CORNELL UNIVERSITY
COLLEGE OF ARCHITECTURE, ART & PLANNING
GRADUATE PROGRAM IN HISTORIC PRESERVATION
FALL TERM, 2015

CRP 6630
HISTORIC PRESERVATION LAW
MONDAYS 11:40AM - 12:55PM
SIBLEY HALL 211

SYLLABUS
August 28, 2015

The value of a Cornell planning education is secured by a rich history of students and faculty applying their talents to address seemingly intractable problems. Following in their footsteps, your success as a planner will in no small measure be found not just in your ability to counter challenges with solutions but more broadly to facilitate within our society the connection between people and the resources they need to lead meaningful, productive lives. As a preservation planner, your leadership will guide the processes of transformation by which economic growth and cultural and social change enable individuals to realize their full potential. Understanding the basic principles of historic preservation law will assist you in this leadership role.

COURSE OBJECTIVE

To understand both statutory and case law protecting historic resources; to understand the system that creates, interprets, and enforces those laws; to understand basic principles of legal research and case briefing.

The goal of this course is to assist non-lawyers in understanding the laws, policies, and procedures that impact historic preservation and related fields. This will enable you to identify potential legal issues before they become problems requiring crisis management. Further, should a situation arise where professional help is required, a basic understanding of the subject matter will facilitate interactions with attorneys by providing a background and basic vocabulary to enable you to ask the right questions.

A NOTE ABOUT LAW, ADVOCACY, AND PUBLIC POLICY IN PRESERVATION

We may think of the law as a set of rules and guidelines produced, interpreted, and enforced by social institutions to govern behavior—a widely accepted if banal definition. The shared if tacit assumption that for all aspects human interaction there is among the variety of options some optimal behavioral choice underlies the validity of all lawmaking. This choice—let us call it “good behavior”—is determined by our social institutions to be somehow morally, socially, or economically superior to other options. This good behavior, and the standards and practices associated with achieving and maintaining it, is the essence of our public policy. Our public policy and the laws and regulations that implement it determine everything from which side of the road we drive on, who can vote, how we spend our money, where we live, who we can marry, where we can travel, our ability to kill, to procreate, and to die by our own hand. Our laws are but the means to the end of the “good behavior” public policy goals we establish. Our laws shepherd our social activity toward that good behavior by means of rewards for compliance or punishments for violations.

A cynical view holds that a legal system based on institutionally-defined concepts of the morally, socially, and economically-acceptable, does little more than codify the status quo. Particularly to the extent that change within the law is neither a clean, nor easy, nor fast process, this would seem to be true. However, as the world changes, so does the status quo, and so must the law.

A legal system that does not allow for change because it is unresponsive to public sentiment is doomed, as it will
not be understood by those governed by it to be fair, equitable, and just. The result is catastrophic for the social institutions formerly ensconced in positions of power. A functioning legal system provides a mechanism for the law to evolve as the definition of morally, socially, and economically-acceptable “good behavior” changes from generation to generation. Ideally, if the social institutions empowered within the government are representative of a constituent public, as the majority public sentiment about a particular issue changes, public policy and law in service to that public policy will change accordingly.

In the United States, public advocacy and education have always been priorities within the field of historic preservation. Preservationists attribute the creation of laws protecting historic resources to a rise in public acceptance of the social and economic benefits of historic preservation. That is, preservationists attribute passage of laws like the National Historic Preservation Act of 1966 (“NHPA”) to a critical mass within the public accepting that preservation was “good behavior,” thereby mandating a change in public policy and the laws in service to it.

However, as the seemingly unending battles over climate change and gun control highlight, a change in public consciousness about a particular issue may be necessary to change the law, but it is rarely in and of itself sufficient to do the job. Changes to the law always require changes within the social institutions that create, interpret, and enforce it. Laws like the NHPA came about because those who believed in preservation came to understand the power structures within and the influences at work upon the social institutions that create, interpret, and enforce it. Public sentiment, absent institutional change, is rarely enough to re-orient public policy and law.

In part, this is intentional. Putting aside the fact that most legal systems are bureaucracies with all the lethargy and inefficiencies that generally inhere to bureaucracies, there is a degree to which the protection of individual rights and freedoms requires insulation from public whim. While a good legal system needs to be responsive to broad patterns of change in public sentiment, history has shown the best legal systems are not reactive to passing passions or mass hysteria. They have some measure of insulation from fringe or radical influence.

Thus, some take-away points. Preservation law exists as a tool because preservation advocates once established preservation as a “good behavior,” meaning that both public sentiment and our social institutions adopted preservation into the framework of accepted social policy. Each generation will need to re-affirm preservation’s place within public policy so that preservation law is supported not just by the public but also by legislative institutions, that it is understood and properly interpreted by judicial institutions, and that it is enforced by the executive institutions.

If you intend to work in the preservation field, it is your duty to be an advocate. Your work in this class to understand both statutory and case law protecting historic resources, to understand the system that creates, interprets and enforces them, to know the context in which they arose, and to evaluate the interpretations of them over time, will serve you well into the future in that advocacy role.

INSTRUCTOR

Nathaniel C. Guest, Esq.
n cg1@cornell.edu
610-724-9611
Office Hours: 10:40-11:40 AM Mondays and by appointment

GRADUATE ASSISTANT

John Southern
js2948@cornell.edu
COURSE EXPECTATIONS AND GRADING

Attendance/Participation (5% of grade). You will be allowed two absences during the course of the semester for occasional illness, family reasons, etc. It is your responsibility to gather class notes for any class you miss and to complete assignments due or assigned during the classes you missed. Arrive on-time to class and be prepared to participate. Any class to which you are more than 30 mintues late or for which you are unprepared will count as an absence. Please complete all required readings prior to class and be prepared to discuss them.

Assignments (10% of grade). Assignments must be turned in to TA by the start of class on the day they are due. Late assignments will not be accepted.

Mid-Term Exam (25% of grade). The mid-term exam will be in-class and open book. You may use any materials you have prepared yourself or in collaboration with other classmates enrolled in the course. You may use a computer but you may not use the internet during the exam.

Final Exam (30% of grade). This will be a take-home exam covering the entirety of the class topics. It will be due at 12 Noon on the date scheduled by the University for the final exam for the course. Late papers will be penalized by one letter grade if received after Noon, and one additional letter grade for each day beyond the due date. Papers may be submitted early.

Course Outline (30% of grade): It is my intention that through the course of the semester that you develop a document that you will refer back to after graduation. You will use this outline both for your midterm and for your cumulative final exam, though you need not submit it until the end of the semester. I expect your outline to be organized effectively, with headings, and that it summarize and analyze key points from lecture and the readings. It need not be organized in the same fashion as the readings and lectures, but its organization should be logical.

Academic Honesty: All students are expected to comply with the University Code of Academic Integrity. All work submitted by a student must be the student’s own work.

MODIFICATION AND CLASS INPUT

Class topics, dates presented, due dates for assignments, and the assignments themselves are subject to modification based on our progress throughout the semester. I am open to including additional topics based on class interest. I welcome your suggestions and feedback.

RECORDING OF LECTURE

Recording of the lectures in any format, including video and audio, other than by your own notes taken by hand is prohibited without the prior, written permission of the instructor.

ACCOMODATION POLICY

In compliance with University policy and equal access laws, I am available to discuss appropriate accommodations required for students with disabilities. Requests for academic accommodations should be made during the first two weeks of the semester, except for unusual circumstances.

ACKNOWLEDGMENT

I am greatly indebted to Emily Bergeron, J.D., ABD Ph.D., a fellow Cornellian, who taught me preservation law. I am also greatly indebted to the staff of the National Trust for Historic Preservation’s Legal Department, who first introduced me to this fascinating field. Betsy Merritt, Tom Mayes, Anita Canovas, Ross Bradford, Julia Miller, and Paul Edmondson—also a Cornell grad—are the best in their field. This course draws greatly from that learned with Emily and the folks from the NTHP.
Basic References for this Class:


2. **Thoughts on Reading and Briefing Cases** (Instructor provided).


---

**Unit 1:** Introduction to Preservation Law and Basic Tools for Research and Case Briefing (SEPT 9)

Welcome and introduction  
Review of course objectives and expectations.  
Review of grading  
A roadmap for our lectures this semester  
The National Trust for Historic Preservation’s analytical framework for historic preservation law  
Sources of Law in the United States. Executive, Legislative, and Judicial roles at federal, state, local levels.  
Sources of preservation law  
Some tools:  
- How to brief a case: Facts; Question Presented (Issue); Analysis; Holding; Rule  
- How to conduct basic legal research  

Readings: (Complete before the mid-term exam)


---

**Unit 2:** Federal Historic Preservation Laws Protecting from Government Action:  
Legal basis of federal preservation law—some history.  
National Register Nomination Process  
NHPA Section 106  
NHPA Section 110  
Other Federal preservation laws: see http://www.nps.gov/history/local-law/fhpl.htm
Other Federal Laws impacting preservation:

Housing Act of 1949
Reservoir Act of 1960

Readings:


Ferris v. Secretary of the United States Department of Transportation, No. 89-C-779-C (W.D. Wis. July 30, 1990)

Olana, Scenic Hudson sue to block 190-foot communications tower in view of historic site, Daily Freeman.com (PDF provided)

Optional Reading:


Assignment due this class: Case brief for the Ferris case.

Unit 3: Federal Historic Preservation Laws Protecting from Government Action:

The NEPA Process and Environmental Impact Statements
Department of Transportation Act of 1966, 49 U.S.C. § 303
Review of the Big Three Federal Historic Preservation Laws: NHPA, NEPA, DOTA 4(f)

Readings:

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).


Assignment due this class: Case brief for the Pierce case.

Unit 4: State Historic Preservation Laws Protecting from State Government Action;

State Policies Encouraging Historic Preservation
Policy
Enabling Laws/Home Rule Charters
Laws requiring “Consideration of Historic Property”: Mini 106’s, Mini NEPA’s, Mini 4(f)s’s
Tax Incentives
Smart Growth and Transportation Policies that are Preservation Friendly
Encouraging State-Use of Historic Properties
Direct Funding
Main Street, Heritage Tourism, and Scenic Roads/Rivers/Byways Programs
Educational Programs
Building and Access Codes
See Mayes, Thompson, A Menu of Historic Preservation Laws and Policies at the State Level
(NTHP 2005).

Readings:

National Historic Preservation Act (Sections 61.1, 61.4, 61.5, and 61.6)

State Laws to Consider Historic Resources, SMART STATES, BETTER COMMUNITIES (NTHP 1996)

Massachusetts Constitution, Article L1; Alaska Constitution, Article VII, Section 7; Pennsylvania
Constitution, Article 1, Section 27

the case itself, we will read the excerpted version of the case AND BE PREPARED TO ANSWER
THE QUESTIONS AT THE END OF this document:
http://www.aspenlawschool.com/books/plater_environmentallaw/updates/20_Commonwealth
_v_National_Gettysburg_Tower.pdf


New York Environmental Quality Review Act, NY CLS §§8-0101 et. seq.


Assignment:
1. Go to the National Conference of State Historic Preservation Officers webpage:
www.ncshpo.org. Refer to the page of your state of choice to see the relevant preservation laws,
policies and incentives. Prepare a brief summary of what you found.
2. Prepare a case brief of the Bedford case

Unit 5: Local Historic Preservation Protections from Private Action
From a policy standpoint, why are they the most effective place for preservation protection?
Legal basis for local preservation protections
Local interaction with NHPA. Certified Local Governments
Local interaction with NEPA
Drafting a good local ordinance
Special Challenges to Local Protections: Economic Hardship and Demolition by Neglect

Readings:

City of Philadelphia Preservation Ordinance, Section 14-1000 of the Philadelphia Code

National Park Service (2010). “Working on the Past in Local Historic Districts,” www.nps.gov/hps/workingonthepast/definehd.htm (please skim through the information on this site. Print it out, bring it to class, and be prepared to discuss).


**Assignment:** Brief Faulkner.

### Unit 6: Protecting Against Private Action Through Private Action

Restrictive Covenants

Liens

Licenses

Easements:

- Types of easements: Appurtenant, Easement-in-Gross
- Types of easements: Affirmative, Negative
- How easements are created
- Tax Implications for Easements
- Common types of easements impacting historic property
  - Access
  - Light and air
  - Natural support
  - Conservation or Preservation Easements

**Readings:**


Sample Preservation Easement Agreement

Sample State Enabling Legislation for Preservation Easements

**Optional Readings:**


### Unit 7: The Protection of Archeological Resources

Significance of Archeological Sites

Archeological Sites and the National Register

Archeological Resources Protection Act
Federal Laws Impacting Archeology
International Laws Relating to Archeology

Readings:

*U.S. v. Diaz*, 499 F.2d 113 (9th Cir. 1974)

*U.S. v. Smyer*, 596 F.2d 939 (10th Cir. 1979)


**Assignment:** Do a short brief of each of the cases above. Facts-Reasoning-Holding.

**Optional Reading:**

Preservation of American Antiquities, 43 C.F.R. 3
Protection of Archaeological Resources, 43 C.F.R. 7


---

**Unit 8**

**The Protection of Native American Resources**

Early protections
American Indian Religious Freedom Act
Native American Graves Protection and Repatriation Act

**Readings:**

*U.S. v. Corrow*, 119 F.3d 729 796 (10th Cir. 1997)
Bonnischsen v. United States, 357 F.3d 962 (9th Cir. 2004)

SKIM Indian Arts and Crafts Act, 25 U.S.C. §§305-305e


Comparison of NAGPRA, ARPA, NHPA Section 106 (NPS 2007)

Unit 9: Constitutional Issues Related to Historic Preservation

Takings:
Two Types of Takings
A History of Regulatory Takings Law
The Takings Analysis
The Penn Central Case’s Multiple Preservation Points

Readings:
U.S. Constitution, Fifth and Fourteenth Amendment

Duerkson, Christopher J. and Roddewig, Richard J., Takings Law in Plain English (NTHP 2004)


Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975).

**Optional Readings:**

ENVIRONMENTAL AFFAIRS REVIEW, Volume 22, No. 3, pp. 593-622.


**Assignment:** Brief Penn Central.

**Due Process**
- Procedural Due Process
- Substantive Due Process
- What are Due Process Requirements?

**Readings**
- U.S. Constitution, Fifth and Fourteenth Amendment

**Religious Issues**
- Separationist versus Accommodation Approaches
- Resistance to landmarking
- Constitutionality of federal, state, and local grants for religious building preservation
- Tax Exempt status of Religious Organizations
- Religious Land Use Zoning
- Emergency Assistance provided to religious sites after disasters
- Chronology of Cases

**Readings:**
- U.S. Constitution, First Amendment
- *St. Bartholomew’s Church v. City of New York*, 914 F. 2d 348 (2nd Cir. 1990).
Assignment: Prepare your course outline for a preliminary review.

Unit 10: Laws Encouraging Preservation Activity

Federal Tax Credits
State Tax Credits

Readings:
TBD