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FLORIDA'S LOCAL HISTORIC PRESERVATION ORDINANCES: MAINTAINING FLEXIBILITY WHILE AVOIDING VAGUENESS CLAIMS

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I. INTRODUCTION

Local historic preservation ordinances differ from city to city and from state to state. Such differences should be expected as each ordinance is tailored to meet the needs of the particular community it

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serves. However, any local government enacting a historic preservation ordinance should focus on two concerns. First, the ordinance should be effective. It should establish a historic preservation program that actually protects structures and sites deemed worthy of preservation. Second, the ordinance should be able to withstand legal challenges. Careful procedures and sufficient standards for reviewing projects impacting historic properties should be established to ensure that a court will not overturn the decision of a historic preservation commission. While only fifteen percent of historic preservation commissions implementing local ordinances have had their decisions challenged in court, "[p]erhaps the greatest fear many commissions have is being sued by a disgruntled property owner and having the validity of the ordinance and the commission's powers questioned, typically with great publicity."[1] Faced with a broad array of potential legal challenges—including claims concerning procedural due process,[2] private property rights,[3] the Americans With Disabilities Act (ADA),[4] and the designation of religious properties[5]—it is no wonder that keeping out of court is a priority for many historic preservation commissions.

A common challenge to local historic preservation ordinances involves the vagueness doctrine.[6] Owners of property designated as historic or located within a historic district often complain that the local ordinance regulating their property is vague or imprecise. Property owners can become frustrated when confronted with an ordinance that requires additions to buildings in historic districts to "conform in appearance . . . to the . . . character"[7] of the district, or that prohibits modifications that are "obviously incongruous to the historic

1. U.S. PRESERVATION COMM'N, IDENTIFICATION PROJECT 13 (1994) [hereinafter USPCIP REPORT).

2. See Metropolitan Dade County v. P.J. Birds, Inc., 654 So. 2d 170, 179-180 (Fla. 3d DCA 1995) (upholding the designation of Miami's Parrot Jungle against a due process claim).

3. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding that the refusal of the New York City Landmarks Preservation Commission to approve plans for construction of a 50-story office building over Grand Central Terminal was not a "taking" of private property).

4. Section 12204 of the ADA and Section 4.1.7 of the Accessibility Guidelines promulgated by the U.S. Architectural & Transportation Barriers Compliance Board specifically govern historic properties. See 42 U.S.C. § 12204 (1994); 36 C.F.R. § 1191.2 (1997) (Appendix A).

5. See City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (holding the Religious Freedom Restoration Act unconstitutional in a case arising out of the refusal of a local zoning authority to grant a building permit to a historic church).

6. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see also discussion infra Part II.B.

7. Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 425 (Cal. Ct. App. 1973) (quoting language contained in the local historic preservation ordinance governing the Old San Diego Historic District).

aspects of the surroundings."[8] While many property owners take pride in knowing the particular architectural style of their dwelling or place of business, few, if any, are capable of determining whether a proposed construction project "conforms in appearance" or is "obviously incongruous" with its surroundings. Furthermore, such language does not appear to provide much guidance to the preservation commission responsible for enforcing the ordinance. Thus, the United States Supreme Court's insistence, announced in Grayned v. City of Rockford,[9] that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and "provide explicit standards for those who apply them," would seem to be violated.[10]

However, most local historic preservation ordinances apply to historic properties ranging from ante-bellum homes to ancient archaeological sites—each possessing different historical attributes. To effectively regulate such a broad diversity of property, a historic preservation ordinance must provide the implementing historic preservation commission with sufficient flexibility to address the variety of problems that may arise. Thus, a vagueness challenge to a local historic preservation ordinance is unique as it must be considered against the backdrop of flexibility required of such ordinances.

Florida's historic preservation program, with both its statewide and local components, has been recognized as one of the strongest in the nation.[11] Combining such a strong preservation ethic with development pressures resulting from significant population increases indicates that lawsuits challenging historic preservation ordinances will arise. This Comment predicts how Florida's local historic preservation ordinances are likely to fare in the face of vagueness challenges, and offers recommendations for strengthening ordinances to withstand such challenges. Part II provides background information on the development of local historic preservation ordinances and the vagueness doctrine. Part III provides an overview of how Florida courts and courts around the country have evaluated vagueness claims in the context of local historic preservation ordinances. Part IV reviews Florida's local historic preservation ordinances in light of the standards applied by courts. Part V recommends changes in Florida's local historic preservation ordinances that will help insulate local governments from vagueness challenges while maintaining the level of flexibility necessary for the continued protection of Florida's historic resources. Finally, Part VI concludes that although Florida's

8. Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955) (quoting language contained in the Nantucket, Massachusetts, historic preservation ordinance).

9. 408 U.S. 104 (1972).

10. Id. at 108.

11. See E.L. ROY HUNT ET AL., HISTORIC PRESERVATION IN FLORIDA ch. 1, at 9 (1988).

local historic preservation ordinances are likely to hold up well in the face of vagueness challenges, improvements can be made to further insure their continued validity, which, in turn, will further insure the preservation of Florida's invaluable historic resources.

It is hoped that this Comment will help state and local historic preservation officials strengthen Florida's historic preservation program, while also serving as a guide to municipal attorneys in the unfortunate event that a local ordinance is challenged in court as being impermissibly vague.

II. THE DEVELOPMENT OF LOCAL HISTORIC PRESERVATION ORDINANCES AND THE VAGUENESS DOCTRINE

A. The Development of Local Historic Preservation Ordinances

Local governments play an important role in protecting historic and cultural resources because land use decisions are essentially local in nature. While the listing of a property on the National Register of Historic Places[12] offers protection in the form of increased public awareness of its significance, there are no federal or state regulatory schemes to protect such properties against demolition or destructive alteration by private owners.[13] Such protective regulation must be provided by local ordinances. However, the federal and state governments do play an important role in establishing policies and promulgating guidelines and criteria for local historic preservation programs.

1. The Role of the Federal Government

The earliest federal contribution to historic preservation was the Antiquities Act of 1906.[14] This Act provided for the protection of historical landmarks and ruins on federal lands, and authorized the President to declare certain properties of the federal government national monuments.[15] The Historic Sites Act of 1935[16] broadened the federal role by declaring it the policy of the United States "to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."[17] The National Historic Preservation Act of 1966 (NHPA)[18]

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12. See 16 U.S.C. § 470a (1994 & Supp. 1997).

13. See HUNT ET AL., supra note 11, ch. 5, at 1 ("[L]isting on the National Register only protects property from adverse actions funded, licensed, permitted or otherwise assisted in part or in whole by federal or State of Florida agencies.").

14. Ch. 3060, §§ 1-4, 34 Stat. 225 (1906) (current version at 16 U.S.C. §§ 431-433 (1994)).

15. See 16 U.S.C. §§ 431-433 (1994).

16. Ch. 593, §§ 1-7, 49 Stat. 666 (1935) (current version at 16 U.S.C. §§ 461-467 (1994)).

17. 16 U.S.C. § 461 (1994).

established the National Register of Historic Places.[19] Sites and structures that qualify for the National Register are those

> that are associated with events that have made a significant contribution to the broad patterns of [American] history; or that are associated with the lives of persons significant in [that history]; or 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 that have yielded, or may be likely to yield, information important in prehistory or history.[20]

Most importantly for the purposes of this Comment, the NHPA established the State Historic Preservation Programs[21] and provided for the certification of local preservation programs.[22]

2. The Role of State Government

Generally, state governments are not involved in the regulation of historic properties.[23] However, state governments do supply local governments with an effective means of adopting specific historic preservation policies. Florida provides one example of this technique.

The Florida Legislature first became involved in protecting Florida's historic resources in 1959 when it established the Historic St. Augustine Preservation Board.[24] However, the first statewide commitment to historic preservation did not occur until 1967 with the passage of the Florida Archives and History Act, chapter 267, Florida Statutes.[25] In 1986 the Act's name was changed to the Florida Historical Resources Act.[26] This Act recognizes the importance of Florida's historic resources, declaring that:

> [t]he rich and unique heritage of historic properties in this state, representing more than 10,000 years of human presence, is an im-

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18. Pub. L. No. 89-665, 80 Stat. 915 (1966) (current version at 16 U.S.C. §§ 470-470x-6 (1994)).

19. See 16 U.S.C. § 470a (1994 & Supp. 1997).

20. 36 C.F.R. § 60.4 (1997).

21. See 16 U.S.C. § 470a(b) (1994 & Supp. 1997).

22. See id. § 470a(c). This certification program, known as the Certified Local Government Program, is discussed in detail in Part IV.A of this Comment.

23. But see FLA. STAT. § 380.05(2)(b) (1997) (allowing the state to protect areas "containing, or having a significant impact on, historical or archaeological resources, sites, or statutorily defined historical or archaeological districts"); see also HUNT ET AL., supra note 11, ch. 1, at 26-29.

24. See Act effective July 1, 1959, ch. 59-521, § 1, 1959 Fla. Laws 1758 (codified as amended at FLA. STAT. ch. 266 (1997)); see also HUNT ET AL., supra note 11, ch. 1, at 4.

25. See Act effective Sept. 1, 1967, ch. 67-50, §§ 1-13, 1967 Fla. Laws 116 (current version at FLA. STAT. ch. 267 (1997)).

26. See Act effective July 1, 1986, ch. 86-163, § 42, 1986 Fla. Laws 794 (amending FLA. STAT. § 267.011 (1986)).

> portant legacy to be valued and conserved for present and future generations. The destruction of these nonrenewable historical resources will engender a significant loss to the state's quality of life, economy, and cultural environment.[27]

The Act serves as the fundamental enabling legislation for local governments to exercise their police power in furtherance of historic preservation goals.[28]

Additional justification for local governments acting in furtherance of historic preservation is found in the Local Government Comprehensive Planning and Land Development Act, better known as the Growth Management Act of 1985 (GMA).[29] The GMA requires each county and municipality to prepare a comprehensive plan to guide and control future development.[30] The consistency requirement of the GMA insures sensitivity to historic preservation goals and policies articulated in the state comprehensive plan.[31]

Within the Department of State, the Division of Historical Resources has primary responsibility for Florida's historic preservation policy and for providing assistance to local governments.[32] Within the Division, the Bureau of Historic Preservation works with the National Park Service to manage Florida's Certified Local Government Program.[33]

3. The Role of Local Government

Because the U.S. Constitution leaves most regulation of private property to the states,[34] and the states delegate this power to local governments, meaningful protection of historic resources occurs primarily at the local level.[35] Thus, since Charleston, South Carolina, New Orleans, Louisiana, and San Antonio, Texas, first adopted local historic preservation ordinances in the 1930s,[36] local governments throughout the country have played a leading role in the development of historic preservation laws designed to protect our nation's historic buildings, sites, and neighborhoods. In Florida, the protec-

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27. FLA. STAT. § 267.061(1)(a) (1997).

28. See HUNT ET AL., supra note 11, ch. 1, at 31.

29. Act effective July 1, 1985, ch. 85-55, §§ 1-19, 1985 Fla. Laws 207 (current version at FLA. STAT. §§ 163.3161-.3211 (1997)).

30. See FLA. STAT. § 163.3167(1)(b) (1997).

31. See id. § 163.3177(9)(c). The GMA requires local governments' comprehensive plans to be consistent with the state plan and its corresponding regional plan.See id.

32. See id. § 267.061(3)(a).

33. See id. § 267.061(3)(h). Florida's Certified Local Government Program is discussed in detail in Part IV.A of this Comment.

34. See U.S. CONST. amend. X.

35. See HUNT ET AL., supra note 11, ch. 1, at 30.

36. See Kristan E. Curry, Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation, 11 J. NAT. RESOURCES & ENVTL. L. 229, 233-34 (1996).

tion of local historic resources originated with the establishment of the Historic St. Augustine Preservation Board.[37] Since then, the Legislature has authorized several more preservation boards, but because of the enactment of broad enabling legislation,[38] and the proliferation of local communities enacting their own ordinances, it has ceased additional authorizations.[39]

In 1978, the U.S. Supreme Court issued a landmark opinion in Penn Central Transportation Co. v. New York City,[40] upholding the constitutionality of New York City's historic preservation ordinance.[41] At that time, more than 500 municipalities had enacted preservation laws.[42] In the wake of Penn Central, the number of local historic preservation ordinances doubled by 1986 to more than 1000,[43] and nearly tripled by 1989 to 1400.[44] Today, that number has grown to approximately 2200.[45] In Florida alone, the number of historic preservation commissions in existence numbers approximately sixty.[46]

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37. See supra note 24 and accompanying text.

38. See Act effective Sept. 1, 1967, ch. 67-50, § 1, 1967 Fla. Laws 116 (current version at FLA. STAT. ch. 267 (1997)) (instituting the Florida Historical Resources Act). This legislation gives the Division of Historical Resources the authority to "adopt such rules as deemed necessary to carry out its duties and responsibilities." FLA. STAT. § 267.031(1) (1997).

39. The difference between a preservation board created by the state legislature and a locally enacted historic preservation ordinance is that the preservation board is eligible to receive financial benefits under chapter 266, while the local commission is not. However, the local commission has the power to designate landmarks, while the preservation boards can only act under the authority granted to it by the state, which omitted the authority to designate individual historic landmarks. See FLA. STAT. ch. 266 (1997); see also HUNT ET AL., supra note 11, ch. 1, at 18.

40. 438 U.S. 104 (1978).

41. See id. at 138.

42. See id. at 107 n.1 (citing NATIONAL TRUST FOR HISTORIC PRESERVATION, A GUIDE TO STATE HISTORIC PRESERVATION PROGRAMS (1976)).

43. See T. BOASBERG ET AL., 1 HISTORIC PRESERVATION LAW & TAXATION iii (1986).

44. See id. § 7.01 (Supp. 1989).

45. See NAT'L ALLIANCE OF PRESERVATION COMM'N, U.S. PRESERVATION COMMISSION IDENTIFICATION PROJECT DATABASE (1998) (maintained by the Office of Preservation Servs., School of Envtl. Design, Univ. of Ga.).

46. See id. The cities and counties in Florida with active preservation commissions are Auburndale, Boca Raton, Bradenton, Broward County, Chipley, Clay County, Collier County, Coral Gables, Dade City, Daytona Beach, DeLand, Delray Beach, Eatonville, Eustis, Fort Myers, Gainesville, Gulfport, Hialeah, Hillsborough County, Hollywood, Homestead, Indian River County, Jacksonville, Key West, Lake Worth, Lakeland, Lee County, Marion County, McIntosh, Metro-Dade County, Miami, Miami Beach, Miami Springs, Micanopy, Monroe County, New Smyrna Beach, Newberry, Ocala, Opa-Locka, Orlando, Ormond Beach, Palatka, Palm Beach, Palm Beach County, Plant City, Quincy, St. Augustine, St. Petersburg, Sanford, Sarasota, Seminole County, South Miami, Sugar Loaf Key, Tallahassee/Leon County, Tampa, Valparaiso, Volusia County, Washington County, West Palm Beach, and Windermere.

B. The Vagueness Doctrine

The vagueness doctrine stems primarily from the Due Process Clauses of the U.S. and Florida Constitutions.[47] However, equal protection and separation of powers have also been cited as sources of the doctrine.[48] The criteria for reviewing and evaluating claims of unconstitutional vagueness were set forth by the United States Supreme Court in Grayned v. City of Rockford:[49]

> It is a basic principle . . . that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[50]

Thus, the vagueness doctrine requires that citizens be apprised of what is legal and what is illegal, and that government officials and administrators apply the law in a uniform manner. Most vagueness challenges to historic preservation ordinances allege that the standards articulated by the ordinance are too vague to ensure uniform enforcement by the implementing commission.[51] However, courts "appear to apply a single standard" to both aspects of the vagueness doctrine, and have determined that language that is definite enough to inform citizens of what is legal and illegal is also definite enough to guide administrative bodies implementing the law.[52]

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47. Compare U.S. CONST., amend. V ("[N]or [shall any person be] deprived of life, liberty, or property, without due process of law."), with FLA. CONST. art. 1, § 9 ("No person shall be deprived of life, liberty or property without due process of law . . . ."); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); HUNT ET AL., supra note 11, ch. 2, at 31.

48. See, e.g., City of New Orleans v. Pergament, 5 So. 2d 129, 131 (La. 1941) (noting that under an equal protection analysis, a regulation prohibiting "unusually large signs" is appropriate because it is not arbitrary or discriminatory); Askew v. Cross Key Waterways, 372 So. 2d 913, 926 (Fla. 1978) (England, C.J., concurring) (stating that the separation of powers doctrine may be an appropriate source of a remedy).

49. 408 U.S. 104 (1972).

50. Id. at 108 (footnote omitted).

51. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-33 (1978); Citizens to Save Historic Rhodes Tavern v. District of Colum. Dept. of Housing & Community Dev., 432 A.2d 710, 719 (D.C. Cir. 1981); Maher v. City of New Orleans, 516 F.2d 1051, 1062 (5th Cir. 1975); South of Second Assocs. v. City of Georgetown, 580 P.2d 807, 810-11 (Colo. 1978); Figarsky v. Historic Dist. Comm'n, 368 A.2d 163, 170 (Conn. 1976); Town of Deering ex rel. Bittenbender v. Tibbets, 202 A.2d 232, 235 (N.H. 1964); City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13, 18-19 (N.M. 1964); A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444, 453 (N.C. 1979).

52. See HUNT ET AL., supra note 11, ch. 2 at 32 (citing Georgetown, 580 P.2d at 811 ("The ordinance contains sufficient standards to advise ordinary and reasonable men as to

While Grayned indicates little tolerance for imprecisely drafted laws and ordinances, courts have recognized that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language."[53] With this limitation in mind, laws and ordinances marked by "flexibility and reasonable breadth, rather than meticulous specificity,"[54] have been upheld. Such flexibility and reasonable breadth has been recognized in the specific context of local historic preservation ordinances.[55] It is of particular importance in this context because most local historic preservation ordinances apply to a broad range of historic properties located in diverse settings. Without such flexibility, implementing commissions will be unable to address the variety of problems that may arise.[56]

III. VAGUENESS CLAIMS IN THE CONTEXT OF LOCAL HISTORIC PRESERVATION ORDINANCES

A. Additional Criteria and Guidelines

When seeking guidance for a proposed addition or alteration to a property designated as historic, property owners naturally turn to the text of the local ordinance. Faced with an ordinance that utilizes imprecise terms such as preserving an area's "quaint and distinctive character,"[57] maintaining compatibility with the "atmosphere of the town,"[58] and preventing developments that are "obviously incongruous,"[59] it is easy to understand the frustration felt by many property owners. However, most ordinances do not stand alone. Rather, they are accompanied by design criteria or design guidelines relating to the particular district or community governed by the ordinance. For example, the historic preservation ordinance for the City of West Palm Beach, Florida, utilizes imprecise terminology such as "compatibility in site and setting" and "distinctive architectural fea-

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the type of construction permitted, permits reasonable application by the Commission, and limits the Commission's discretionary powers.")).

53. Grayned, 408 U.S. at 110 (footnote omitted).

54. Esteban v. Central Mo. St. College, 415 F.2d 1077, 1088 (8th Cir. 1969).

55. See Burke v. City of Charleston, 893 F. Supp. 589, 612 (D.S.C. 1995) ("The Supreme Court has never imposed a requirement that an ordinance specifying grounds for denial of a permit exhaust the range of possibilities in order to withstand facial challenge."); see also Kalorama Heights Ltd. Partnership v. District of Colum. Dep't of Consumer and Reg. Aff., 655 A.2d 865, 873 (D.C. 1995).

56. See discussion infra Part III.E.

57. Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 425 (Cal. Ct. App. 1973) (quoting language contained in the local historic preservation ordinance governing the Old San Diego Historic District).

58. Town of Deering ex rel. Bittenbender v. Tibbetts, 202 A.2d 232, 235 (N.H. 1964) (quoting language contained in a preservation ordinance governing districts within the Town of Deering).

59. Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955) (quoting language contained in the Nantucket, Massachusetts, historic preservation ordinance).

tures."[60] However, in addition to the ordinance, West Palm Beach has promulgated guidelines providing detailed descriptions of properties and districts designated as historic[61] and describing the significance of individual architectural features such as roofs, porches, and chimneys.[62] Such criteria and guidelines provide the essential design characteristics of the buildings or district in question. The historic preservation commission implementing the ordinance or the property owner seeking to alter his or her property can use the criteria to determine which design characteristics and elements are essential in preserving the distinctive character of the property or district.[63] Furthermore, such criteria and guidelines need not be specifically mentioned in the text of the ordinance to be considered relevant.[64] Thus, the constitutional sufficiency of seemingly ambiguous terms within an ordinance are not judged in a vacuum.[65] Instead, their meaning is clarified by turning to regulations that provide additional detail.[66]

Even if design criteria and guidelines tailored to the specific historic properties governed by the ordinance are not available, seemingly ambiguous terms can be clarified by referencing nationally recognized design criteria. The Secretary of the Interior's Standards for

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60. CITY OF WEST PALM BEACH, FLA., ORDINANCE No. 2421-90, art. II, § 6(d)(1)-(2) (1990).

61. See MARY BRANDENBURG & WILLIAM DALE WATERS, HISTORIC PRESERVATION, A DESIGN GUIDELINES HANDBOOK, 15-27 (1992).

62. See id. at 63-70. The guidelines regarding roofs are partially delineated below:

> ROOFS:
>
> Pediment roofs characterize Neoclassical Revivals. New England gambrel roofs have two steep upper slopes, while Dutch gambrel roofs have two short upper slopes and a lower slope with a bell-like flare. Decorative details often can be found below the roof and under the eaves. . . . Wood shakes and shingles, plated steel, clay tiles, and tar and gravel covered early West Palm Beach buildings. . . . Most historic roofing materials are still available, so roofs can be repaired inconspicuously. Composition materials, such as asphalt and asbestos shingles, and roll roofing are not historic materials. . . . A building's character can be affected significantly by installing equipment such as air conditioners, solar hot water heaters, antennas, or elevator equipment on the roof. If they must be located on a roof, the best place is an inconspicuous one where the equipment is not visible from sidewalks or streets. Changing a roof by adding new features such as dormer windows or skylights, is not acceptable. Original features should be kept, but the addition of new ones decreases a buildings historic value.

Id. at 63-64, 66.

63. See, e.g., Nadelson v. Township of Millburn, 688 A.2d 672, 678 (N.J. Super. Ct. Law Div. 1996).

64. See id. (recognizing the significance of the guidelines even though they were not incorporated by reference into the text of the ordinance).

65. See Kalorama Heights Ltd. Partnership v. District of Colum. Dep't of Consumer and Reg. Aff., 655 A.2d 865, 873 (D.C. 1995).

66. See id.

Rehabilitation[67] contain standards for acquisition, protection, stabilization, preservation, rehabilitation, restoration, and reconstruction projects affecting historic properties and historic districts.[68] Although not tailored to the historic properties in any particular community, these nationally accepted standards are specific enough to apply to all grant-in-aid projects assisted by the National Historic Preservation Fund.[69] Courts have found that local ordinances modeled on these standards will be upheld against vagueness challenges. For example, in Metropolitan Dade County v. P.J. Birds, Inc.,[70] the court rejected a vagueness challenge to an ordinance that relied on the imprecise term "exceptional importance" because the ordinance also referenced the Secretary of the Interior's Standards for Rehabilitation, which provided more detailed criteria.[71]

B. Historical Documentation and Physical Character

Courts have held that a preservation ordinance defining the historic character of a district must "take . . . clear meaning from the observable character of the district to which [they] appl[y]."[72] For example, in A-S-P Associates v. City of Raleigh,[73] the court found that "the standard of 'incongruity' must derive its meaning . . . from the total physical environment of the Historic District."[74] In that case, the historic district governed by the local ordinance was considered an architectural mélange.[75] Yet the court determined that the predominant architectural style was Victorian, which was objectively ascertainable.[76] Additionally, the court found the other historic architectural styles to be equally distinctive and ascertainable.[77] Therefore, the district's Victorian character sufficiently limited the Historic District Commission's discretion with regard to implementing the

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67. 36 C.F.R. § 68.3 (1997). These standards require, in part, that a historic property "be used as it was historically, or be given a new use that maximizes the retention of distinctive materials, features, spaces and spatial relationships," and that "[w]ork needed to stabilize, consolidate and conserve existing historic materials and features will be physically and visually compatible." Id. § 68.3(a)(1), (3).

68. See id. §§ 68.3-.4.

69. See id. § 68.1.

70. 654 So. 2d 170 (Fla. 3d DCA 1995).

71. See id. at 176. "The Dade County Historic Preservation Ordinance is patterned on the federal historic preservation regulations . . . which are generally accepted within the field of historic preservation . . . ." Id. at 176-77.

72. Maher v. City of New Orleans, 516 F.2d 1051, 1063 (5th Cir. 1975) (quoting Town of Deering ex rel. Bittenbender v. Tibbets, 202 A.2d 232, 235 (N.H. 1964)).

73. 258 S.E.2d 444 (N.C. 1979).

74. Id. at 454.

75. See id.

76. See id. (noting that the Victorian architecture was readily identifiable and stating that Raleigh's planning director found the historic district to contain the best examples of the Victorian style in the area).

77. See id.

"incongruity" standard.[78] The court went on to conclude that "it is a practical necessity that a substantial degree of discretionary authority . . . be delegated to such an administrative body possessing the expertise to adapt the . . . policies and goals to varying, particular circumstances."[79]

Additionally, courts have relied on historical research about the district as a basis for limiting administrative discretion:

> It may be difficult to capture the atmosphere of a region through a set of regulations. However, old city plans and historic documents, as well as photographs and contemporary writings may provide an abundant and accurate compilation of data to guide the Commission. . . . The existence of the survey and other historical source material assist in mooring the Commission's discretion firmly to the legislative purpose.[80]

When such sources are available, they help promote the exercise of reasoned and well-informed judgment, and guard against arbitrary and capricious decision-making.

C. Procedural Safeguards

Procedural safeguards in historic preservation ordinances seek to ensure consistent decisions of the administrative body implementing the ordinance. "[T]he presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards."[81] These procedural safeguards include requiring local officials to have specific professional expertise, providing the right to appeal decisions, and providing the right to an informal review.[82]

1. Specific Professional Expertise

Appointing commission members with specific professional expertise helps to ensure that the local ordinance is applied in a rational and well-informed manner,[83] while a broad range of expertise enables the commission to address miscellaneous issues that may arise when

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78. See id.

79. Id.

80. Maher v. City of New Orleans, 516 F.2d 1051, 1063 (5th Cir. 1975) (footnote omitted).

81. A-S-P Assocs., 258 S.E.2d at 454.

82. See Estate of Tippett v. City of Miami, 645 So. 2d 533, 537 (Fla. 3d DCA 1994) (Gersten, J., concurring).

83. See Maher, 516 F.2d at 1062; see also Tippett, 645 So. 2d at 537 (stating that "delegation to a Board of historic preservation experts has been held to be a protection against arbitrary political infringement"); South of Second Assocs. v. Georgetown, 580 P.2d 807, 808-09 n.1 (Colo. 1978) (stating that qualifications of commission members "weighs heavily" against claims of arbitrary enforcement).

applying a local ordinance.[84] Thus, vagueness challenges have been rejected where local ordinances were interpreted by historic preservation commissions consisting of experts in architecture, art or architectural history, landscape architecture or planning, structural or civil engineering, and real estate.[85] As stated in A-S-P Associates, "To achieve the ultimate purposes of historic district preservation . . . [authority must] be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances."[86]

While the existence of expertise on the commission implementing the local historic preservation ordinance is a mitigating factor when imprecise standards are used, it does not completely eliminate the need for standards.[87] The Texas Supreme Court rejected the argument that standards for designating properties as historic were not necessary when experts were responsible for designating such properties.[88]

2. The Right to Appeal

The right to appeal decisions of a historic preservation commission to a separate legislative body, such as a city council, is also frequently relied upon to find standards and criteria adequate to withstand a vagueness challenge.[89] The legislative body should have the ability not only to review the decision of the commission and send it back for redetermination, but also to either affirm, modify, or reverse the decision of the commission.[90] The right to appeal to judicial authorities, such as a county court or board of adjustment, provides even greater protection against arbitrary enforcement.[91] This type of

84. Most local historic preservation ordinances govern many individual historic properties and historic districts, each located in a different environment and historically significant for different reasons. Thus, a commission with a broad array of experts will be more effective in dealing with different problems that may arise than a commission comprised of experts in a single field. See discussion infra Part III.C.1.

85. See U-Haul Co. of Eastern Mo., Inc. v. City of St. Louis, 855 S.W.2d 424 (Mo. Ct. App. 1993).

86. A.S.P. Assoc., 258 S.E.2d at 454.

87. See HUNT ET AL., supra note 11, at ch. 2, 35.

88. See Texas Antiquities Comm. v. Dallas County Comm. College Dist., 554 S.W.2d 924, 927 (Tex. 1977).

89. See Maher v. City of New Orleans, 516 F.2d 1051, 1062-63 (5th Cir. 1975) (footnote omitted) ("The elaborate decision-making and appeal process set forth in the ordnance creates another structural check on any potential for arbitrariness that might exist.").

90. See Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 425 (Cal. Ct. App. 1973).

91. See Estate of Tippett v. City of Miami, 645 So. 2d 533, 537 (Fla. 3d DCA 1994) (finding that the right to appeal was "frequently relied upon as a basis for holding that standards and criteria are adequate" where the ordinance provided for an appeal to the city commission and then to the circuit court).

appeal affords property owners the opportunity to offer expert witnesses, inspect documents, and offer rebuttal evidence.[92]

3. Informal Review

Courts may rely upon the right to an informal review as a basis for holding standards and criteria sufficiently specific. "An informal preapplication review is conducted so that a preliminary assessment of the project's compliance with standards, and suggestions for modifications, can be made."[93] Furthermore, courts have expressed little sympathy for individuals who challenge an ordinance as impermissibly vague, but who began their particular construction project or executed a finished work without first seeking preapplication review.[94]

D. Clarification Through Judicial and Administrative Interpretations

A number of courts have recognized that the meaning of a statute can be clarified by turning to "judicial and administrative interpretations [that] have elaborated its text."[95] Thus, the "court's interpretations . . . have enhanced understanding of the statute. These interpretations provide guidance to parties in applying [for permits], and inform and assist the [Commission] in deciding the case."[96] Moreover, judicial and administrative interpretations have been deemed sufficient even when regulations amplifying the statutory standard have not been promulgated.[97]

Although not the preferred method nor the most efficient and productive, a historic preservation commission may sharpen its purposes and policy through case-by-case adjudication.[98] As is the case with many institutions, a historic preservation commission may implement policies and guidelines before they are officially adopted.[99]

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92. See, e.g., A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444, 455 (N.C. 1979) (citation omitted).

93. Burke v. City of Charleston, 893 F. Supp. 589, 611 (D.S.C. 1995).

94. See id.; see also Nadelson v. Township of Millburn, 688 A.2d 672, 678-79 (N.J. Super. Ct. Law Div. 1996).

95. LCP, Inc. v. District of Colum. Alcoholic Beverage Control Bd., 499 A.2d 897, 902 (D.C. App. 1985).

96. Kalorama Heights Ltd. Partnership v. District of Colum. Dep't of Consumer and Reg. Affs., 655 A.2d 865, 873 (D.C. 1995) (rejecting a vagueness challenge to the term "special merit" in a historic preservation ordinance).

97. See id. at 902 n.3 (noting that a regulatory board can proceed "either by regulation or case-by-case adjudication").

98. See Metropolitan Dade County v. P.J. Birds, Inc., 654 So. 2d 170, 178 (Fla. 3d DCA 1995).

99. See id.

E. Problems With Overly Specific Criteria

Attempting to develop criteria that are too detailed can hinder the ability of a historic preservation commission to function effectively. Overly specific criteria unduly constrain the commission's ability to consider the facts and circumstances of individual cases, some of which may contain unforeseen variations. In particular, "concerns of aesthetic or historical preservation do not admit to precise quantification."[100] Thus, out of practical necessity, legislatures must limit the specificity with which they spell out prohibitions.[101] For example, in City of Santa Fe v. Gamble-Skogmo, Inc. ,[102] the court recognized that "it would be impossible to rigidly and literally set forth every detail without impairing the underlying public purpose" of the preservation ordinance.[103] Furthermore, the court noted that an overly detailed preservation ordinance often results in an inflexible and unworkable plan with "resultant pressures on the legislative body for frequent amendments leading to the evils of spot zoning."[104] Consequently, there are quantitative limits to the detail of policy that can effectively be promulgated as rules.[105]

F. Operative Language Upheld in the Face of Vague ness Challenges

A broad cross-section of cases challenging local historic preservation ordinances as unconstitutionally vague have been unsuccessful.[106] In each case, the court, relying on the factors mentioned above,

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100. Maher v. City of New Orleans, 516 F.2d 1051, 1062 (5th Cir. 1975).

101. See Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); see also Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 655 (Fla. 1979) (noting that "the complex and ever-changing conditions that attend and affect . . . [regulation under the police power] make it impracticable for the Legislature to prescribe all necessary rules and regulations") (quoting Bailey v. Van Pelt, 78 Fla. 337, 350, 82 So. 789, 793 (1919)).

102. 389 P.2d 13 (N.M. 1964).

103. Id. at 19.

104. Id. at 18.

105. See Metropolitan Dade County v. P.J. Birds, Inc., 654 So. 2d 170, 178 (Fla. 3d DCA 1995) (quoting Gulf Coast Elec. Coop., Inc. v. Florida Pub. Serv. Comm'n, 462 So. 2d 1092, 1094 (Fla. 1985)).

106. See Mayes v. City of Dallas, 747 F.2d 323, 325 (5th Cir. 1984) ("harmonize with the structure's facade;" "complement the overall character of the District;" "architecturally and historically appropriate;" and "compatible and harmonize with the existing structures in the block"); Maher v. City of New Orleans, 516 F.2d 1051, 1062 n.58, 59 (5th Cir. 1975) ("quaint and distinctive character" and "architectural and historical value"); Burke v. City of Charleston, 893 F. Supp. 589, 612 (D.S.C. 1995) ("intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, and an absence of unity and coherence not in consonance with the character of the existing structure"); Second Baptist Church v. Little Rock Hist. Dist. Comm'n, 732 S.W.2d 483, 485-86 (Ark. 1987) ("obviously incongruous with the historic aspects of the District") (emphasis omitted); Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 424-25 (Cal. Ct. App. 1973) ("in general accord with the appearance of the structures built in Old San Diego prior to 1871;" "designs prevailing during the principal recognized Old San Diego Historical periods;" and

found that "fair warning" had been provided and that "arbitrary and discriminatory enforcement" had been prevented.[107]

IV. A REVIEW OF FLORIDA'S LOCAL HISTORIC PRESERVATION ORDINANCES

A. Ordinances Qualified Under the Certified Local Government Program

An analysis of Florida's local historic preservation ordinances must begin with the Certified Local Government (CLG) program. The CLG program was established under the National Historic Preservation Act (NHPA),[108] and is administered jointly by the National Park Service and the various state preservation offices.[109] Under the

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"conform in appearance, size, position and design to the quaint and distinctive character of Old San Diego District, and . . . not injuriously affect the same"); South of Second Assocs. v. City of Georgetown, 580 P.2d 807, 810 (Colo. 1978) ("the effect of the proposed [change] upon the 'general historical and/or architectural character of the structure or area' . . . [and] the architectural style, arrangement, texture, and material used on existing buildings or structures . . . and their relationship to other structures in the area"); Figarsky v. Historic Dist. Comm'n, 368 A.2d 163, 170 n.3 (Conn. 1976) ("A certificate of appropriateness may be refused . . . [if] in the opinion of the commission, [it] would be detrimental to the interest of the historic district."); Citizens Comm. to Save Historic Rhodes Tavern v. District of Colum. Dept. of Housing and Comm. Dev., 432 A.2d 710, 719 (D.C. Ct. App. 1981) ("exemplary architecture"); Life Concepts, Inc. v. Harden, 562 So. 2d 726, 728 (Fla. 5th DCA 1990) ("compatible with the surrounding residential uses"); Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955) ("obviously incongruous to the historic aspects of the surroundings"); U-Haul Co. of Eastern Mo., Inc. v. City of St. Louis, 855 S.W.2d 424, 426 (Mo. Ct. App. 1993) ("generally compatible with the style and design of surrounding improvements and conducive to the proper architectural development of the community"); Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61, 65 (Mo. Ct. App. 1980) ("degenerated beyond feasible limits for rehabilitation" and "rehabilitation impractical"); Town of Deering ex rel. Bittenbender v. Tibbetts, 202 A.2d 232, 234-36 (N.H. 1964) ("impair the atmosphere of the Town;" "relationship . . . to its surroundings;" "compatibility of land uses;" and "character and integrity of [the] district"); City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13, 19 (N.M. 1964) ("harmony with adjacent buildings, preservation of historical and characteristic qualities, and conformity to the Old Santa Fe Style"); Salvatore v. City of Schenectady, 530 N.Y.S.2d 863, 865 (N.Y. App. Div. 1988) ("compatibility . . . with existing structures of historic or architectural value . . . and with the environment of open spaces in the surrounding neighborhood"); A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444, 452 (N.C. 1979) ("incongruous with the historic aspects of the district") (emphasis omitted); Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 857 (Ohio 1984) ("accepted and recognized architectural principles"); Park Home v. City of Williamsport, 680 A.2d 835, 838 (Pa. 1996) ("[t]he effect of the proposed change upon the general historic and architectural nature of the district" and "[t]he appropriateness of exterior architectural features"); Bellevue Shopping Ctr. Assocs. v. Chase, 574 A.2d 760, 763 (R.I. 1990) ("historic or architectural value or significance of the structure and its relation to the historic value of the surrounding area" and "general compatibility of exterior design, arrangement, texture and material"); State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 223 (Wis. 1955) ("architectural appeal" and "substantial depreciation in the property values of [the] neighborhood") (emphasis omitted).

107. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

108. 16 U.S.C. § 470a(a)(7)(c) (1994 & Supp. 1997).

109. See id.

NHPA, local governments that establish a historic preservation program meeting certain federal and state requirements may participate in the CLG program.[110] Benefits of CLG participation include eligibility for special grants, technical assistance and training, and participation in the National Register nomination process for local properties.[111] Currently, thirty-five local governments in Florida have been approved as CLGs.[112]

Minimum requirements for state certification of a local historic preservation program have been promulgated by the National Park Service.[113] These regulations do not require CLGs to adopt historic preservation ordinances.[114] Rather, the regulations only require that when state enabling legislation permits local historic preservation ordinances, states "may require adoption of an ordinance and indicate specific provisions that must be included in the ordinance."[115] However, the regulations do require CLGs to enforce state legislation for the protection of designated historic properties if local protection is inconsistent with state historic preservation legislation.[116]

The regulations further require CLGs to establish historic preservation commissions comprised of both professionals and laypersons.[117] Professional commission members are required to have specific expertise in disciplines related to historic preservation.[118] If no experts are available in a particular community, a local government may be certified if it has made a reasonable effort to find such members and continues to seek experts when considering National Register nominations and taking other actions that will impact historic properties.[119] Lastly, the regulations require CLGs to survey and in-

110. See generally 36 C.F.R. Part 61 (1997) (containing federal procedures for certified local government programs).

111. See id.

112. These include Auburndale, Collier County, Coral Gables, DeLand, Delray Beach, Eatonville, Eustis, Fort Myers, Gainesville, Gulfport, Hillsborough County, Hollywood, Homestead, Jacksonville, Key West, Lake Worth, Lakeland, Lee County, Metro-Dade County, Miami, Micanopy, New Smyrna Beach, Ocala, Orlando, Palm Beach, Palm Beach County, Plant City, St. Augustine, St. Petersburg, Sanford, Sarasota, Tallahassee/Leon County, Tampa, West Palm Beach, and Windermere. See Listing obtained from the Florida Department of State, Division of Historical Resources, Bureau of Historic Preservation (December 1997) (on file with the Bureau of Historic Preservation, Tallahassee, Florida).

113. See 36 C.F.R. § 61.5(c) (1997).

114. See id.

115. Id. § 61.5(c)(1) (emphasis added).

116. See id.

117. See id. § 61.5(c)(2) (discussing appointing experts in areas such as "architecture, history, architectural history, planning, archeology, or other historic preservation related disciplines, such as urban planning").

118. See id.

119. See id. § 61.5(c)(2)(i).

ventory historic properties[120] and to provide for adequate public participation in the local historic preservation program.[121]

As the federal regulations anticipated, Florida has adopted more explicit criteria for its CLG program.[122] To qualify as a CLG in Florida, a local community must adopt a historic preservation ordinance.[123] Such an ordinance must include: a statement of purpose for the ordinance and the implementing commission authorizing the commission to designate and protect historic properties;[124] criteria for designating historic properties that are similar to those contained in the NHPA for designating properties to the National Register of Historic Places;[125] boundaries for any historic districts or landmarks, or a mechanism for establishing such boundaries;[126] authority for review of alterations, relocations, demolition, or new construction within a historic district or affecting historic landmarks, and procedures for such review;[127] criteria for reviewing alteration, relocation, demolition and construction proposals equivalent to those contained in the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings;[128] enforcement and penalty provisions;[129] an appeals process;[130] and public and owner notification and public hearings regarding designation of historic properties and the review of applications.[131]

In addition to these provisions, the guidelines include requirements that apply to the historic preservation commissions established by such ordinances. A commission must have sufficient staff to enable them to carry out their work, must meet publicly at least four times per year, and must make records of its decisions available to the public.[132] Commissions must include professional members from the disciplines of architecture, history, architectural history, plan-

120. See id. § 61.5(c)(3).
121. See id. § 61.5(c)(4).
122. See BUREAU OF HISTORIC PRESERVATION, FLORIDA DEP'T OF ST., FLORIDA CERTIFIED LOCAL GOVERNMENT GUIDELINES Part B (1993) (incorporated by reference in 1 FLA. ADMIN. CODE R. 1A-38.007 (1997)) [hereinafter LOCAL GOV'T GUIDELINES].
123. See id. Part B.1. The federal regulations do not require the adoption of a local ordinance if the local government is required to enforce state laws for designating and protecting historic properties. See 36 C.F.R. § 61.5(c)(1) (1997). Florida does not have a statewide law for the designation and protection of historic resources. Thus, to qualify as a CLG, local governments must adopt their own historic preservation ordinances. See generally, HUNT ET AL., supra note 11, ch. 1, at 5 (providing an overview of the Florida historic preservation scheme).
124. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.a.
125. See id. Part B.1.b; see also discussion supra Part II.A.1.
126. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.b.
127. See id. Part B.1.c.
128. See id. Part B.1.d.
129. See id. Part B.1.e.
130. See id.
131. See id. Part B.1.g.
132. See id. Part B.2.

ning, archaeology, or other historic-preservation-related disciplines such as urban planning, American studies, American civilization, cultural geography or cultural anthropology.[133]

These national and state requirements for participation in the CLG program should insulate participating local governments from vagueness challenges.[134] The CLG program requires local ordinances to list criteria equivalent to those contained in the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings.[135] These nationally accepted standards are sufficiently specific to withstand a vagueness challenge.[136] Thus, even though an ordinance approved under the CLG program may contain arguably vague criteria and standards such as compatible with the "character of the property, neighborhood or environment"[137] or "essential form and integrity of the structure,"[138] the use of the Secretary of the Interior's Standards provides additional criteria that should thwart vagueness challenges.

The CLG program requires commissions to establish a system to survey and inventory historic properties. The Florida Certified Local Government Guidelines state that a "detailed inventory of the designated districts, sites, and structures within the jurisdiction of the local government must be maintained."[139] The material constituting such an inventory must be available for public inspection.[140] In the face of a vagueness challenge, not only should the "observable character"[141] of the district or structure be available, but the inventory material should provide an "abundant and accurate compilation of data to guide the Commission."[142] Thus, the discretion of the historic preservation commissions is limited by the historical documentation and the physical character of the districts.[143]

The CLG program requires historic preservation commission members to have specific professional experience,[144] thus ensuring that decisions are rational and well-informed, as opposed to arbitrary and capricious.[145] In addition, CLGs must provide the right to appeal

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133. See id. Part B.2.c.

134. In addition to the requirements contained in the actual text of a CLG ordinance, other factors guard against vagueness claims. See discussion supra Parts III.B, III.D, and III.E.

135. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.d.

136. See, e.g., Metropolitan Dade County v. P.J. Birds, Inc., 654 So. 2d 170, 176 (Fla. 3d DCA 1995).

137. CITY OF DELAND, FLA., MUNICIPAL CODE § 33-34.03(B)(i) (1995).

138. Id. § 33-34.03(B)(j).

139. LOCAL GOV'T GUIDELINES, supra note 122, Part B.3.b.

140. See id. Part B.3.d.

141. Maher v. City of New Orleans, 516 F.2d 1051, 1063 (5th Cir. 1975).

142. Id.

143. See discussion supra Part III.B.

144. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.2.c.

145. See discussion supra Part III.C.1.

decisions.[146] This right is frequently relied upon as a basis for holding standards and criteria adequate to withstand a vagueness challenge.[147] However, the CLG program does not require that the appeal of a decision by the historic preservation commission be to a legislative body or a judicial authority.[148] Therefore, a local ordinance can provide the right to appeal to another administrative body, such as a planning commission. In such a case, a court is less likely to view the right to appeal as providing adequate protection against arbitrary enforcement.[149]

B. Ordinances Not Qualified Under the Certified Local Government Program

Of the sixty local historic preservation ordinances currently in effect in Florida,[150] twenty-five are not qualified under the CLG program.[151] This section examines three such ordinances—from the cities of Daytona Beach, Newberry, and Chipley—for their compliance with factors discussed in Part III of this Comment. Non-CLG ordinances are widely divergent concerning both specificity of design criteria and procedural protections; some are likely to fare well against vagueness challenges, while others are not.

1. Additional Criteria and Guidelines

As noted previously, courts have recognized that the text of a historic preservation ordinance can be clarified by accompanying criteria and guidelines.[152] Therefore, the City of Daytona Beach requires that when the Daytona Beach Historic Preservation Board evaluates proposed projects that may affect a historic property or district, it must abide by the Secretary of the Interior's Standards as well as design guidelines accompanying the designation of the individual site or district.[153] In sharp contrast to this requirement, neither the

146. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.e.

147. See discussion supra Part III.C.2.

148. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.e (stating only that a "right of and mechanism for appeal must exist in the legislation").

149. See discussion supra Part III.C.2.

150. See supra note 46.

151. These include Boca Raton, Bradenton, Broward County, Chipley, Clay County, Dade City, Daytona Beach, Hialeah, Indian River County, Marion County, McIntosh, Miami Beach, Miami Springs, Monroe County, Newberry, Opa-Locka, Ormond Beach, Palatka, Quincy, Seminole County, South Miami, Sugar Loaf Key, Valparaiso, Volusia County, and Washington County.

152. See discussion supra Part III.A.

153. See CITY OF DAYTONA BEACH, FLA., ORDINANCE No. 86-51, art. 5.5 (1986). The Daytona Beach ordinance requires that individual designations "prescribe . . . the types of construction, alteration, demolition and removal that should be reviewed for appropriateness; [and] the design guidelines for applying the criteria for review of appropriateness." Id. art. 4.7.

Chipley ordinance[154] nor the Newberry ordinance[155] reference any additional guidelines or criteria outside their ordinances. The Chipley Landmark Commission is authorized to review building projects that may adversely affect historic properties.[156] However, the Commission is only to "determine whether in its opinion, the proposed work would adversely change . . . any exterior architectural feature . . . or would lack harmony with the historic site . . . or adversely affect the artistic quality of the surrounding district."[157] Similarly, the Newberry Historic Architectural Review Board evaluates building proposals based only upon the imprecise guidelines set forth in the ordinance.[158] Furthermore, neither ordinance makes reference to the Secretary of the Interior's Standards.[159]

2. Historical Documentation and Physical Character

As noted previously, courts have recognized that historical documentation and the physical character of a historic property or district can be used to clarify the meaning of seemingly imprecise terms.[160] The Daytona Beach Preservation Board is responsible for undertaking "an ongoing survey and research effort . . . to identify and professionally document [sites] that have historic, architectural, or archaeological importance, interest or value."[161] Moreover, the board is to evaluate any prior surveys and studies and "compile appropriate descriptions, facts, and photographs."[162] Likewise, the Newberry Historic Architectural Review Board is charged with acquiring and maintaining information and materials, such as maps and photographs, necessary for understanding the history of the city and providing for historic preservation.[163] Thus, in the event of a vagueness challenge to either the Daytona Beach or Newberry ordinance, there will be ample documentation available to further illuminate the written standards. In contrast, while the Chipley Landmark Commission is responsible for recommending sites for listing on the local register

154. See CHIPLEY, FLA., ORDINANCE No. 645 (1985).
155. See CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11 (1992).
156. See CHIPLEY, FLA., ORDINANCE No. 645, § 29-142(3)(g) (1985).
157. Id. § 29-142(6)(l)(a)(iv).
158. See CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11, § 11.11.4 (1992). The guidelines state, in part, that the Board shall determine "the effect of the proposed work on the landmark or the property upon which such work is to be done [and] the relationship between such work and other structures on the landmark site or other property in the historic district." Id.
159. The importance of referencing the Secretary's Standards is discussed in Part III.A of this comment.
160. See discussion supra Part III.B.
161. CITY OF DAYTONA BEACH, FLA., ORDINANCE No. 86-51, art. 4.2 (1986).
162. Id.
163. See CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11, § 3.3.3 (1992).

of historic places, there is no explicit survey and documentation requirement.[164]

3. Procedural Safeguards

As noted previously, requiring an implementing commission to be comprised partly of experts in historic-preservation-related disciplines helps guard against arbitrary and capricious enforcement.[165] The Daytona Beach, Chipley, and Newberry ordinances each require their implementing commissions to include such experts.[166] The right to appeal a decision of the implementing commission also helps guard against arbitrary and capricious enforcement.[167] Both the Daytona Beach and Newberry ordinances allow an appeal to their respective city commissions.[168] However, the Chipley ordinance does not provide for a right to appeal to either a legislative, judicial, or administrative body. Lastly, a procedure for an informal preapplication review helps guard against vagueness claims.[169] The Daytona Beach ordinance provides for such a procedure,[170] but the Chipley and Newberry ordinances do not.[171]

V. RECOMMENDATIONS

A. Ordinances Qualified Under the Certified Local Government Program

The criteria for CLG participation established by the Bureau of Historic Preservation are sufficiently thorough to withstand most vagueness challenges.[172] However, improvements can further insulate local governments from such challenges and promote better rela-

164. See CHIPLEY, FLA., ORDINANCE No. 645, § 29-142(3) (1985) (listing the duties and responsibilities of the Landmark Commission).

165. See discussion supra Part III.C.

166. See CHIPLEY, FLA., ORDINANCE No. 645, § 29-142(4) (1985); CITY OF DAYTONA BEACH, FLA., ORDINANCE No. 86-51, art. 3.2 (1986); CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11, § 3.3.1 (1992).

167. See discussion supra Part III.C.2.

168. See CITY OF DAYTONA BEACH, FLA., ORDINANCE No. 86-51, art. 5.7 (1986); CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11, § 11.11.2 (1992).

169. See discussion supra Part III.C.3.

170. See CITY OF DAYTONA BEACH, FLA., ORDINANCE No. 86-51, art. 5.2 (1986) (stating that "any applicant may request a meeting with the Preservation Board during the review period").

171. See CITY OF NEWBERRY, FLA., MUNICIPAL CODE art. 11, § 3.3.2 (1992) (listing procedures to be followed by the Historic Architectural Review Board); CHIPLEY, FLA., ORDINANCE No. 645, § 29-142(4) (1985) (noting that "[n]o business shall be conducted by the Commission without the presence of a majority of voting members").

172. See discussion supra Part IV.A.

tions between historic preservation commissions and owners of historic property.[173]

1. Requiring Additional Criteria and Guidelines

One of the most difficult issues commissions face is developing an effective set of design guidelines.[174] Many commissions consider the preparation of local design guidelines as one of their greatest accomplishments.[175] As discussed in Part III.A, such criteria and guidelines provide the essential design characteristics of the buildings or districts in question. The historic preservation commission implementing the ordinance or the property owner seeking to alter his or her property can use the criteria to determine which design characteristics and elements are essential in preserving the property.[176] However, the standards set by Florida for communities to achieve CLG status do not require criteria for the review of proposals any more detailed than the Secretary of the Interior's Standards for Rehabilitation. The Secretary's Standards state, in part, that stabilization work must be "physically and visually compatible"[177] and that "[t]he historic character of a property will be retained and preserved."[178]

While criteria based on the Secretary's Standards are generally upheld as sufficient, many property owners are likely to perceive them as impermissibly vague. Indeed, the Secretary's Standards are a far cry from guidelines tailored to the specific historic properties and districts governed by a local ordinance.[179] When such guidelines are available, property owners are less likely to experience frustration and less likely to file lawsuits. Florida's local historic preservation ordinances could be strengthened by requiring each ordinance to be accompanied by guidelines tailored to the historic properties regulated by the ordinance rather than the generally applicable Secretary of the Interior's Standards.[180]

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173. In evaluating whether or not to implement the changes recommended in this section, the Florida Bureau of Historic Preservation must weigh the projected benefit of such changes against the projected cost to local commissions. Such a cost/benefit analysis is outside the scope of this Comment.

174. See USPCIP REPORT, supra note 1, at 16.

175. See id.

176. See Nadelson v. Township of Millburn, 688 A.2d 672, 678 (N.J. Super. Ct. Law Div. 1996).

177. 36 C.F.R. § 68.3(a)(3) (1997).

178. Id. § 68.3(a)(2).

179. For example, the criteria and guidelines promulgated by the West Palm Beach Historic Preservation Commission provide detailed descriptions of properties and districts designated as historic and describe the significance of architectural features such as roofs, porches, and chimneys. See BRANDENBURG & WATERS, supra note 61, at 15-27.

180. As previously noted, overly specific guidelines limit the flexibility, and thus the effectiveness, of the commissions. See discussion supra Part III.E. However, by locating the specific guidelines outside the text of the ordinance, they can be amended more easily than when they are in the actual text of the ordinance itself. In any event, an implementing

2. Requiring an Informal Review Procedure

Providing an informal, preapplication review procedure during which property owners can meet with commission members to discuss their plans for alterations or new construction helps mitigate claims that standards applied by the commission are vague.[181] Requiring local governments seeking CLG status to provide such a procedure would not be onerous and would provide considerable insulation from vagueness challenges. In addition, this requirement would promote openness and accessibility, almost certainly creating a more amicable relationship between the regulating commission and the regulated property owners.

3. Requiring an Appeals Process

The right to appeal decisions of a historic preservation commission to another body is frequently relied upon as a basis for holding standards and criteria adequate for withstanding a vagueness challenge.[182] While the standards for CLG certification require that local governments provide such a right, they do not specify to what body the appeal should be made.[183] The requirement should provide for appeals to either a legislative or judicial body, thus ensuring greater protection against arbitrary and discriminatory application of the ordinance than if appeal were to another administrative body, such as a planning commission or zoning board.[184]

B. Ordinances Not Qualified Under the Certified Local Government Program

Non-CLG historic preservation ordinances present an entirely different problem than CLG ordinances. Broad legislation authorizes local governments to exercise their police power in furtherance of historic preservation.[185] Absent a legislative mandate, the Florida Bureau of Historic Preservation cannot require local communities to enact historic preservation ordinances or to refine ones currently in effect. The Bureau provides assistance and services to both non-CLG and CLG qualified programs.[186] It would not be prudent to withdraw services from non-CLG communities, as doing so would lead to less protection of historic resources. Thus, absent the ability to make re-

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commission should promulgate guidelines that strike the proper balance between specificity and flexibility.

181. See discussion supra Part III.C.3.

182. See discussion supra Part III.C.2.

183. See LOCAL GOV'T GUIDELINES, supra note 122, Part B.1.e.

184. See discussion supra Part III.C.2.

185. See discussion supra Part II.A.2.

186. See generally LOCAL GOV'T GUIDELINES, supra note 122, Part B (stating that acceptance into the CLG program is gained through the Bureau of Historic Preservation).

quirements of local governments or to withdraw support and services, the most feasible alternatives are to either offer additional incentives for local communities to participate in the CLG program or to establish a second-tier certification program with less stringent requirements than the CLG program.

Currently, there are many benefits offered to communities that participate in the CLG program.[187] Additional incentives would most likely be financial. However, with federal and state funding for historic preservation shrinking, establishing a second-tier certification program is a more feasible alternative. To insulate against vagueness claims, such a certification program should, at a minimum, require design review criteria based upon the Secretary of the Interior's Standards,[188] mandate that commission members have expertise in historic-preservation-related disciplines,[189] and provide for an appeals process to either a legislative or judicial body.[190] However, the Bureau of Historic Preservation should also include additional requirements to ensure adequate protection of historic properties and to insulate local governments against legal challenges other than those based on the vagueness doctrine.[191]

VI. CONCLUSION

Because the protection of historic resources occurs primarily at the local level, insuring the continued validity of Florida's local historic preservation ordinances is the best way to insure the continued protection of Florida's invaluable historic resources. Without careful attention to legal issues, historic preservation efforts will be thwarted and resources will be lost. A successful vagueness challenge can invalidate an entire local historic preservation ordinance. In the time required to enact a new ordinance, valuable resources may further deteriorate or be destroyed. While vagueness challenges can be won in the courtroom, the better solution is to provide adequate design review criteria and procedural safeguards so that they can be avoided altogether.

As discussed, many of Florida's local historic preservation ordinances contain sufficient criteria and procedural safeguards that will enable them to withstand vagueness challenges. However, others do not. If implemented, the recommendations made in this Comment

187. See discussion supra Part IV.A.
188. See discussion supra Part III.A.
189. See discussion supra Part III.C.1.
190. See discussion supra Part III.C.2.
191. As discussed in the introduction to this Comment, local historic preservation ordinances should be concerned with the protection of historic resources and withstanding legal challenges. Local commissions face legal challenges based not only on the vagueness doctrine, but also on procedural due process, private property rights, the ADA, and the designation of religious properties. See supra notes 2-5 and accompanying text.

will help further strengthen those ordinances that are already well insulated against vagueness claims, and provide minimum protections to those ordinances that remain vulnerable. At the same time, the proposed changes will not lead to overly specific criteria and guidelines that will hinder the effectiveness of the implementing commissions.