme as a District] Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous.
- G. 7. [Unique Visual Feature] Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.

X. The Illinois as-applied zoning standard.

1. In *LaSalle Nat'l Bank of Chicago v. County of Cook*, the Illinois Supreme Court listed factors to be taken into consideration in determining the validity of a zoning ordinance under attack as applied to a particular property *LaSalle Nat'l Bank of Chicago v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65, 69 (1957), with factors added by *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 378, 167 N.E.2d 405, 411 (1960) and *Hoffman v. City of Waukegan*, 51 Ill. App. 2d 241, 201 N.E.2d 177, 179 (3d Dist. 1964):
 - a) The existing uses and zoning of nearby properties;
 - b) The extent to which property values are diminished by the particular zoning restriction;
 - c) The extent to which the destruction of property values of the plaintiff promotes the health, safety, morals or general welfare of the public; The relative gain to the public as compared to the hardship imposed upon the individual property owner;
 - d) The suitability of the subject property for the zoned purposes;
 - e) The length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property
 - f) The need and demand for the use; and
 - g) The extent to which the use conforms to the municipality's comprehensive planning.

XI. Who is Albert C. Hanna? (Information from <http://news.medill.northwestern.edu/chicago/news.aspx?id=114911> accessed September 9, 2009.)

- A. Four plus one builder; explorer.
- B. Hanna has frequently challenged zoning substance and process.
- C. He said the City has long used its zoning to discriminate against youth and redevelopment, especially in his own Lincoln Park historic district, Arlington-Deming. "There's a difference between conceptual plans and the outright taking of property rights," he said. "It's my obligation as a citizen to defend the rights of property owners, and after 50 years in real estate, I am in a unique position to understand those rights."
- D. "What the City isn't doing," he said, "is informing people of the risks associated with changing their historic landmark status." Hanna said that forcing people into historic districts, such as Arlington-Deming and East Village, can affect homeowners' mortgages - forcing them into default through a typical, if obscure, clause about zoning changes in many mortgage agreements - as much as it can affect their homeowners' insurance. Hanna said homeowners' policies often do not cover the higher costs of renovation that come with the designation, by requiring homeowners to use historically correct materials. And the cost of insurance that does cover the more expensive materials can be as much as 10 percent of the annual premium - as much as \$10,000, in some cases.

- XII.** The multiple challenges to preservation presented in the trial court in the Hanna case.
 - A.** Lack of specificity of qualifications for Commission members.
 - B.** Substantive Due Process--The designation ordinance bears no rational relationship to a legitimate governmental purpose.
 - C.** Improper delegation--automatic landmarking by Commission recommendation if City Council does in act in one year.
 - D.** Lack of specificity of standards for selecting landmarks.
- XIII.** The Constitutional standard.
 - A.** Due Process.
 - B.** The requirement of specificity.
 - C.** Substantive Due Process. Do the selection criteria bear a rational relation to a legitimate government purpose?
 - D.** Ambiguity test. Are the criteria so vague that people of common intelligence must necessarily guess at their meaning. Do they authorize or encourage arbitrary and discriminatory enforcement?
- XIV.** Hanna case in the Appellate Court.
 - A.** How a court decides the case.
- XV.** The Rule 23 order issued January 23, 2009.
- XVI.** Rehearing and publication March 6, 2009. *Hanna v. City of Chicago*, 388 Ill.App.3d 909 (2009).
- XVII.** Initiation of amicus curiae process by Landmarks Illinois; Assembly of amici; coordination with the National Trust for Historic Preservation.
- XVIII.** The function of a brief amicus curiae.
- XIX.** The preparation of amicus petition.
 - A.** assistance to be given to the court.
- XX.** The amicus brief.
- XXI.** Supreme court rejection of amicus brief without prejudice March 24, 2009.
- XXII.** Illinois Supreme Court rejects petition for leave to appeal. May 28, 2009.
 - A.** Granting leave to appeal is a statistical rarity.
 - B.** No reasons given by Court.

- XXIII.** The case was returned for action by the trial court.
- XXIV.** Predicted progress of case through the courts.
 - A.** The trial court's options.
 - B.** Further appeals.
 - C.** Which court will have the final say?
- XXV.** Impact of the Hanna case until a final judgment is entered and affirmed.
- XXVI.** Impact if final judgment is adverse.
- XXVII.** Impact if final judgment is favorable.
- XXVIII.** Impact in other states.
- XXIX.** Planning for the worst.
 - A.** Alternate standards.
 - B.** No standards.
 - C.** Home rule standards.