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# Procedural Due Process Under the District of Columbia Historic Protection Act

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# PROCEDURAL DUE PROCESS UNDER THE DISTRICT OF COLUMBIA HISTORIC PROTECTION ACT

In an attempt to prevent dissipation of its historic endowment, the District of Columbia enacted the Historic Landmark and Historic District Protection Act of 1978 (Historic Protection Act or Act).[1] The Act endeavors to protect, enhance and perpetuate landmarks and districts representing the city's cultural and architectural history. While historic preservation generally may imply protection of existing landmarks, the Historic Protection Act reflects the framer's recognition that municipal preservation activities must also prevent the destruction of historic settings by the physical appearance of new construction.[2] Under the Act, a party who proposes new construction in an existing historic district must apply to the mayor's agent for a construction permit.[3] Application triggers the Act's "design review process"[4] which, in essence, provides for appraisal of the project by the Joint Committee of Landmarks (JCL) and final review by the mayor's agent.

Under the District of Columbia Administrative Procedure Act (DCAPA),[5] any person aggrieved by a decision of the mayor's agent under

1. D.C. CODE ANN. §§ 5-1001 to 5-1015 (1981 & Supp. 1983). The Act was submitted to the District of Columbia City Council as D.C. Bill 2-367 on June 28, 1978, by Councilman John A. Wilson. It was signed by Mayor Walter E. Washington on Dec. 28, 1978, and became law on March 3, 1979.

2. The relevant provision of the Historic Protection Act, § 5-1007, concerning new construction, states:

> (a) Before the Mayor may issue a permit to construct a building or structure in an historic district . . . the Mayor shall review the permit application in accordance with this section and shall place notice of the application in the District of Columbia Register.
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> . . . .
>
> (e) In any case where the Mayor deems appropriate, or in which the applicant so requests, the Mayor shall hold a public hearing on the permit application.
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> (f) The permit shall be issued unless the Mayor, after due consideration of the zoning laws and regulations of the District of Columbia, finds that the design of the building and character of the historic district are incompatible . . . .

D.C. CODE ANN. § 5-1007 (1981).

3. *Id.* at § 5-1007(a).

4. The term "design review process" is used by the court in Dupont Circle Citizens Ass'n v. Barry, 455 A.2d 417, 419 (D.C. 1983), in referring to the procedural requirements of § 5-1007.

5. D.C. CODE ANN. §§ 1-1501 to 1-1510 (1981).

the Historic Protection Act has recourse of appeal to the District of Columbia Court of Appeals.[6] The DCAPA, in turn, limits the court's jurisdiction to the review of "contested cases."[7] The court of appeals previously has held that in order to constitute a "contested case," the controversy must involve an aggrieved party who possesses a statutory or constitutional right to a "trial-type hearing."[8] The court recently addressed the question whether a citizens' association possesses a statutory or constitutional right to a hearing when new construction is proposed in an historic district. In *Dupont Circle Citizens Association v. Barry*,[9] the court held that the asserted property interests of diminution in value and aesthetic blight were too vague and speculative to entitle the Citizens' association to a "trial-type hearing."[10] The court thus found that the controversy did not constitute a "contested case" and dismissed the appeal for lack of jurisdiction.[11]

## I. Protected Property Interests Under the Due Process Clause

Although the scope of interests shielded by the fourteenth amendment has widened greatly in the last decade,[12] the United States Supreme Court

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6. *Id.* at § 1-1510.

7. D.C. Code Ann. § 1-1502(8) states:

> The term "contested case" means a proceeding before the Mayor or any agency in which the legal rights, duties or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency . . . .

8. *See, e.g.*, Capitol Hill Restoration Soc'y, Inc. v. Moore, 410 A.2d 184, 187 (D.C. App. 1979); Chevy Chase Citizens Ass'n v. District of Columbia Council, 327 A.2d 310, 313 (D.C. 1974).

9. 455 A.2d 417 (D.C. 1983).

10. *Id.* at 423. In order to bring suit, the association must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interest it seeks to protect is germane to the association's purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). The Dupont Circle Citizens Association (Association) is a chartered representative of its members and, therefore, is empowered to assert the economic and aesthetic injuries claimed by its members for the purpose of establishing standing. *See* Warth v. Seldin, 422 U.S. 490 (1975). Specifically, the injuries asserted by the Association were that the proposed construction of an office building between Connecticut Avenue and N Street in the Dupont Circle Historic District would cause a reduction in property values within the district and permanently damage the historic character of that designated neighborhood. *Dupont Circle*, 455 A.2d at 421-22.

11. The court noted that the Association was not completely foreclosed from access to judicial review: "Any party aggrieved by an agency's decision may initiate an equitable action in the Superior Court of the District of Columbia to seek redress." *Dupont Circle*, 455 A.2d at 424 n.28.

12. *See* Rendleman, *The New Due Process: Rights and Remedies*, 63 Ky. L.J. 531 (1975). The author argues that due process has been extended into many spheres which had

has stated that the range of protected interests is not infinite.[13] In *Board of Regents v. Roth*,[14] the Supreme Court outlined the scope of property interests which warrant constitutional protection, thereby singling out those interests which must be accorded appropriate procedural safeguards.[15] In *Roth*, an assistant professor hired for a fixed term of one year to teach at a state university was informed without explanation that he would not be rehired. The rules promulgated by the university provided that no reason need be given for nonretention of a nontenured teacher and specified no standards for reemployment.[16] Roth brought suit against the university charging that the failure of university officials to give him notice of any reason for nonretention or to provide an opportunity for a hearing violated his fourteenth amendment right to procedural due process.[17] Both the district court and court of appeals ruled in Roth's favor, and the university appealed to the Supreme Court.

The Court determined that "some kind of hearing"[18] is required prior to the deprivation of a protected property interest.[19] If an individual is not deprived of a statutory or constitutionally recognized property interest, however, constitutional due process protection is unnecessary.[20] Because

previously escaped its influence, expanding procedural protections and remedies to include a vast array of previously unprotected interests. *Id.* at 532-34.

13. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

14. *Id.* at 564.

15. Justice Stewart's majority opinion in *Roth* states that procedural due process requirements apply only to acts that infringe upon those interests encompassed by the fourteenth amendment's protection of liberty and property. *Id.* at 569. An interest in property arising from a legitimate claim of entitlement based upon an independent source, such as the common law, constitutes such a protected interest. *Id.* at 577. In the context of historic preservation, the common law recognizes that landowners are normally entitled to use their property in any way that does not cause a nuisance. This entitlement creates a property interest in the free use of land. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). While this interest in property is subject to the restrictions of the state's police power, courts have long recognized that any legitimate use is properly within the protection of the Constitution. 408 U.S. at 577.

16. 408 U.S. at 566.

17. The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

18. The phrase "some kind of hearing" is drawn from an opinion by Justice White in Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). One year later, it became the title of an article written by Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975). Judge Friendly discusses the vast increase in the number and types of hearings required in all areas in which the government and the individual interact, an increase he describes as a "due process explosion." *Id.* at 1268.

19. *Roth*, 408 U.S. 564, 569-70 (1972).

20. *Id.* at 576-77.

the terms of Roth's contract made no provision for renewal of employment and because there was no state statute creating an interest in continued employment, the Court concluded that Roth did not have a constitutionally cognizable property interest.[21] It held that for a property interest to warrant constitutional protection, a person must have a "legitimate claim of entitlement" to the interest and not an abstract need or desire for it.[22]

The Supreme Court's reluctance to expand the scope of the property interest beyond the *Roth* standard was demonstrated in *O'Bannon v. Town Court Nursing Center*.[23] The Court held that nursing home residents had no constitutionally protected property interest in the home's continued participation in the Medicaid program.[24] It reasoned that because residents were obligated to pay for use of the home regardless of the home's Medicaid status, they were only indirect beneficiaries of the home's participation in the program.[25] Therefore, nursing center residents had no right to a hearing prior to the home's decertification for failure to meet government health standards.[26] The Court determined that since decertification did not reduce or terminate a resident's financial assistance, but merely required that he use those benefits for care at a different facility, regulations granting Medicaid recipients the right to a hearing prior to decertification were unnecessary.[27]

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21. *Id.* at 578. As a matter of statutory law, a tenured teacher at a state university could not be discharged except upon written charges and pursuant to certain procedures. A nontenured teacher, similarly, was protected to some extent during his one-year term. Rules promulgated by Wisconsin State University provided that a nontenured teacher dismissed before the end of his term may have an opportunity for review. But the rules provided no protection for a nontenured teacher whose contract simply was not renewed. *Id.* at 567.

22. *Id.* at 577. Justice Stewart noted that property interests are not created by the Constitution. Rather, they are created by existing rules or understandings that stem from independent sources such as state law. *Id.* Thus, Roth's property interest in employment at Wisconsin State University was defined by the terms of his employment, which did not support Roth's claim of entitlement to reemployment. Nor, significantly, was there any state statute or University rule which secured Roth's interest. *Id.* at 578.

23. 447 U.S. 773 (1980).

24. *Id.* at 786. The Court noted that the matter did not involve a withdrawal of direct benefits, which would constitute a deprivation of a protected interest. Rather, the case involved the government's attempt to impose standards on health care facilities. The Court construed the adverse impact caused by enforcement of those standards as indirect and incidental, thereby not constituting a deprivation of life, liberty or property. *Id.* at 786-87.

25. *Id.* at 787-88.

26. Justice Blackmun, dissenting, agreed that the due process clause generally is unconcerned with indirect deprivations of property interests. He asserted, however, that the adverse impact of the home's decertification had a very real and direct effect on the home's residents. *Id.* at 793-94 (Blackmun, J., dissenting).

27. *Id.* at 773-74. The Court indicated that while a resident has a right to continued benefits for care in a qualified home, he has no enforceable expectation of continued benefits for care in an unqualified home. *Id.* at 786.

In the realm of historic preservation, the Supreme Court similarly has restricted the procedural due process protection available to parties who challenge decisions made under preservation laws. In *Penn Central v. New York City*,[28] the Court ruled that a prohibition on construction of an office tower atop Grand Central Station by New York City's Preservation Commission was not a "taking" under the fifth and fourteenth amendments and did not require compensation.[29] The New York City Landmarks Commission barred the contemplated construction on the ground that it would have impaired the appearance of the station. The Penn Central Company argued that the restriction would prevent it from earning a greatly increased income from its property, but failed to show that it could not earn a fair return from the station in its present form.[30] The Court upheld the construction prohibition on the theory that it represented a valid exercise of the state's police power and not an unconstitutional taking.[31] Although it alluded to the local government's role of providing "standards, controls and incentives,"[32] the Court did not address the procedural due process that must be afforded parties under a landmarks preservation program.

Conversely, the Federal District Court for the Eastern District of Vir-

28. 438 U.S. 104 (1978).

29. *Id.* at 123-28. The ruling validated the New York City Landmarks Preservation Law, N.Y.C. ADMIN. CODE, ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-82), as a proper exercise of the city's police power to regulate private property for the preservation of historic values. *Penn Central* has spawned a wealth of commentary on the status of historic preservation law. *See, e.g.*, Samuels, *After Penn Central: A Look Down the Track at Constitutional Taking*, 8 REAL EST. L.J. 230 (1980); 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); Comment, *Alas in Wonderland: The Impact of Penn Central v. New York Upon Historic Preservation Law and Policy*, 7 B.C. ENVTL. AFF. L. REV. 317 (1978).

30. The Court also rejected Penn Central's argument that the original historic designation of the station was a "matter of taste" and therefore arbitrary. 438 U.S. at 132. It stated that the argument had a "particularly hollow ring" as Penn Central had not sought judicial review of the designation decision. *Id.* at 132-33.

31. The fifth amendment to the United States Constitution provides in relevant part that "[N]o 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. The Supreme Court held the fifth amendment due process clause applicable to the states through the fourteenth amendment in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

32. 438 U.S. 104, 109-10 (1978). Several procedural challenges to some of the 600 county and municipal historic preservation ordinances, as well as various state and federal landmark designation statutes, have already been heard by courts. *See, e.g.*, Jennewein v. City Council of Wilmington, 46 N.C. App. 324, 264 S.E.2d 802 (1980) (invalidating Council decision based on information outside the record); Southern Nat'l Bank v. City of Austin, 582 S.W.2d 229 (Tex. Civ. App. 1979) (lack of articulable standards).

ginia recently invalidated the federal government's National Historic Landmark program because the program failed to provide due process protections to landowners within the historic district. In *Historic Green Springs, Inc. v. Bergland*,[33] neighboring property owners challenged a federal government decision to designate a 14,000 acre district in Virginia as a national historic landmark because the government failed to prepare and publish rules of procedure to govern the designation process.[34] The Department of the Interior argued unsuccessfully that the designation did not affect property interests of area landowners and that any potential effects on property interests were merely speculative.[35] The court noted that national landmark designation "targets" a property for acquisition by the state through the power of eminent domain.[36] Acquisition, in turn, may result in the delay or denial of federal assistance to a land development project.[37] Although a landowner has neither an entitlement to nor a protected property interest in the federal development assistance itself, the court recognized the extent of federal involvement in private and public land development.[38] Because of federal involvement in private land development, the court determined that the denial of federal assistance may effectively preclude private uses to which a property owner might otherwise be entitled.[39] It concluded that, absent procedural due process protections, historic designation under the National Historic Preservation Act

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33. 497 F. Supp. 839 (E.D. Va. 1980).

34. *Id.* at 845. The landowners also charged that the designation of the land as an historic district constituted a taking for public use without just compensation in violation of the fifth amendment, but the Court rejected that argument. *Id.* at 848-49.

35. *Id.* at 853.

36. *Id.* Section 462 of the 1966 Preservation Act provides in pertinent part:

> The Secretary of the Interior . . . for the purpose of effectuating the policy expressed in section 461 of this title (to preserve historic sites, buildings and objects of national significance), shall have the following powers and perform the following duties and functions:
>
> . . . .
>
> (d) [A]cquire in the name of the United States by gift, purchase or otherwise any property, personal or real, or any interest or estate therein . . . .

16 U.S.C. § 462 (1982).

37. *Historic Green Springs*, 497 F. Supp. at 853.

38. *Id.* at 853-54. The listing of a site in the National Register of Historic Places triggers the "federal involvement" restrictions of § 106 of the National Historic Preservation Act. 16 U.S.C. § 470f (1982).

39. *See Historic Green Springs*, 497 F. Supp. at 853-54. In many instances the effect of federal development assistance on private development rights may be readily apparent. *See, e.g.*, Wisconsin Heritages, Inc. v. Harris, 476 F. Supp. 300 (E.D. Wis. 1979) (urban renewal funding). In other circumstances, however, such a claim may be subject to challenge by the government on the ground it is too speculative. *See, e.g.*, Waterbury Action to Conserve Our Heritage, Inc. v. Harris, 603 F.2d 310 (2d Cir. 1979).

violated the due process rights of landowners within the district.[40]

In considering a similar challenge to a local historic preservation ordinance, the Appellate Division of the New York Supreme Court in *Zartman v. Reisem*[41] held that the interests of adjoining landowners in preservation of landmarks were not of constitutional dimension.[42] The preservation statute at issue in *Zartman* provided that application for construction, alteration or demolition of a structure in an historic district must be approved by the preservation board.[43] In reviewing an application, the board must determine whether the proposed construction, alteration or demolition is consistent with the historic character of the district.[44] While the court acknowledged the legitimate interests of adjoining landowners particularly, and of the public generally, in the preservation of historic landmarks and historic districts, it refused to elevate those interests to a constitutionally protected status.[45] Accordingly, the court concluded that the landowners were not entitled to the procedural safeguards of notice and a hearing.[46]

The District of Columbia Court of Appeals has had similar occasion to consider the due process rights of a citizen association under the District's historic preservation program. The court has been steadfast in granting review of administrative decisions made pursuant to the District's Historic Protection Act only where the appellant enjoyed a statutory or constitutional right to a "trial-type" hearing at the agency level.[47] A jurisdictional prerequisite, then, has been the appellant's demonstration of a judicially recognized and protected property interest.

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40. *See* 497 F. Supp. at 856-57. The procedural due process problem for federal historic designation may be alleviated by the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980), (codified at 16 U.S.C. § 470a (1982)). These amendments, enacted after *Historic Green Springs*, require that notice of proposed designation be given to affected landowners. 16 U.S.C. § 470a(6) (1982).

41. 59 A.D.2d 237, 399 N.Y.S.2d 506 (App. Div. 1977).

42. 399 N.Y.S.2d at 510.

43. *Id.* at 509. The nine-member board was composed of at least one member of the Rochester Real Estate Board, one member of the Landmark Society, one registered architect, and four residents from preservation districts. *Id.*

44. *Id.* The court noted that the board's decisions concerning whether changes are permissible involve judgment and expertise. *Id.* The court stated that the governing consideration is not beauty or taste, but whether the change will preserve or interfere with the qualities of the particular location. *Id.* at 510.

45. *Id.* The court's decision to uphold the ordinance against a due process attack was greatly influenced by the facts of this case. The proposed improvement, a tennis court, was to be located in a large backyard in a residential area and was not visible from the street. Further, the improvement was not to a designated landmark, but was simply located in an historic district. *Id.* at 508, 510.

46. *Id.*

47. *See supra* note 8 and accompanying text.

In *Capitol Hill Restoration Society, Inc. v. Moore*,[48] a restoration society sought review of housing agency approval of a developer's plan of subdivision. The developer's plan called for the demolition of three buildings to make possible a new townhouse development. Because the subdivision concerned land located in an historically designated district, the District of Columbia Historic Sites Subdivision Amendment of 1976[49] (Subdivision Ordinance) was applicable. Pursuant to the Subdivision Ordinance, the Joint Committee on Landmarks convened a public meeting at which the Capitol Hill Restoration Society objected to the proposed design of the townhouses. Despite these protests, the JCL unanimously recommended approval of the developer's plan and the housing agency concurred.[50]

The restoration society appealed the agency determination to the District of Columbia Court of Appeals. Although conceding that it was not entitled to a trial-type hearing at the administrative level, the society argued that the court's jurisdiction stemmed from the grant of review in the District of Columbia Administrative Procedure Act (DCAPA).[51] In dismissing the appeal for lack of jurisdiction, Judge Harris noted that the judicial review provision of the DCAPA provides for direct review only in a "contested case."[52] The court held that the jurisdictional determinant was whether the housing agency proceeding constituted a "contested case" within the ambit of the DCAPA.[53] It found that agency approval of the subdivision plan was a policy decision and did not constitute an adjudicatory hearing.[54] The court concluded that since it had not placed a "contested case" before the court, the society was foreclosed from appeal.[55]

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48. 410 A.2d 184 (D.C. 1979).

49. Law of June 29, 1976, D.C. Law 1-80, 22 D.C. Reg. 7240 (repealed 1979). The procedure for agency review of proposed plans of subdivision has been incorporated in D.C. CODE ANN. § 5-1006 (1981).

50. 410 A.2d at 186.

51. *Id.* at 186-87. The DCAPA delineates proper judicial review procedures and defines the term "contested case." D.C. CODE ANN. §§ 1-1501 to 1-1510 (1981). The District of Columbia Court of Appeals is authorized to review agency action in accordance with the DCAPA. D.C. CODE ANN. §§ 11-722, 5-1012 (1981).

52. *See supra* notes 9-11 and accompanying text.

53. 410 A.2d at 186.

54. *See id.* at 187. Pursuant to the Subdivision Ordinance, the function of the JCL and the housing agency is to determine whether the proposed subdivision would be contrary to the public interest. The restoration society contended that a statement of reasons must support the decision; however, the Subdivision Ordinance was silent on the issue. *Id.*

55. *Id.* at 187-88. The court observed that the society was not, however, entirely foreclosed from judicial review of the agency decisions. *Id.* at 188. The court noted that any party aggrieved by an agency's decision may initiate a suit in equity in the Superior Court to seek redress. *Id.*

## II. THE DUE PROCESS IN HISTORIC PRESERVATION

With guidance from the Supreme Court's delineation of constitutionally protected property interests, the District of Columbia Court of Appeals recently ruled that the interests of a neighborhood association are not of sufficient magnitude to trigger a due process right to a hearing on a developer's application for new construction in an historic district. In *Dupont Circle Citizens Association v. Barry*,[56] the International Association of Machinists and Aerospace Workers (IAM) submitted an application on October 29, 1979, to the mayor's agent for a construction permit to build an office building on vacant land in the Dupont Circle historic district.[57] Accordingly, the "design review process" under the Historic Protection Act was triggered, and IAM's application was referred to the Joint Committee on Landmarks for a recommendation on the compatibility of the proposed project with the character of the historic district.[58] During the following year, the JCL held seven public meetings at which IAM and the Dupont Circle Citizens Association (Association) presented opposing views concerning the proposed construction.[59]

After an initial denial of the permit,[60] IAM modified its proposal and the mayor's agent gave approval.[61] The Association appealed the administrative decision to the District of Columbia Court of Appeals, charging that refusal by the mayor's agent to grant a hearing violated its constitutionally protected right to due process.[62] The court of appeals adhered to the "legitimate claim of entitlement" standard enunciated by the Supreme Court in *Roth*, and found that the Association's interests were too vague

56. 455 A.2d 417 (D.C. 1983).

57. *Id.* at 419.

58. *Id.* at 419-20. The relevant provision of the Historic Protection Act, D.C. CODE ANN. § 5-1007(b) (1981), states: "Prior to making the finding on the permit application . . . the Mayor may refer the application to the Historic Preservation Review Board for a recommendation . . . ."

59. 455 A.2d at 420. The Association attended each JCL meeting and presented both oral and documentary evidence. *Id.* It argued that the proposed design of the building clashed with the architecture of the historic district. *Id.*

60. The initial permit was denied because the JCL found that the proposed design presented "a flat horizontally banded wall . . . in contrast with the repeated vertical patterns of the predominant historical design." *Id.* at 419.

61. IAM resubmitted its application containing significant revisions in the building's design which adequately addressed the JCL's concerns. *Id.*

62. *Id.* at 418-19. The pertinent section of the Historic Protection Act, § 5-1007(e), states that a hearing is required only upon request of the applicant (herein IAM), or where the mayor's agent deems appropriate. D.C. CODE ANN. § 5-1007(e) (1981). The court was unpersuaded by the Association's assertion that it was "unfair" to permit an aggrieved applicant to demand a hearing while not providing the same right to "injured" property owners. *Dupont Circle*, 455 A.2d 417, 422 (1983).

and speculative to command procedural due process safeguards.[63] Judge Kern first noted that the Association had no statutory authority under the Historic Protection Act to compel the mayor's agent to hold a hearing on proposed new construction.[64] He then cited *Roth* as the benchmark determinant of whether the property interests of the citizens' group merited constitutional protection.[65] Judge Kern reasoned that "speculative diminution in property values" and "alleged aesthetic blight" on the character of the historic district were not deprivations of property deserving of the due process shield.[66] Because the Association's interests were not of constitutional magnitude, the mayor's agent was not remiss in denying the Association a hearing. The court concluded, therefore, that the appeal did not constitute a "contested case," and dismissed it for lack of jurisdiction.[67]

*Dupont Circle* does not advance the proposition that the interests of a neighborhood association are not deserving of procedural safeguards. Indeed, Judge Kern noted that the Historic Protection Act provides citizens' associations the right to demand a hearing when demolition or alteration of an historic structure is proposed.[68] The court reasoned that construction of a new structure does not pose as great a danger of injury to the historic district as does the demolition or alteration of an existing structure, and

63. *Dupont Circle*, 455 A.2d at 423. The court noted that "it strains credibility to find constitutional protection for the Association's interest in preserving the character of the neighborhood." *Id.* at 423 n.26. Such interest, the court observed, is adequately protected by the District of Columbia zoning laws. *Id.*

64. *See supra* note 62 and accompanying text.

65. 455 A.2d at 423.

66. *Id.* at 423. The due process clause clearly protects the owner's interest in property that is the subject of historic preservation proceedings. *See generally Developments in the Law-Zoning*, 91 HARV. L. REV. 1427, 1522-24 (1978). It is less clear whether the interests of third parties are protected by the due process clause. The most common third party interest is probably the economic one of diminution in value. Such an interest reflects the concern of property owners over the potential loss of various uses of a property resulting from governmental restrictions placed on the property of another. *See, e.g.*, Scott v. City of Indian Wells, 6 Cal. 3d 541, 548, 492 P.2d 1137, 1141 (1972) (proposed development would affect value and use of plaintiff's land). Another commonly asserted third party interest is the property owner's expectation that his neighborhood will retain its particular character. *See Developments in the Law-Zoning*, 91 HARV. L. REV. 1427, 1517 (1978). In general, a landowner has a right to a particular zoning pattern. Kent v. Zoning Bd. of Review, 74 R.I. 89, 91-92, 58 A.2d 623, 624 (1948). Several courts, however, have held that persons who have relied on a particular property classification have some type of property interest in that classification. *See* Burns v. City of Des Peres, 534 F.2d 103, 110 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976) (property owners have right to rely on zoning classification unless public interest changes); Allen v. Coffel, 488 S.W.2d 671, 678-79 (Mo. App. 1972) (purchasers have right to rely on zoning ordinance).

67. *Dupont Circle*, 455 A.2d at 423-24.

68. *Id.* at 422. The relevant provision of the Historic Preservation Act may be found at D.C. CODE ANN. §§ 5-1004 to 5-1005 (1981).

thus, construction requires lesser scrutiny.[69] The court's reasoning is sound. Alteration or demolition necessarily connotes a change in an existing structure that specifically had been designated for historic preservation. New construction, while altering the landscape of an historic district, does not endanger existing landmarks.

Further reason for the court's denial of review stemmed from its recognition that administrative decisions made pursuant to the Historic Protection Act are unique, aesthetic judgments within the expertise of the JCL.[70] By acknowledging this expertise, the court did not abandon its responsibility as a reviewing body. Judge Kern observed that the Association had access to all JCL hearings, and that the concerns of the group had been considered exhaustively by the JCL, as well as by the mayor's agent.[71] Judge Kern wisely declined to substitute his judgment on the aesthetic quality of the proposed building design for that of the JCL. Rather, the court limited its review to the procedural safeguards afforded the Association in the "design review process." Accordingly, it held that the asserted interests of the Association were protected adequately by the "design review process" of the Historic Protection Act.[72]

In light of the significant procedural due process safeguards extant in the Historic Protection Act, the *Dupont Circle* court's reasoning is consistent with prior decisions made under historic preservation law. The Association's opportunity to participate in the decision making process of the JCL clearly influenced Judge Kern's denial of review.[73] In contrast, the court in *Historic Green Springs*[74] was persuaded to sustain the appeal of the neighboring landowners because of the lack of procedural protections provided by the National Historic Preservation Act.[75] Because the landown-

69. The court noted that the District of Columbia City Council intentionally afforded different treatment to permit applications for new construction as opposed to those for demolition or alteration of existing structures. 455 A.2d at 422 n.24. The court stated:

> [I]t appears to us that there is inherent logic in mandating the scrutiny, provided by a public hearing, or a permit application which seeks to remove or change a building or buildings within a historic district. Presumably, demolition of a building will permanently alter a portion of the very reason for which an area has been deemed a historic district. Construction of a new building, so long as an adequate design review process is established, does not pose the same dangers.

*Id.*

70. *Id.* at 424.

71. *Id.* at 423-24 n.27. The court noted that a "full-blown" hearing would be unlikely to produce any material facts not previously considered by the JCL or the mayor's agent. *Id.*

72. *Id.* at 424. *See supra* note 4 and accompanying text.

73. *See supra* note 71 and accompanying text.

74. 497 F. Supp. 839 (E.D.Va. 1980).

75. *See supra* text accompanying notes 33-40.

ers in *Historic Green Springs* had no statutory right to participate in the administrative decision to designate the adjoining land an historic site, the court invalidated the designation.[76] It found that, while the restrictions burdening the landowners' property were insufficient to constitute a taking under the fifth amendment, the restrictions were of sufficient magnitude to warrant procedural due process protection.[77]

Similar analysis can be discerned in *Penn Central*[78] and *Zartman*.[79] In both cases, historic preservation programs which provided due process safeguards were sustained against due process attacks. The New York statute at issue in *Penn Central* provided for a public hearing prior to demolition or alteration of a designated landmark.[80] Similarly, the ordinance applied in *Zartman* required notice and a hearing to landowners whose property interests merited protection.[81] It appears, then, that administrative findings rendered under statutory schemes which provide procedural safeguards for aggrieved parties are less likely to be disturbed by courts.

Judge Kern's finding that the property interests of the citizens' group did not meet *Roth* standards inevitably led to dismissal of the group's appeal. Prior decisions of the court, such as *Capitol Hill*,[82] are conclusive in determining the court's jurisdiction.[83] If a property interest does not merit due process protection, a "trial-type hearing" is not required. If a "trial-type hearing" is unnecessary, the matter is not a "contested case." Thus, Judge Kern has made the logical conclusion. The court of appeals has jurisdiction only to review agency action in a contested case.

## III. CONCLUSION

Proceedings before historic preservation agencies often involve crucial determinations of property rights. Courts reviewing decisions made pursuant to historic preservation statutes have attempted to limit the discretion of administrators by requiring that procedural standards be provided af-

76. It is clear from *Historic Green Springs* that even nominal designation may interfere with the use and enjoyment of a landowner's property. In that case, for example, there was evidence that designation resulted in delays in local mining operations, and caused a steel company to abandon plans to locate a mill in the area. *Historic Green Springs*, 497 F. Supp. at 849.

77. *Id.* at 857. *See supra* notes 30-32 and accompanying text.

78. 438 U.S. 104 (1978).

79. 399 N.Y.S.2d 506 (App. Div. 1977).

80. N.Y. ADMIN CODE, ch. 8-A, § 207-2 to 207-7 (1976).

81. *Zartman*, 399 N.Y.S.2d at 509.

82. 410 A.2d 184 (D.C. 1979).

83. *See supra* notes 7-10 and accompanying text.

fected parties before important private interests may be infringed upon.[84] *Historic Green Springs* illustrates the courts' disapproval of preservation statutes devoid of procedural protection for affected landowners. Conversely, *Dupont Circle* demonstrates the courts' reluctance to expand the due process rights of aggrieved parties beyond the reasonable procedural safeguards provided by the Historic Preservation Act. A trial-type evidentiary hearing is not required, but those affected must be guaranteed the right to an impartial decisionmaker, a reasoned decision with specific findings, and ascertainable standards to permit effective challenge and review. In those jurisdictions which have required greater procedural protection for affected landowners, the valid goals of landmark preservation have not been compromised.[85] The procedural safeguards provided by the District of Columbia Historic Protection Act evince a due process approach well-suited to meet the valid claims of objecting landowners, while allowing the flexibility needed to ensure a manageable historic preservation program.

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84. *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (required agency to formulate standards and provide statement of findings as basis for refusal to suspend registration of pesticide).

85. *See* Johnston, *Legal Issues of Historic Preservation for Local Government*, 17 WAKE FOREST L. REV. 707 (1981). Johnston examines the North Carolina Historic Preservation Act and determines that the Act's strict regulatory provisons have not hampered the success of historic preservation nor unduly burdened the private sector.