

No. 62563-2-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

WILLIAM CONNER and MARILYN CONNER,

Petitioners/Appellants,

v.

CITY OF SEATTLE,

Respondents.

On Appeal from the Superior Court of the
State of Washington for King County

**AMICUS CURIAE BRIEF OF NATIONAL TRUST FOR HISTORIC
PRESERVATION IN SUPPORT OF RESPONDENT CITY OF
SEATTLE**

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IDENTITY AND INTERESTS OF AMICUS CURIAE

The National Trust for Historic Preservation is a private, charitable, educational, nonprofit corporation chartered by Congress in 1949 to protect America's historic resources, and to facilitate public participation in the preservation of our nation's heritage. *See* 16 U.S.C. §§ 461, 468. The National Trust is headquartered in Washington, D.C., and has nine offices around the country, including a regional office in San Francisco, which is specifically responsive to Washington state concerns, and a newly formed Preservation Green Lab based in Seattle.

With the support of almost 240,000 members nationwide, and nearly 4,000 members in Washington, the National Trust has a vital interest in securing judicial, administrative, and legislative decisions that uphold the validity and effectiveness of local land-use regulations and state and federal laws that protect our nation's historic and cultural resources. The National Trust has participated as a party or *amicus curiae* in more than 200 cases in federal and state courts since 1970.¹

¹ Examples of Washington cases in which the National Trust has participated as amicus include *First Covenant Church v. City of Seattle*, 114 Wn. 2d 392, 787 P.2d 1352 (Wash. 1990), *vacated & remanded*, 499 U.S. 901 (1991), *on remand*, 120 Wn. 2d 203, 840 P.2d 174 (Wash. 1992); *First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preserv. Bd.*, 129 Wn. 2d 238, 916 P.2d 374 (Wash. 1996); *Munns v. Martin*, 131 Wn. 2d 192, 930 P.2d 318 (Wash. 1997); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn. 2d 30, 26 P.3d 241 (Wash. 2001); and *Friends of First United Church v. City of Seattle*, No. 55731-9-I (Wash. App. Nov. 21, 2005), 2005 Wash. App. LEXIS 2927, *aff'd*, 130 Wn. App. 1031, 2005 Wash. App. LEXIS 3377 (Wash. Nov. 21, 2005).

The National Trust's brief will assist the Court in understanding and deciding the important issues presented by this case by providing a national perspective on the substantial case law addressing vagueness challenges to historic preservation ordinances throughout the United States.

ISSUE ADDRESSED BY AMICUS CURIAE

Whether Seattle's historic preservation ordinance, as applied to Appellants, is void for vagueness.

SUMMARY OF ARGUMENT

Appellants, William and Marilyn Conner, maintain that Seattle's historic preservation ordinance is unconstitutionally vague as applied by the Landmarks Preservation Board to their property. In essence they argue that, because the standards governing the issuance of certificates of approvals in the city's preservation ordinance are not, in effect, prescriptive, with specific, uniform, measurable limits as to size, height, setback, etc., they are unconstitutionally vague.

Historic preservation does not lend itself to regulation by quantifiable formulas, and the U.S. and Washington Constitutions do not insist on such a result, even though such standards may be preferred by the Appellants. As courts across the United States have recognized, standards

of review in preservation ordinances are not by their nature appropriate for bright-line rules or formulaic application, because of widely diverse variations in the types of specific resources protected by historic preservation ordinances and the locations in which they are sited. Yet these standards fully comport with due process and are not unconstitutionally vague because they take on meaning when considered in the specific context to which they are applied. Moreover, courts have ruled that any conceivable concerns relating to potential abuses of discretion are sufficiently addressed through the many procedural safeguards contained within a preservation ordinance, including review by board members knowledgeable in historic preservation, specific notice and hearing requirements, and provisions for appeal.

Consistent with 42 court decisions in 24 states, including the State of Washington, and the District of Columbia, (see n.2 below), Seattle's historic preservation ordinance and its standards for review of applications for certificates of approval are not unconstitutionally vague. These standards provided Appellants with fair notice of the law's requirements and protect against arbitrary enforcement. Yet this overwhelming body of case law is largely ignored both by the Petitioners and Amicus Curiae Pacific Legal Foundation.

ARGUMENT

I

THE LANDMARKS PRESERVATION ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED

A. The Constitutionality of Historic Preservation Standards of Review is Well-Established.

Standards applied by historic preservation boards in their review of applications to alter historic landmarks are, out of necessity, contextual standards that require case-by-case consideration of the individual historic site, rather than quantified rules about size and location that could be applied without any discretion. To borrow a phrase from the Missouri Court of Appeals, in upholding the constitutionality of St Louis's preservation law, *U-Haul Co. v. City of St. Louis*, 855 S.W. 424, 426 (Mo. App. 1993), it would be "practically impossible" to develop standards that would eliminate the need to exercise discretionary review without impairing the underlying purpose of such ordinances, which is to preserve historic resources. As the federal district court observed in *International College of Surgeons v. City of Chicago*, Nos. 91 C 1587 and 91 C 5564, 1994 U.S. Dist. LEXIS 18989, at *45 (N.D. Ill. Jan. 9, 1995), *rev'd on other grounds*, 91 F.3d 981 (7th Cir. 1996), *rev'd*, 522 U.S. 156 (1997), *orig. opinion aff'd*, 153 F.3d 356 (7th Cir. 1998), upholding the criteria in Chicago's landmark ordinance against a due process claim, "[t]he nature

of the ordinance's objectives and the complexity of the problems with which the ordinance is concerned negate the need to set more precise standards." See also *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 16 (N.M. 1964) (impossible to rigidly and literally set forth every detail without impairing underlying public purpose); and *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 454 (N.C. 1979) ("it is a practical necessity that a substantial degree of discretionary authority, guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances").

This imprecision, however, does not mean these standards are impermissibly vague. The U.S. and Washington Constitutions are not so demanding. Indeed, as the U.S. Supreme Court, in upholding an anti-noise ordinance in *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), recognized, "we can never expect mathematical certainty from our language" and "we think it is clear what the ordinance as a whole prohibits." Thus, in the State of Washington, this court upheld the Town of La Conner's denial of application to demolish or relocate two buildings in a historic preservation district against a vagueness challenge in *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 622, 987 P.2d 103, 107 (Wash. App. 1999), *review denied*, 140 Wn. 2d 1014; 5 P.3d 9 (2000).

Similarly, courts have upheld standards in historic preservation ordinances in 24 states and the District of Columbia in 42 separate court decisions.²

² See, e.g., **CALIFORNIA:** *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 426 (Cal. Ct. App. 1973) (ruling that requirements and criteria for approval of signs are not so vague and ambiguous as to permit arbitrary action by the board where the ordinance contains sufficiently prescribed standards, the standards can be amended only with council approval, and decisions by the board are subject to council review). **COLORADO:** *Kruse v. Town of Castle Rock*, 192 P.3d 591, 598-600 (Colo. App. 2008) (provisions in preservation ordinance relating to designation of property as historic are not unconstitutionally vague on their face or as applied); *South of Second Assocs. v. City of Georgetown*, 580 P.2d 807, 811 (Colo. 1978) (“[H]istorical and/or architectural character” language of the ordinance, when considered in conjunction with the objective factors contained in the ordinance, and in the context of the public purposes to be achieved, is sufficiently definite to pass constitutional muster). **CONNECTICUT:** *Figarksy v. City of Norwich*, 368 A.2d 163, 170 (Conn. 1976) (Norwich preservation ordinance does not constitute “vague aesthetic legislation” and sets out, “with some specificity the factors to be considered by the commission in passing upon an application for a certificate of appropriateness”). **DISTRICT OF COLUMBIA:** *Kalorama Heights Ltd. Partnership v. D.C. Dept. of Housing & Community Dev.*, 655 A.2d 865, 875 (D.C. App. 1995) (“special merit” provision is not standardless or unconstitutionally vague, in view of the purposes of the preservation act, the context in which the act is applied in this case, and judicial decisions clarifying the term’s meaning); *Citizens Committee to Save Historic Rhodes Tavern v. D.C. Dept. of Housing & Community Dev.*, 432 A.2d 710, 719 (D.C. App. 1981) (preservation law did not delegate unfettered authority to Mayor’s agent where “[c]oncerns of aesthetic or historical preservation do not admit to precise quantification,” other courts have found “historical and/or architectural” language sufficiently definite to pass constitutional muster, and objective factors, such as height, appearance, texture, color and nature of materials guide the Mayor’s Agent in making his or her decision). **FLORIDA:** *Estate of Tippett v. City of Miami*, 645 So. 2d 533, 536-38 (Fla. App. 1994) (concurring opinion) (concurrence with decision to dismiss challenge to designation of Miami historic district on ripeness grounds, where, “[n]umerous courts have rejected vagueness challenges to similar historic preservation ordinances,” (citations omitted), and “there are several procedural safeguards in the [Miami] ordinance which reinforce the legislative control of the Board’s exercise of its discretion”); *Friends of the Great Southern, Inc. v. City of Hollywood*, 964 So. 2d 827, 831 (Fla. App. 2007) (city’s grant of certificate of appropriateness upheld against claim that the criteria for granting certificates under ordinance are unconstitutionally vague where ordinance uses mandatory language, commission may not consider factors outside the criteria provided, and the criteria are objective and sufficiently detailed); *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170 (Fla. App. 1995) (due process rights not violated by board’s application of “over fifty standard” in historic preservation ordinance and language was sufficient to guide board in administration of preservation law, where standard was patterned by federal law, clarified by judicial and administrative interpretation, and greater specificity would hinder the commission). **ILLINOIS:** *Int’l. Coll. of Surgeons v. City of Chicago*, Nos. 91 C 1587 and 91 C 5564 (N.D. Ill. Jan. 9, 1995), 1994 U.S. Dist. LEXIS 18989, *34-*50, *rev’d on other grounds*, 91 F.3d 981 (7th Cir. 1996), *rev’d*, 522

U.S. 156 (1997), *orig. opinion aff'd*, 153 F.3d 356 (7th Cir. 1998) (landmarks Ordinance does not unconstitutionally delegate legislation power to preservation commission where the standards are intelligible and not unconstitutionally vague in view of the “nature of the ordinance’s objectives and the complexity of the problems with which the ordinance is concerned negate the need to set more precise standards”). **INDIANA:** *Boczar v. Kingen*, 6 Fed. Appx. 471, 475-76 (7th Cir. 2001), *cert. denied*, 534 U.S. 952 (U.S. 2001) (standards under Indiana preservation statute are not unconstitutionally vague); *Tourkow v. City of Fort Wayne*, 563 N.E.2d 151, 153 (Ind. App. 1990) (standards in preservation ordinance relating to the approval and denial of applications for certificates of appropriateness are not unconstitutionally vague). **LOUISIANA:** *Maher v. City of New Orleans*, 516 F.2d 1051, 1062-63 (5th Cir. 1075) (Vieux Carre ordinance provides adequate legislative direction to the Commission to enable it to perform its functions consonant with the due process clause where the ordinance delineates the district, defines what alterations in which locations require approval, specifies the qualifications and manner of selection of board members, and provides an “elaborate decision-making and appeal process”). **MARYLAND:** *Faulkner v. Town of Chestertown*, 428 A.2d 879, 885 (Md. 1981) (state enabling act and local preservation ordinance are not unconstitutionally vague where people of ordinary intelligence would be able to comprehend the meaning. “In plain language what the ordinance and the Act are saying is that if one proposes to do anything to a building within a historic district which will involve changes to the exterior appearance of the structure visible from a street or alley in the district, then one must obtain a permit”). **MASSACHUSETTS:** *Opinion of Justices to Senate* (Nantucket), 128 N.E.2d 557, 562 (Mass. 1955) (proposed historic preservation ordinance is “not too indefinite or lacking in sufficient standards”); *Paananen v. Old King’s Hwy. Reg’l Hist. Dist. Comm’n*, 1991 Mass. App. Div. 135, 1991 Mass. App. Div. LEXIS 17 (1991) (requirements of the Old King’s Highway Regional Historic District Act “are not too indefinite or lacking in sufficient standards” where “committees shall consider, among other things, the historical value and significance of the building or structure, the general design, arrangement, texture, material and color of the features involved and the relation of such factors to similar factors of buildings and structures in the immediate surroundings” and “settings, relative size of buildings and structures but shall not consider detailed designs, interior arrangements and other building features not subject to public view”); *Sleeper v. Old King’s Hwy Reg’l Hist. Dist. Comm’n*, 417 N.E.2d 987, 989-90 (Mass. 1981) (certificate of appropriateness criteria are not impermissibly vague where “[a] committee is to consider the historical value and significance of the structure, the general design, arrangement, texture, material, color, the setting, and immediate surroundings, with a view toward avoiding exterior effects “obviously incongruous to the purposes set forth in this act” and “[s]imilar elements of appropriateness” have been found by other courts to be “sufficient”). **MINNESOTA:** *Coalition for Non-profit Student Housing v. City of Minneapolis*, No. A03-1873 (Minn. App. Oct. 5, 2004), 2004 Minn. App. LEXIS 1149, *18-*19 (unpublished) (designation criteria of the city’s Heritage Preservation Regulations, contained in the Minneapolis Code of Ordinances, is not unconstitutionally vague); *Handicraft Block Ltd. Partnership v. City of Minneapolis*, 611 N.W.2d 16, 22-23 (Minn. 2000) (standards for designation “when applied to a specific property, establish specific criteria that curtail the discretion of the City when it chooses to designate that property”). **MISSOURI:** *Lafayette Park Baptist Church, v. Board Of Adjustment Of St. Louis*, 599 S.W.2d 61, 65 (Mo. App. 1980) (property owner was not deprived of due process under standards for demolition in preservation

ordinance, where administrative discretion in denying demolition permits is controlled by judicial interpretation of “the words `degenerated beyond feasible limits for rehabilitation’”); *U-Haul Co. v. City of St. Louis*, 855 S.W. 424, 426 (Mo. App. 1993) (Preservation ordinance is not unconstitutionally vague where decisions are made on by a commission comprised of 11 members with expertise in architecture, history, and so forth; it advises owner of minimums that must be met; and it provides sufficient guidelines to preclude arbitrary enforcement. It would be “practically impossible and socially undesirable” for the city to list all minimum exterior standards). **NEW HAMPSHIRE:** *Town of Deering v. Tibbetts*, 202 A.2d 232, 235-36 (N.H. 1964) (the “criterion which the ordinance provides for the determination of whether a structure shall be approved or disapproved” is not so vague “as to furnish no valid standard to guide the selectmen in its administration”). **NEW JERSEY:** *Nadelson v. Township of Millburn*, 688 A.2d 672, 677-79 (N.J. Super. 1996) (Requirement that alteration or addition not be incongruous with purpose of historic preservation article was not impermissibly vague in all its applications” where “the characteristics of the Short Hills Park Historic District’s physical environment to be sufficiently distinctive to lend reasonable guidance to the Commission in applying the ordinance’s standard of `incongruity’”; the ordinance “includes and is surrounded by criteria which supplement the adequacy of the standards;” the ordinance limits the Commission’s discretion by requiring members of the Commission to be “knowledgeable in building design and construction or architectural history ... [and] knowledgeable of, or who [have] a demonstrated interest in, local history;” and it provides an appeal process and an informal review process that allows an applicant “to present a proposal for informal review and comment by the Commission”); *Pansini Custom Design Assocs., LLC v. City of Ocean City*, No. A-5635-99T5 (N.J. App. Div. Apr. 9, 2005), 2002 WL 549413, *3 (N.J. Super. App. Div.), *review denied*, 803 A.2d 1161 (N.J. 2002) (the phrases, “reasonably related to fair market value” and “reasonable assurance,” as set forth under Section 25-1800.10.1d of the Ocean City Preservation Ordinance are not unconstitutionally vague on their face or as applied in view of “the contextual background of the purpose of the enactment”). **NEW MEXICO:** *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 14-19 (N.M. 1964) (“[T]here is no substantial basis for a claim that the ordinance vests uncontrolled discretion in an administrative body, nor does it appear that the ordinance fails to furnish the necessary standards to guide the administrative body designated by the ordinance” where, the historic style of architecture is described in detail; the committee’s determinations must be based on the standard of “harmony with adjacent buildings, preservation of historical and characteristic qualities, and conformity to the Old Santa Fe Style” and the ordinance includes “specific safeguards to insure against arbitrary action or unrestricted administrative discretion”). **NEW YORK:** *Rector, Wardens & Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 728 F. Supp. 958, 964-65 (S.D.N.Y. 1989), *aff’d*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (legal standards for designation of a landmark and for granting a certificate of appropriateness are not impermissibly vague in violation of the due process clause of the Fourteenth Amendment); *Palin v. City of Rochester*, 765 N.Y.S.2d 550 (App. Div. 2003) (denial of certificate of appropriateness affirmed where there was “no merit to petitioner’s challenge to the constitutionality of the preservation ordinance” as unconstitutionally vague or as an overbroad delegation of authority to the Board”); *Russo v. Beckelman*, 611 N.Y.S.2d 869, 871 (App. Div. 1994) (decision of lower court, *Russo v. Beckelman*, No. 14635/91 (N.Y. Sup. Ct. Apr. 24, 1992), upholding constitutionality of New York City’s

criteria for designation against void for vagueness claim, affirmed, rejecting the claim “the relevant provisions of Landmarks Preservation Law (Administrative Code § 25-302, 303) are unconstitutionally vague or overbroad” in view of *Penn Cent. Transp. Co. v New York City*, 438 U.S. 104 and *Rector, Warden & Members of the Vestry of St. Bartholomew’s Church v City of New York*; *Salvatore v. City of Schenectady*, 530 N.Y.S.2d 863, 864-65 (App. Div. 1988) (ordinance and compatibility standards under preservation ordinance are not unconstitutionally vague. Standards “are sufficiently precise and objectively verifiable to give fair notice and provide minimal guidelines to safeguard against arbitrary or discriminatory enforcement,” and “are clearly consistent with the legitimate legislative purposes of historic district regulation”). **NORTH CAROLINA:** *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 453-55 (N.C. 1979) (ordinance governing changes to properties within historic district, which prevents activities “which would be incongruous with the historic aspects of the district” does not rise to the level of an unconstitutionally delegation of legislative power. Standard of incongruity is a contextual standard, which derives its meaning “from the total physical environment of the Historic District,” is sufficient to limit the discretion of the commission, where characteristics in historic districts are “distinctive” and “objectively ascertainable;” a majority of the members of a historic district have demonstrated special interest, experience, or education in history or architecture; it is necessary to provide a substantial degree of discretionary authority to achieve the policies and goals of the legislature; and procedural safeguards serve as an additional check). **NORTH DAKOTA:** *County of Stutsman v. State Historical Soc’y of N. Dakota*, 371 N.W.2d 321, 327-28 (1985) (legislature’s delegation of power and authority to State Historical Board to place historical sites on historical sites on state registry is not an unconstitutional delegation of its legislative power and the term “historical value” is not unconstitutionally vague “when considered within the context of the object and policy of our Chapter on ‘Preservation of Historic Sites and Antiquities;” and the plain, ordinary, and commonly understood meaning of the phrase.” The “Board’s administrative construction, is a reasonably clear guideline and a sufficiently definite standard to pass constitutional muster. Minutely designated standards are not required”). **OHIO:** *City of Springfield v. Pullins*, No. 2927 (Ohio App. Oct. 5, 1992), 1992 Ohio App. LEXIS 5189, *9-*12 (“Springfield Ordinance 1321 sets forth sufficient criteria to guide the Landmarks Commission in the exercise of its discretion and is therefore constitutional,” where the ordinance “contains a policy statement and creates certain standards by which the Landmarks Commission is to be guided in its determination of whether to award a certificate of appropriateness in any given circumstance”); *Village of Hudson v. Albrecht*, 458 N.E.2d 852, 857 (Ohio 1984) (village ordinance “includes standards reasonably necessary to guide the board in the exercise of its discretion” and “does not constitute an unlawful delegation of legislative authority where policies in ordinance and board’s authority is guided by ‘accepted and recognized architectural principles,” as well as other provisions of the zoning code and ordinances of the village”). **PENNSYLVANIA:** *Riel v. City of Bradford*, 485 F.3d 736, 755-56 (3d Cir. 2007) (sign ordinance provisions are not unconstitutionally vague so as to violate first amendment rights where review board’s discretion is limited standards in the ordinance; a nine-member board is composed of “individuals knowledgeable about preservation, as opposed to a single official;” and “applicants have recourse through judicial review process to protect against arbitrary governmental action”); *Park Home v. City of Williamsport*, 680 A.2d 835, 838-39 (Pa. 1996) (Williamsport ordinance is not unconstitutionally vague where challenge amounts

The reasoning behind these numerous decisions is both instructive and persuasive. For example, courts have rejected vagueness challenges to

to no more than generalized claim that provisions contain potential for arbitrary action and plaintiff has “failed to show how the provisions in question are vague or how the Board has applied them in an arbitrary or discriminatory way”). **RHODE ISLAND:** *Bellevue Shopping Ctr. Assocs. v. Chase*, 574 A.2d 760, 764-65 (R.I. 1990) (enabling legislation is not unconstitutionally vague where the purposes of the legislation are “explicitly outlined,” and specific factors for consideration in reviewing applications are delineated. “Although the board’s discretion cannot be entirely eliminated because of the subjective nature of this process, we believe the standards set forth in the historic-zoning legislation sufficiently alert the public of the statute’s scope and meaning”). **SOUTH CAROLINA:** *Burke v. City of Charleston*, 893 F. Supp. 589, 611-12 (D.S.C. 1995), *vacated on jurisdictional grounds*, 139 F.3d 401 (4th Cir. 1998) (city preservation ordinances upheld against due process/vagueness claim where they “sufficiently circumscribe[d] the BAR review process” by requiring the board “to maintain files, drawings, and other documents to serve as general guides in decision-making;” by establishing “a process of informal application review whereby preliminary assessment of compliance and suggestions for modification could be made”; by requiring that a denial “be reduced to writing, with consideration given to certain enumerated factors”). **TEXAS:** *Mayer v. City of Dallas*, 747 F.2d 323, 325-26 (5th Cir. 1984) (district court’s decision, that contested provisions governing issuance of certificate of appropriateness “provide adequate legislative direction to the Commission to enable it to perform its functions consonant with due process” upheld where the plaintiff failed to show “(a) that the regulations themselves did not provide reviewable articulated standards that justified these rulings, or (b) that the standards were arbitrarily applied against him”); *In Re Vermont Nat’l Bank*, 587 A.2d 317, 320 (Vt. 1991) (trial court’s reversal of certificate of appropriateness for demolition of International Style building, on the grounds that building was not historic, upheld where the term “heritage,” as set forth under the city’s ordinance and as construed by the trial court, is not “unconstitutionally void for vagueness”). **WASHINGTON:** *Carpenter v. City of Snohomish*, No. C06-0755-JCC (W.D. Wash. June 13, 2007), 2007 U.S. Dist. LEXIS 42819, *5 (city is entitled to summary judgment on federal due process claims where standards for signs under historic district design code, which specify materials, set forth detailed limits on size, and repeatedly focus on the aesthetics of the 1880-1930s era, are not unconstitutionally vague); *Swoboda v. Town of La Conner*, 97 Wn. 2d App. 613, 622, 987 P.2d 103, 107 (Wash. App. 1999) (phrase, “[t]he proposal shall relate to, and not diminish any physical or visual aspect of the site, neighborhood, and community,” LCMC 15.50.080(2), is not so vague as to be unconstitutional where “the Code contains ascertainable standards with which to implement the general provision of LCMC 15.50.080(2)”). **WISCONSIN:** *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 225 (Wis. 1955) (standard set by ordinance No. 129, which requires the village’s building board to find, as a condition to a permit, “that the exterior architectural appeal and functional plan of the proposed structure will not be so at variance with those of other structures already constructed, or in the course of construction, as to cause a substantial depreciation in the property values of the neighborhood” is “not so indefinite or ambiguous as to subject applicants).

standards under preservation ordinances because the meaning of the standards within the ordinance is capable of being understood by persons of ordinary intelligence, even in the absence of precise, quantified rules.

Courts have upheld terms such as the following:

- “unusual, uncommon, character, and sense of place,” *Kruse v. Town of Castle Rock*, 192 P.3d 591, 598-600 (Colo. App. 2008);
- “historical and architectural character,” *South of Second Assocs. v. City of Georgetown*, 580 P.2d 807, 811 (Colo. 1978);
- “historical and aesthetic interest,” *Russo v. Beckelman*, 611 N.Y.S.2d 869, 871 (App. Div. 1994);
- “historical value,” *County of Stutsman v. State Historical Society of N. Dakota*, 371 N.W.2d 321, 327-28 (N.D. 1985);
- “heritage,” *In Re Vermont Nat’l Bank*, 587 A.2d 317, 320 (Vt. 1991);
- “exemplary architecture,” *Maher v. City of New Orleans*, 516 F.2d 1061, 1062-63 (5th Cir. 1075);
- “special merit,” *Kalorama Heights Limited Partnership v. D.C. Dept. of Housing & Community Dev.*, 655 A.2d 865, 875 (D.C. App. 1995);
- “conspicuous change,” *Tourkow v. City of Fort Wayne*, 563 N.E.2d 151, 153 (Ind. App. 1990);
- “incongruous,” *Opinion of Justices to Senate (Nantucket)*, 128 N.E.2d 557, 562 (Mass. 1955), *Sleeper v. Old King’s Hwy Reg’l Hist. Dist. Comm’n*, 417 N.E.2d 987, 989-90 (Mass. 1981), and *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 453-55 (N.C. 1979);
- “compatible with atmosphere of town,” *Town of Deering v. Tibbetts*, 202 A.2d 232, 235-36 (N.H. 1964); and
- “neighborhood” and “substantial,” *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 225 (Wis. 1955).

Courts, including the Washington Court of Appeals, have found such standards constitutionally sufficient when considered in conjunction

with the purpose behind the preservation law (*South of Second Assocs.*, 580 P.2d at 811; *International College of Surgeons*, 1994 U.S. Dist. LEXIS 18989, at *34; *Opinion of Justices*, 128 N.E.2d at 562; *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 16 (N.M. 1964); *County of Stutsman*, 371 N.W.2d at 327-28 (1985); *City of Springfield v. Pullins*, No. 2927, 1992 Ohio App. LEXIS 5189, at *9 (Ohio App. Oct. 5, 1992)), or in view of the entire preservation law (*see Kruse* at 600; *Int'l College of Surgeons*, 1994 U.S. Dist. LEXIS 18989, at *34; *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 622, 987 P.2d 103, 108 (Wash. App. 1999)).

Significance has been accorded to the fact that preservation standards take on meaning upon consideration of the physical context in which they are applied (*see Kalorama Heights*, 655 A.2d at 875; *Citizens Committee to Save Historic Rhodes Tavern v. D.C. Dept. of Housing & Community Dev.*, 432 A.2d 710, 719 (D.C. App. 1981); *Maher*, 516 F.2d at 1063; *Town of Deering*, 202 A.2d 232 at 235-36, *A-S-P Assocs.*, 258 S.E.2d at 454; *Carpenter v. City of Snohomish*, No. C06-0755-JCC, 2007 U.S. Dist. LEXIS 42819, at *5 (W.D. Wash. June 13, 2007), and when considered against the physical data and research used to support individual decisions (*Maher*, 516 F.2d at 1063; *Russo v. Beckelman*, No. 14635/91, slip op. at 6 (N.Y. Sup. Ct. Apr. 24, 1992), *aff'd*, 611 N.Y.S.2d 869, 871 (App. Div. 1994); *Burke v. City of Charleston*, 893 F. Supp. 589, 611-12 (D.S.C.

1995), *vacated on jurisdictional grounds*, 139 F.3d 401 (4th Cir. 1998)). Arbitrary decision-making is avoided by requirements that preservation board members be knowledgeable and/or interested in historic preservation. *A-S-P Associates*, 258 S.E.2d at 454; *Estate of Tippett v. City of Miami*, 645 So. 2d 533, 537 (Fla. App. 1994) (Gersten, J., concurring); *Maher*, 516 F.2d at 1062; *Nadelson v. Township of Millburn*, 688 A.2d 672, 678 (N.J. Super. 1996); *Riel v. City of Bradford*, 485 F.3d 736, 755 (3d Cir. 2007); and *Russo*, No.14635/91, slip op. at 6 (N.Y. Sup. Ct. Apr. 24, 1992), *aff'd*, 611 N.Y.S.2d 869, 871 (App. Div. 1994).

Moreover, courts have upheld such standards where the ordinances themselves include numerous procedural safeguards and elaborate decision-making processes, including the ability of property owners to obtain preliminary assessments on proposed projects, and the requirement that decisions must be reduced to writing (*see Citizens Comm. to Save Historic Rhodes Tavern*, 432 A.2d at 719; *Estate of Tippett*, 645 So. 2d at 537; *Maher*, 516 F.2d at 1062-63; *Nadelson*, 688 A.2d at 678; *A-S-P Associates*, 258 S.E.2d at 455; *Burke*, 893 F. Supp. at 611); as well as provisions for appeal to a legislative body (*see Bohannan v. City of San Diego*, 30 Cal. App. 3d 416, 425 (Cal. App. 1973; *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d at 17; *Estate of Tippett*, 645 So. 2d at 537; *Maher*, 516 F.2d at 1062-63; *Nadelson*, 688 A.2d at 678).

Against this overwhelming body of case law, the two decisions relied upon by Amicus Curiae Pacific Legal Foundation—*Texas Antiquities Committee v. Dallas County Community College District*, 554 S.W.2d 924, 928 (Tex. 1977), and *Hanna v. City of Chicago*, ___ N.E. 2d ___, 2009 Ill. App. LEXIS 98 (Ill. App. 2009), *leave to appeal docketed*, No. 108172 (Ill., filed Mar. 11, 2009), are decidedly unpersuasive. In *Texas Antiquities Committee*, a plurality of four of nine justices found that terms set forth in Section 6 of the Texas Antiquities Code, such as “buildings ... and locations of historical ... interest,” were unconstitutionally vague because there were *no* safeguards in the statute. In *Hanna*, the Illinois Appellate Court specifically determined that the seven criteria used to guide the Commission on Chicago Landmarks (“Landmarks Commission”) and the City Council for the designation of landmarks and historic districts were “vague, ambiguous, and overly broad.” 2009 Ill. App. LEXIS 98 *14.³

³ In *Hanna*, the Appellate Court further held that the plaintiffs had adequately stated a cause of action that the Chicago landmark ordinance amounted to an unconstitutional delegation of discretionary authority by the Chicago City Council to the Landmarks Commission, based again on the Appellate Court’s finding that the designation criteria in the ordinance “are unconstitutionally vague and therefore do not adequately provide intelligible standards by which to guide the Commission.” *Id.* at *22. It should also be noted that the delegation authority challenged was not actually exercised in this case, since the City Council itself by ordinances designated both of the historic districts at issue.

These decisions, both of which involved vagueness challenges to the designation of property rather than standards of review for the issuance of certificates of approval, stand in stark contrast to the substantial weight of authority on vagueness challenges to historic preservation ordinances, as established above. Indeed, the North Dakota Supreme Court in *County of Stutsman v. State Historical Society of N. Dakota*, 371 N.W.2d 321, 328 (N.D. 1985), and the New Jersey Superior Court in *Nadelson v. Township of Millburn*, 688 A.2d 672, 676 (N.J. Super. 1996), both specifically found the *Texas Antiquities* case unconvincing. Moreover, the Illinois Appellate Court's decision in *Hanna*, handed down just two months ago, may yet be reversed on appeal. A petition filed by the City of Chicago to review the Illinois Appellate Court's decision is currently pending before the Illinois Supreme Court. *Hanna v. City of Chicago, leave to appeal docketed*, No. 108172 (Ill., filed Mar. 11, 2009).

Even more importantly, this Court has already considered and rejected a vagueness challenge brought under the Town of La Conner's preservation ordinance. In *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 622, 987 P.2d 103, 107-8 (Wash. App. 1999), this Court found standards contained within or referenced by the town's ordinance to be ascertainable and not unconstitutionally vague as applied, including the *Secretary of the Interior's Standards for Rehabilitation* and specific

design review standards contained within the ordinance. Consistent with that decision, the standards applied by the City of Seattle are likewise constitutional. The *Secretary's Standards* are the very same standards applied by the City of Seattle in this case.

B. The Landmark Preservation Board's Application of the Landmarks Preservation Ordinance is Not Unconstitutionally Vague.

The standards applied by the Landmark Preservation Board—in denying its approval of Appellants' request to construct three houses on the lawn of the Satterlee House—are not unconstitutionally vague. These standards, which incorporate the *Secretary of the Interior's Standards for Rehabilitation*, see Landmark Preservation Board's Rules and Regulations, No. 18, are substantially similar to accepted and recognized standards throughout the country and are not unconstitutionally vague as applied. Despite claims to the contrary, the standards provide Appellants with fair notice of the ordinance's scope and what projects may or may not be constructed. Appellants are not required to guess at the meaning of the standards by which their project will be judged. Moreover, the standards are reasonably precise to guide the Board in the exercise of its discretion, and the city's preservation law contains the necessary safeguards to prevent arbitrary enforcement.

Notice of the Law. The city’s preservation laws—including its designation ordinance, its preservation ordinance, and its rules of procedure—provide Appellants with fair notice of the limitations on their application for a certificate of review. First, the city’s preservation ordinance unequivocally establishes the city’s commitment to historic preservation, *see* SMC 25.12.020 (A) (embracing a policy of “protect[ing], enhanc[ing], perpetuat[ing] and us[ing] sites, improvements and objects of historical, cultural, architectural, engineering or geographic significance, located within the City”).

Moreover, the ordinance designating the Satterlee House as a historic landmark unequivocally establishes the property is significant not only because of the house itself, but also its sweeping lawn (“the site”). Seattle Designation Ordinance No. 111022. The designation ordinance states that the house qualifies as a historic landmark on the basis that it “embodie[d] the distinctive visible characteristics of an architectural style, or period, or of a method of construction,” and also because of “its prominence of spatial location, contrasts of siting, age, or scale.” Seattle Designation Ordinance No. 111022 (1) (citing to SMC 25.12.350). In addition, the designation ordinance expressly requires that a certificate of approval under the city’s preservation ordinance for changes to the house as well as the site.

Lastly, the standards governing Appellants’ application to construct additional houses on the property—which include the *Secretary’s Standards*—unambiguously require that such projects be compatible with the massing, size, scale and architectural features of the landmark. The preservation ordinance makes clear that its application would be judged by “[t]he extent to which the proposed alteration or significant change would adversely affect the specific features or characteristics specified in ... the designating ordinance.” SMC 25.12.750. Secretary Standard 9 states—

New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale and architectural features to protect the historic integrity of the property and its environment.

36 C.F.R. § 67.7(9).

The application procedures themselves reinforce the meaning of these standards. They require, among other things, the submission of “photographs of any existing features that would be altered and photographs showing the context of those features, such as the building facade where they are located.” SMC 25.12.680 (B)(10).

As such, the City of Seattle’s preservation standards provided Appellants with clear guidance on what its preservation law requires. The

proposed houses must not adversely affect the landmark (including the house and its setting) and must be consistent in terms of massing, size, and scale. Moreover, Appellants had notice in fact as specific guidance was provided through the proceedings themselves. While the Board's Architectural Review Committee (ARC) and the Board itself refrained from designing Appellants' project themselves, consistent with common practice, both the ARC and the Board stressed that the proposed houses were too big for the site. The ARC itself advised Appellants' architect to submit alternatives that would make the proposed new houses appear subservient to the Satterlee House, suggesting that the houses be made smaller or less intrusive. CP 135, Finding of Fact 32. The Board reiterated the ARC's concerns, expressing concern over the height and scale of the proposed buildings and suggested that the height of the building be lowered by one story. CP 136-137, Finding of Fact 36.

Prevention Against Arbitrary Enforcement. As in other jurisdictions in which comparable standards were upheld against vagueness challenges, Seattle's preservation ordinance contains procedural safeguards to protect against arbitrary application of its terms. The city's 11-member Landmarks Preservation Board is comprised of professional experts, including architects, historians, structural engineer, real estate management, and finance. SMC 25.12.270. In addition, the

procedures established by the Seattle preservation ordinance provide a fair and reasoned framework for the review of applications for certificates of review, including notice and a public hearing before the Board, SMC 25.12.670-730 and 25.12.840. They also offer further protection against any potential abuse of discretion by enabling appeals of to a hearing officer, SMC 25.12.740, which Appellants availed themselves of in this case.

CONCLUSION

For these reasons, the Court should uphold the City of Seattle's decision in this case and, consistent with the weight of the case law on this issue, rule that Seattle's preservation laws are not unconstitutionally vague nor violative of due process.

Respectfully submitted on May __, 2009,

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