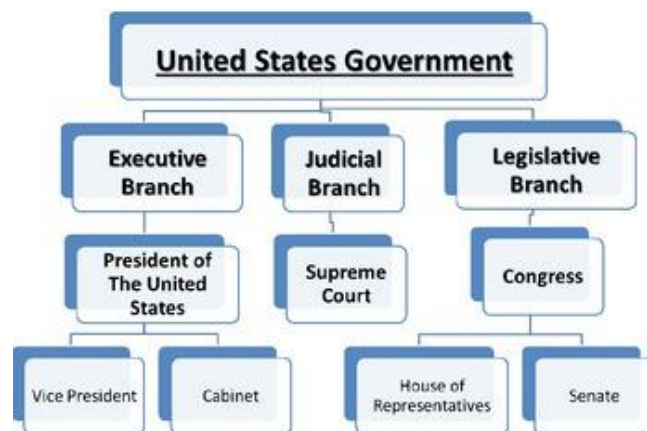
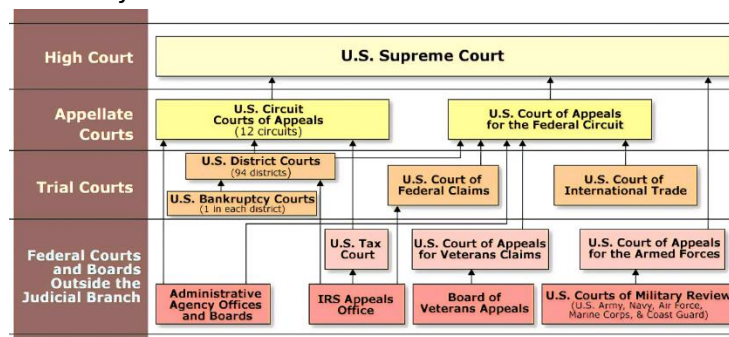


- What is Historic Preservation Law?
 - A set of rules surrounding various things like...
 - The built environment
 - Archeological artifacts
 - Etc...
 - In the Context of Preservation, laws endeavor to save + avoid the abandonment of Heritage
- Historic Preservation Protections come from the one of the following in order of descending importance
 - 1. U.S. Constitution
 - 2. International Treaties (Equal to 3, newest takes precedence)
 - 3. Federal Statutes (equal to 2, newest take precedence)
 - 4. Executive Orders
 - 5. State Constitution
 - 6. State Statutes
 - 7. Local Ordinances
 - 8. Federal, State, + local agency rulings
 - 9. Federal and State Court Decisions
- Policy vs. Law
 - Law is intended to serve policy upon establishment of policy goals and guide us toward that policy
 - Policy goals can become part of the law.
- Roles in Law
 - Lawmakers write law to support policy
 - Regulators write regulations
 - Etc...
- Government Structure



-
- Federalist and sovereignty are spread between different bodies
- The U.S. is a common law system mostly based on English Legal tradition; English legal tradition based on French Legal Tradition

- English legal tradition had law established by king-appointed judges + courts which were called equity because they were meant to be fair and not based on written law
- As English parliament got more advanced, they wrote down laws called continental law or parliamentary law
- As monarchy lost power, Parliament gained it
- The constitution establishes the roles within the government through a system of checks and balances
 - Every level of government can exercise review over congress + Executive Actions
- Federal and State bodies divided into three branches
 - Legislative, like Congress, making laws
 - Produces Statutes
 - Judicial, like Supreme Court, makes decisions concerning laws
 - These decisions influence future laws and cases
 - Judicial branch specifies the authority of federal court
 - The constitution established the Supreme Court, but allows congress to establish lower courts
 - Federal Courts
 - Have jurisdiction over foreign government involvement
- Hierarchy of Courts:



- Cases first go to District Court where district judges hear case in Jury Trial
- If district court decision appealed, brought to regional appellate court.
- When someone appeals and appellate court opinion, they can petition the court to review the case or go to the state supreme court (except in NYS)
- The american court system has two fonts of law
 - Laws passed down or the commonlaw sytem
 - Heavily weighs precedent or previous decisions
 - So this precedential system means to bind future court decisions to establish a baseline of fairness and treat similar facts the same on different occasions

- If there is no precedent in the same court, look to other jurisdictions
 - To come to a different conclusion than precedent, you must gather facts to prove why your different conclusion is correct
- Executive, like president, enforces laws
 - Executive can produce laws through executive rulings and administrative agencies
 - Admin agencies are quasi legislative + Judicial
- Any powers not specifically delegated in the constitution revert to the state, as dictated in the 10th amendment.
 - In some areas Federal + state share jurisdiction, like when people sue each other across states
- The constitution states that federal law supersedes state law
 - If highest lawmaker hasn't specifically spoken on a matter, then the next level down controls it, and so on
- States maintain jurisdiction over:
 - Torques
 - Contract law
 - Property law (also dealt with on the local level, but not the federal)
 - But if there is a tie-in with constitutional issues, case can go to federal court
 - Howe
- Hierarchy of laws in descending order
 - 1. Constitutional Laws (law of control)
 - 2. International treaties (can't conflict with constitutional laws)
 - Equivalent in Strength in Federal Statues
 - 3. Federal statutes (If statutes conflict with treaty, latest ruling prevails)
 - Equivalent in strength to international treaties
 - Only Congress has Federal Powers under the Constitution
 - Passing these statutes takes forever
 - 4. Presidential Executive from President
 - 5. Ruling from Federal Executive Agencies
 - 6. Agency Adjudications
 - 7. State Constitutions
 - 8. State Statutes
 - 9. State Executive Orders
 - 10. State agency Regulations
 - 11. Local Ordinances + adjudications
- Democracy in America means the Federal government isn't the first + last word on all topics
- Agencies + Rulings
 - Happens @ 3 levels of government, with each branch having agencies underneath
 - Delegated authority to deal with specialties others cannot deal with

- Agencies handle themselves by the APA
 - There are also independent agencies that don't answer to specific entities, but then hold less influence
 - Agencies have competencies in expertise areas
 - Perform advising, reviewing, supervising, adjudication, investigating, prosecuting.
- Historic Preservation Specific Laws
 - Constitution
 - Doesn't specifically speak to Preservation law, but provides implications
 - Due Process
 - Requires notice, hearing, unbiased fact finders, presentation of evidence, etc.
 - Equal protection
 - Difference in treatment must serve a permissible government purpose
 - Freedom of Speech + Expression
 - Freedom of Religion
 - Relates to religious buildings and conflicts between congregations and historic guidelines
 - Some think landmark designations for churches undermine religious freedoms under state law
 - Freedom to Contract
 - Article 1, Sec. 10 of constitution
 - Protections for laws surrounding contractual obligations
 - State Constitutions
 - Supreme law of state but can't conflict with constitution
 - Some state constitutions have preservation provisions with the text
 - Allows entities to hold easements to limit modifications to historic property
 - Executive Orders
 - Presidents and Governors issue these orders
 - Preserve America program result of executive order
 - Typically important in a symbolic way, but aren't very functional
 - State Statutes
 - Conform to State Constitution
 - Increasing number of states creating tax incentives for historic preservation
 - There are limitations of Judicial Review baked in Statutes
 - Local Ordinances
 - Local bodies that deal with local level concern
 - Strongest Historic preservation protections come at the local level
 - Codes and Designations
 - When a bill becomes law, it undergoes a designation and is published as an SLP law

- These laws are compiled by session and chronologically
 - Contains exact language of passed laws
 - Statutory codes, U.S. codes
 - Federal and state codes are public annotated version of laws
 - Two code annotation services in the United States
- The National Trust
 - The 1980s and 1990s saw a rise in fiscal conservatism that led to the elimination of the trust's federal funding.
- The National Historic Preservation Act of 1966 16 [U.S.C. §§470a-470w-6 et. seq](#)
 - The National trust for Historic preservation did a report in 1964, "plan for preservation"
 - Some states created enabling acts for preservation based local land-use. \$2 states had enabling statutes to allow
 - This report paved the way for the NHPA in 1966
 - This act helped to increase legitimacy in historic preservation at all governmental levels
 - Private preservation activities are encouraged by tax incentives and regulations exist to protect properties from harmful private activities
 - The NHPA doesn't require the government to protect historic places, only to consider them
 - Expanded the national register of historic places (in section 60) which was create by the 1935 act
 - Created Section 106 review
 - Had amendments in 1976, 1980, 1992
 - In 1980, section 110 was added. It outlined **the broad historic preservation responsibilities of Federal agencies.**
 - It established states and Historic preservation offices
 - Duties changed state to state
 - Each state must have state register list (which usually includes national register buildings)
 - Coordinates certified local governments
 - SHPOs made to be agents for the Section 106 process.
 - Sets up process to certify local governments
 - 5 requirements outlined for certified local govs
 - Establish Preservation review commission
 - Create/maintain inventory
 - Provide for public participation
 - Do whatever makes the state happy
 - Has to be in accordance with the state
 - NHPA has a Grants program, and it established a dedicated funding scheme for the national register.
 - 10% of the funding from Feds given to SHPOs must go to certified local governments

- Not very much money flows from Feds to SHPOs, but the money that does comes from the Outer Continental Shelf Oil Lease.
 - The funds from the oil lease must be matched by the state on 60 (Fed pay)/ 40 (state pay) basis
 - The NPS Approves these funding plans
 - Tax Credits
 - Rehab tax credits were important in the 1960 -70s
 - Historic Districts
 - We constitutionally justify historic Districts through Comprehensive study + planning, not through property owner perspective
 - Hardship Provisions are a safety valve from maintenance mandates + restrictions
- Agency Determinations
 - When a court looks at agency determinations, they examine
 - Statutory Jurisdiction (have they exceeded it?)
 - Constitutional rights
 - Does the statute affect an agency responsibility>
 - Was the agency ruling adopted with the proper procedure
 - If an adjudication is challenged, is it supported by evidence?
- Lawsuits
 - Civil suits aren't criminal charges
 - In criminal suits, the Government prosecutes the defendant
 - In civil suits
 - The person who appeals is an Appellant
 - The opponent is an appellee
 - In the case of seeking relief from the court of final resort is petitioner, other party is the respondent
 - Other definitions
 - Bringing a suit, you need
 - A court with jurisdiction to hear complaint or venue
 - Need to demonstrate injury
 - Meaning invasion of legally protected interest which need to be concrete + particularized and actual + imminent
 - Causal relationship between injury and conduct being challenged
 - You can't sit on rights, must bring lawsuit with timeliness (lecher)
 - Ripeness means you can't bring a suit too soon and you've exhausted all other recourse
 - Mootness – no longer matters or can no longer be resolved by a court
 - Likelihood will be reaccessible from a major court decision, Logan v Defenders of Wildlife (1992)
- How to brief a case
 - A structured set of notes in listed importance of facts of Court Opinion
 - Important to use the actual words of the court
 - The shorter the brief, the better

- Import
 - Recitation of Facts
 - Issues presented
 - The holding
 - Holding rules and Applications
 - The reasoning
- Write case name, deciding court, major decision
- Facts:
 - Who is suing which parties/litigation status
 - Descriptive language/plain English
 - What are they suing for/party objectives
 - What issue are they asking court to resolve
 - Who are they /why are they there
 - Basic legal question case stands for
- The Holding
 - Majority answer to basic legal question
 - Usually, a rule set forth + an application of rule to facts @ hand
 - Once court presents their holding, they'll state controlling principles of law and will assert that the law applies to issues of the case
 - When they choose an applicable rule, look to statutes, low expectations + legislative intent
- Early Preservation actions
 - Ladies of Mount Vernon
 - In 1819, City of Philadelphia saved Independence Hall
 - In NY in 1819, acquired Hasburg House, Turned into a hotel
 - In 1895 in U.S. v. Gettysburg Electric Railway Company 160 U.S. 668
 - In 1893, Grover Cleveland ordered a park to be made from the Gettysburg Battlefield
 - The government took this property through eminent domain
 - Government can take private property if its for a public purpose
 - The railroad sued the government, saying the condemnation of the grounds + historic preservation of the grounds is not a valid public purpose
 - The Supreme Court disagrees with the railroad, saying the conversion of the battlefield into a park is in the interest of public, safety, + welfare
 - The U.S. Paid the railway \$2,000
- Important Historic Preservation Laws
 - American antiquities Act of 1906
 - Sought to protect resources of archeological sites on Federal lands
 - Prohibits excavations/destructi without permission of related agencies
 - Established a permitting system
 - Designated/authorized the president to designate national monuments
 - Encouraged agencies to develop regulations to care for historic resources
 - Allowed to receive donations for upkeep of preservation
 - National Park Service Organic act of 1916

- Established the National Park Service
 - The Historic Sites, Buildings and Antiquities Act (Historic Sites Act) of 1935
 - Gave the secretary of the interior authority to preserve historic things + enter into states
- Housing Act of 1949
 - Title 1 speaks of slum clearance/urban renewal
 - *D.C. had a renewal act in 1945 which came out of the impetus of blight clearance of this act
- The most valuable aspect of state level towards historic preservation is delegation of power to local governments,
 - Grants of power to preserve resources through zoning
 - Power to establish historic districts and commissions
 - Power for comprehensive planning?
 - Power to acquire and utilize historic properties
- Enabling laws:
 - Delegating and regulating districts to sites
 - Allowing local govs to approve or deny exterior operations or constructions
 - Gives local govs the ability to create historic districts as part of comp plans
 - Gives authority to create tools like transport development rights
 - Enables the establishment of preservation commissions and review bodies which can prevent demolitions and grant variances, engage in the full range of landscape tools for the purposed of historic preservation
 - Municipalities can acquire properties through easements for historic preservation
 - The authority to tax for the purposes of historic preservation (preservation and conservation)
- Power is delegated through these means
 - Home rule
 - In a home rule, an amendment to the state constitution will grant municipalities to pass laws as they see fit as long as that laws stays within the state and federal constitutions
 - Dillons rule
 - Municipal govs have no power except for that that is explicitly granted to them by the states
 - Some states make quasi exceptions for larger cities, like Pennsylvania
- State's will establish a historic preservation plan which the SHPO will run
- Some states establish hist funds
- Many states set up semi-private corps establish by the legislature that become statewide preservation organizations that advocate
- Many states have reg that guides state agencies on how to care for historic properties under their control
 - Some may have this language in their constitution
 - Some have laws or regs
- State law authorizes preservation easements by non-profits
 - If not established by state law, you can't do it

- Some will allow for liberalization of the building code as applied to historic structures
 - Many state enabling acts encourage municipalities to give density bump up
 - Some state enabling acts also allow for control of signage along highways
- Some states have mini NHPAs or NEPAs
 - Require that government actions concerning historic resources mitigate harms
 - SEQRA
 - Some preservation language included along state constitutions
- Trustees hold an asset to the benefit of someone else, a constitutional amendment was put in in which a state could hold in trust cultural resources for the benefit of its citizens
 - Gettysburg case was the first time this doctrine was tested
 - Now this amendment has gotten traction in the environmental context
- Public trust doctrine means the public has the right to access water, light, and air even its over private property
 - Used to be used by railroads to go many places
- Gettysburg tower case posited what does it mean to hold something in trusts? Since it wasn't clear, the tower came down
- Many states have historic tax credits like the federal tax credit, the only benefit is that states will allow owner occupied units to be included in credits
 - Heritage tours and their promotion
 - Scenic roads and byways promotion programs
 - State heritage marker programs and heritage areas
 - Heritage areas lack coherence of district, but has status and identity on a region
 - No review board, but people promote activities for heritage areas, usually include trails or something.
 - Education programs
- States can have impact but sometimes the most valuable thing is to allow local orgs to engage in historic preservation and connect local to federal
- In the US, most property is privately owned and applicable properties deal with property at the local level.
- Federal Historic preservation law only applies to public land
- Most federal statues serve to protect properties from government actions
- Most of the time what threatens historical properties comes from private action, most properties are only protected as the local level if at all.
- Country founded where there were restrictions on land.
 - Land use control is always from a top-down level
- Nuisance
 - Aldred Claimed that Thomas Benton had erected a pigsty to close to Aldred's house, making it impossible for him to live there.
- Village of Euclid v ambler realty company 272 US 365 (1926)
 - Supreme Court
 - Deals with challenge of property owner who wanted to put industrial use in residential area

- Zoning is the division of land into districts that have different regulations
 - NYC developed first zoning ordinance
- Per se uses
- Fed gov said nuisances were in police power
- Not only can you regulate uses, you can protect aesthetic character and things that would make buildings safer
- Baltimore 1904,
 - Regulations were acceptable?
- Berman v Parker 348 US 26 (1954)
 - Urban renewal project in DC, a redevelopment law permitted flight clearance,
 - Blight designations allowed government to condemn blighted properties
 - DC argued that slums were a danger to public welfare, and therefore had police power to remove them.
 - Department of Stree argues that they aren't a slum and not a blight, so the police power doesn't apply to it and the urban renewal project cant go forward
 - Gov admitted property wasn't slum, but need to be cleared for aesthetic reasons
 - The concept of the public welfare is broad and inclusive
 - First regulation that legitimizes aesthetic reasons alone for regulation
- Penn Central transportation v New York City 438 US 104 (1978)
 - Applies the concept of aesthetics directly to historic preservation
 - Penn central owned grand central terminal, which had been designated a historic structure by NYC landmark preservation hall.
 - Penn central wanted to erect multi-story office building on top of the terminal
 - The plans were submitted to the historic preservation commission who denied the approval. Penn Central argued the restriction was discriminatory and then argued it was a regulatory taking to deny the construction of the office building
 - Charge that legislation was discriminatory because there were many historic districts in NYC
 - Plan was comprehensive
 - In contrast to discriminatory zoning, the NY preservation law protects historic resources where they be found in the city.
 - Enabling legislation of the state gives the commission authority
 - Was the law regulating exceeding the limits of the commission's authority?
 - What did the enabling statute say?
 - Penn Central commission has a responsibility to historic properties in itself
 - Local government has an interest in regulating places for the health safety and welfare of others.
- National Trust of historic preservation
 - President Truman signed legislation creating the National Trust on October 26, 1949 (16 U.S.C. §§ 468-468d).
 - Is selective in cases they join, only join those that could set bad precedents
- Reservoir Act of 1960
 - Fed created massive lakes and projects across the country
 - Did this in flooded areas that held communities

- Established that whenever the Federal gov takes on a project that has adverse consequences, the acting agency must disclose those consequences to the secretary of the interior
- City of Philadelphia Preservation Ordinance, Section 14-1000 of the Philadelphia Code
 - This section of Philadelphia's preservation ordinance outlines the makeup of the city's historical commission and its powers and duties concerning historic buildings and districts
 - Also outlines criteria for historic designation
 - Outlines processes for public meeting and permitting processes
- Local Historic Preservation Measures as an Alternative to Federal Preservation Efforts
 - Federal laws aren't far-reaching enough to adequately protect many historic properties, in contrast to local ordinances and preservation commissions.
 - National Indian Youth Council v Watt 664 F.2d 220 (10th Cir. 1981)
 - Centers around the Interior Department's approval of a lease and plan for a surface mining coal operation on a Navajo Reservation in NM.
 - The plaintiffs, the NIYC and individual Navajo Indians claimed that the interior department and the coal & gas companies involved had not complied with NEPA and the Surface mining control and Reclamation Act of 1977 (SMCRA).
 - Plaintiffs felt preservation of the reservation would protect traditional lifestyles of native Americans
 - 10th circuit court found no violation of NHPA in the approval of the lease to surface mining coal operation.
 - This case is an example of dual claims under NEPA and NHPA.
 - State and local governments use two methods to preserve historic property through eminent domains and police power.
 -
- NEPA v. NHPA
 - NHPA does not require that the activity in question have a significant effect on the cultural resource before 106 review takes effect, meaning 16 applies to any federal action that could actually or potentially alter the significance of a historic site.
- Chevron
 - The Chevron doctrine has since been overturned by the Supreme Court
 - It meant that an agency ruling was valid unless it was ambiguous

10/28/2024

- Local historic preservation protections from private action
- Comprehensive plans are based on surveys and studies. Historic research surveys have to unbind ordinances and the National Register of Historic Places.
- Surveys mean to collect info about these buildings like
 - Architectural description
 - Age
 - History
 - Setting

- Survey must include
 - Location
 - Photographs
 - Some kind of drawing
 - Map to show location of resource
 - Recorded on standard inventory form
- Surveys create a presumption of validity
 - Texas Antiquity v Dallas Community College District
 - The property owner who wanted to tear his building down challenged the listing based on the validity of survey and the building was torn down
 - V City of Honolulu
 - The property survey the property was based on wasn't completed
 - The property was torn down so the survey could not be retroactive
- Survey Considerations
 - Who is conducting the survey?
 - What is being Surveyed? You can't just do a survey of an entire town, it has to be specific
 - Have to be done within a certain time period
 - You can put a moratorium on development or change to historic properties while conducting survey but has to be constitutional.
- Comprehensive preservation plans provide a mechanism for technical and economic assistance
- Preservation ordinances often allow some kind of tax breaks or ties into the tax code somewhere
- may allow for direct grant programs or revolving funds
- easements offer tax deductions
- Some states require that comprehensive plans must include a historic preservation elements
- No federal level police power
- TO create local ordinance to withstand constitutional scrutiny
 - Start with state enabling legislation
 - What is the purpose of the ordinance
 - Start with statement of what you're protecting and what kind of resources and features for protections
 - Make a statement that ties in the ordinance purposes with values to promote within the community
 - Who is going to administer and enforce the ordinance
 - Create review body
 - Designate who will be on it, what the powers are, and who will supervise it
 - One an architect, one a designer, one an attorney, and one in real estate development
 - Some times more broad restrictions
 - Define scope of powers
 - To deny application to demolish a building

- Power to regulate new construction within the vicinity of historic landmarks
 - Power to affirm maintenance requirements on land owners
 - Power to initiate and supervise survey undergirding the register
 - Power to make designations to the register
 - So they don't need third parties to make nominations
 - Educational programs
 - Buying or selling property (depends on board)
 - Can the board accept easements?
 - Does the board have the power of eminent domain, can it condemn property?
 - Who (if any one) has authority over the board and supervise them
- Define Key terms
 - Lots of litigation surrounding definitions of terms and vagueness
- Define standards procedures and the hearings process
 - How much leeway does the commission have in designating structures?
 - What are the standards that are used in reviewing an application for designation, alteration, demolitions?
 - Can commissioners rely on personal knowledge for making decisions?
 - Procedures must be made clear so public knows what steps to take for any intervention/action they make take in relation to the ordinances
- Enforce the state legislation for the establishment and protection of historic properties
- Certified local government functions within the bound of the state legislature. They establish and maintain and regularly update a system for the survey and inventory of properties
- Must provide for adequate public participation in the process of nominating properties for the national register
- Satisfactorily perform all responsibilities delegated
- Demolition by neglect
 - Passive demolition of property by poor or no maintenance
 - Major problem for preservation boards
 - A review board has some power by to fight this
 - Economic hardship is when someone simply doesn't have the money to maintain a property
- Lien
- Licenses
- Restrictive covenants
 - Easements are a particular kind of Restrictive Covenant
 - an easement is the right of use over the property of another
 - Right of use is broadly defined
 - The burden falls on the possessor of the land over which the easement is issued
 - The easement is called the dominant tenement
 - Rights of way are involved with Easements, Easements protect right of way
 - Easements come from common law

- Express easements
 - All historic preservation easements are this kind because they were enabled by written state law
- Necessity easements
- Easements created by permission
- Easement created by prescription
- Assessing Economic Hardship Claims under Historic preservation Ordinances
 - Ordinances often have a provision providing for administrative relief from preservation restrictions in the case of economic hardship
 - The definition of hardship varies by ordinance
 - Generally, requests for economic relief are decided by the Historic Preservation Commission, but it is variable
 - Commissions look at a variety of factors to evaluate a person's economic hardship
 - They must look at and evaluate economic impact through the following factors:
 - Vacancy Rates
 - Revenue
 - Operating Expenses
 - Financing
 - Tax Incentives
 - Income producing properties have considerations as well:
 - effect of a particular course of action on a property's overall value or return.
 - Reasonable or Beneficial use
 - owner's ability to continue to carry out the traditional use of the property, or whether another viable use for the property remains.
 - Reasonable investment-backed expectations
 - Is hardship self-created?
 - Regulatory taking
 - Definition: something that occurs when governmental regulations limit the use of private property to such a degree that the owner is essentially deprived of all economically reasonable use or value of their property
 - Application of such a taking is straight-forward when concerning income-producing properties, but not with homeowner-occupied properties
 - Non-profits and special considerations
 - Don't serve commercial purposes, so economic hardship evaluations must consider beneficial use of property
 - Other considerations include
 - organization's charitable purpose
 - whether the regulation interferes with the organization's ability to carry out its charitable purpose
 - the condition of the building and the need and cost for repairs

- and whether the organization can afford to pay for the repairs, if required
- Proceedings of the Economic Hardship Claims
 - Applicant must submit evidence supporting their claim
 - Hearing is scheduled after application is filed, during which the claimant must demonstrate:
 - the structural integrity of the historic building
 - estimated costs of rehabilitation
 - the projected market value of the property after rehabilitation
 - Opponents may demonstrate their evidence
 - Commission should ask 5 questions:
 - Is the evidence...
 - Sufficient?
 - Relevant?
 - Competent?
 - Credible?
 - Consistent?
- Demolition by Neglect in the Preservation Law Reporter
 - Demolition by Neglect
 - Definition: describes a situation in which a property owner intentionally allows a historic property to deteriorate, usually to avoid historic preservation regulations
 -