

Summary of Florida Historic Preservation Law

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I. Introduction

Historic preservation laws are a variation of the land use laws commonly employed by local governments. They differ from ordinary zoning in that the primary concern of a historic preservation ordinance is not density or usage, but maintaining the appearance of historic structures and the visual integrity of historic districts. In this way they are akin to aesthetic zoning, such as the regulation of signs. Even so, they are treated by the courts as a type of zoning or land use ordinance and are governed by the same constraints, whether political or legal.

This article sets forth an overview of historic preservation law in Florida, including a survey of the federal and state roles in historic preservation. However, local government ordinances remain the most important component in preserving historic resources, and a discussion of local land use regulations to protect and incentives to encourage historic preservation occupies the greater portion of this article. The reader is also referred to separate articles on constitutional issues related to historic preservation, on Florida's private property protection legislation, and on the related field of aesthetic zoning, all of which have a close relationship to the field of historic preservation.

II. Overview of Federal and State Roles in Historic Preservation

A. *Historic Preservation and the Federal Government*

Matters of historic preservation remain predominately the preserve of state and local governments. This is because of the essentially local nature of all land use decisions. Nevertheless, the federal government plays a limited though important role in historic preservation. The contribution of the federal government lies in two major areas: first, federal statutes, such as the National Historic Preservation Act, which set forth national policy on historic preservation and regulates the impact of federal projects on historically significant properties; and second, in the role played by certain federal agencies, most notably the National Park Service, as administrators of certain historic resources and coordinators of historic programs. A final federal issue is the use of federal income tax policy to promote historic preservation and rehabilitation.

The National Historic Preservation Act (NHPA), 16 U.S.C. sections 470 - 470x-6, establishes the National Register of Historic Places and authorizes the Secretary of Interior to designate properties as historic landmarks, and to set forth criteria for landmark designation.¹ 16 U.S.C. § 470a (2008). Properties listed in the National Register enjoy certain federal procedural safeguards. The Act requires that any federal agency with direct or indirect control over proposed federal, federally-assisted or federally-authorized projects must consider the effects on any district or site included, or eligible to be included,² in the National Register before approving the expenditure of federal funds or granting any federal license or permit.³ 16 U.S.C. § 470f (2008). The State Historic Preservation Officer means the official within each State designated by the Governor or a State statute to act as liaison for purposes of administering historic preservation programs within that State.” 36 C.F.R. § 67.2. The State Historic Preservation Officer identifies and nominates properties to the National Register of Historic Places. 36 C.F.R. § 60.6; *see* § 267.061(5), Fla. Stat. (2008) (providing for the State Historic Preservation Officer). This process is known as Section 106 review. NHPA also establishes the State Historic Preservation Programs and provides for the certification of local governments’ preservation programs by the National Park Service. The Certified Local Government Program will be discussed later in this work.

¹ 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; 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 . . . that represent the work of a master . . . that possess high artistic values, 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. 36 C.F.R. § 60.4. These criteria, modified to suit local conditions and priorities, are included in many local historic preservation ordinances. *See, e.g., Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170 (Fla. 3d DCA) (upholding Dade County’s preservation criteria, which were substantially the same as the National Register criteria). For a general discussion of federal laws and conventions impacting historic preservation, *see* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 66-79 (1993).

² The NHPA was amended in 1976 to expand its application to property “eligible for inclusion” in the National Register. 16 U.S.C. § 470(f) (2008). Courts have ruled that eligible property includes any property which meets the National Register Criteria, regardless of whether it has been officially so designated. *Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986).

³ Section 106 of NHPA is limited in scope in that it only applies to federal agencies, and exempts states from coverage where no federal funding or permits are used. *See Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989); *cf.* 16 U.S.C. § 470w(2). Section 106 review usually involves identification of properties protected by the Act and consultation with the Advisory Council on Historic Preservation and the local State Historic Preservation Officer on the best means of mitigating harmful effects to listed or eligible properties. In addition, most states, including Florida, have established a state equivalent to Section 106 review for projects involving state agencies or funding. *See* § 267.061(2), Fla. Stat. (2008) (Florida equivalent to the Section 106 review process).

Two other federal laws significantly impact historic preservation. The National Environmental Policy Act (NEPA), codified at 42 U.S.C. sections 4321-70a, although first and foremost a natural environment protection act, also requires environmental impact statements for federal and federally-assisted projects which “significantly affect the quality of the human environment.”⁴ 42 U.S.C. § 4332(C) (2008). NEPA requires the federal government to “use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . preserve important historic, cultural and natural aspects of our national heritage.”⁵ *Id.* at 1563-64. 42 U.S.C. § 4331(b)(4) (2008). For more generally on NEPA and a discussion of cases involving impact statements, see Daniel R. Mandelker, *NEPA Law and Litigation* (1991); Sherry Hutt *et al.*, *Heritage Resources Law; Protecting the Archeological and Cultural Environment*, 75-105 (1999); Joseph Z. Fleming & Paul C. Savage, *Analysis of the National Environmental Policy Act of 1969*, Florida Environmental and Land Use Law, 16-1 (Fla. Bar Env'tl & Land Use L. Section, 2006).

The Department of Transportation Act, Section 4(f), 49 U.S.C. § 303, contains a further federal protection of historic resources. Applicable to federal or federally approved transportation projects, Section 4(f) prevents such projects where they would impact any historic site, public park, recreation area or wildlife refuge unless no feasible alternative exists to the project and unless the project minimizes harm to historic or natural resources.

NHPA, NEPA and Section 4(f) of the Department of Transportation Act are significant in requiring federal projects to mitigate any harm they would cause to historic resources, much as they seek to minimize harm to the natural environment. Nevertheless, most risks to historic resources do not involve federal projects, and for these, local and state protection is required.

⁴ NEPA establishes the Council on Environmental Quality (CEQ) to review government programs in light of the policies announced in NEPA. The CEQ has published guidelines for the preparation of Environmental Impact Statements in C.F.R. Part 1500.

⁵ A recent NEPA case in Florida, *Protect Key West, Inc. v. Cheney*, 795 F. Supp. 1552 (S.D. Fla. 1992) involved a challenge to an Environmental Assessment (EA) prepared by the Navy on a proposed housing construction project in Key West close to the city’s historic district. The federal district court found that the Navy’s EA failed to meet the standards of NEPA. The court recited the standards evaluating the need for an Environmental Impact Statement under NEPA:

- whether the agency took a “hard look” at the problem;
- whether the agency identified the relevant areas of environmental concern;
- as to the problem studied and identified, whether the agency made a convincing case that the impact was insignificant; and
- if there was impact of true significance, whether the agency convincingly established that the changes in the project sufficiently reduced it to a minimum. *Id.* at 1559. The district court granted an injunction against construction of the project until the Navy completed a complying Environmental Assessment. *Id.*

B. *The State Role in Historic Preservation*

The Florida Department of State, Division of Historical Resources is primarily responsible for state policy and programs. § 267.031, Fla. Stat. (2008). The Bureau of Historical Resources is responsible for Florida's preservation policy and for the cooperation and assistance provided to local governments.⁶ The Bureau of Historical Resources also works with the National Park Service to run the Certified Local Government Program in Florida. The Certified Local Government Program was established under the National Historic Preservation Act, and is administered jointly by the National Park Service and state preservation offices. Under the NHPA, local governments which have established that historic preservation programs meeting certain federal and state requirements may participate in the Certified Local Government (CLG) program. Benefits of CLG participation include eligibility for special grants, technical assistance and training, participation in the National Register nomination process for local properties.⁷ Every certified local government may apply to the Bureau of Historic Resources for grants from Florida's annual apportionment from the federal Historic Preservation Fund. Federal law requires that at least ten percent of the amount transferred annually to the State of Florida under the NHPA be distributed to certified local governments.⁸ 16 U.S.C. § 470c.; §§ 267.0612, 267.0617, Fla. Stat. (2008); *see also* 1 Fla. Admin. Code R. 1A-35.005 (sources of grant funds for historic preservation grants-in-aid). Two categories of activities are funded by grants-in-aid from the Historic Preservation Trust Fund: Acquisition and Development Activities, and Survey and

⁶ § 267.031(5), Fla. Stat. (2008). The Bureau identifies and nominates properties for inclusion in the National Register of Historic Places and assists local governments with applications for listing. Finally, the Bureau of Historic Resources is charged with drawing up the historic preservation element of the Florida Comprehensive Plan and with working with the Department of Community Affairs to review Historic Preservation Elements of local comprehensive plans.

⁷ General federal procedures for CLG certification are contained in 36 C.F.R. 61. The CLG program under the National Historic Preservation Act must be distinguished, however, from the certification of local historic districts or preservation ordinances for federal tax incentive purposes pursuant to 36 C.F.R. § 67.9.

⁸ The Act also provides that whenever more than \$65,000,000 is transferred to the states by the federal government, one half of these excess funds shall be transferred to certified local governments. *Id.* Procedures and specific requirements for applications by local governments for these grants-in-aid are found in *Florida Certified Local Government Guidelines*, Pt. C.3 (2002): 36 C.F.R. §§ 61.6, 61.7. In Florida, grants-in-aid are awarded by the Florida Historical Commission, which also awards funds from the state Historic Preservation Trust Fund. Monies transferred by the federal government to the state under NHPA are deposited in the Trust Fund, as are thirty percent of the corporation registration fees transferred from the Corporations Trust Fund and those funds authorized by the Division of Pari-Mutuel Wagering from charity racing days. *See* § 550.0351(2), Fla. Stat. (2008). The council may award grants-in-aid to state agencies, local governments, private organizations and corporations and individuals.

Other sources of grant funding to local governments include the Florida Main Street Program, which is administered by the Division of Historical Resources. Florida Main Street is intended to promote preservation and revitalization of historic downtowns in cities having a population of less than 50,000. *See* § 267.061(3)(g), Fla. Stat. (2008). Designated communities are eligible to receive special assistance grants, as well as technical assistance over a subsequent three-year period. The Secretary of State designates six Florida Main Street communities yearly.

Planning Activities. The former category also includes such activities as restoration, rehabilitation, salvaging of archeological sites, and the preparation of drawings or photographs of threatened historic sites. The Survey and Planning Category of grants-in-aid includes community education and community relations projects which promote historic and archaeological preservation. Finally, the Division of Historical Resources also administers the Florida Main Street Program in cooperation with the National Trust for Historic Preservation. *See* § 267.031(5)(g), Fla. Stat. (2008).

III. Local Historic Preservation Programs

A. *Basis of Local Government Authority in Florida*

1. *HOME RULE*

The police power allows a state to legislate on any matter affecting public health, safety, morals, or welfare so long as the state does not impinge upon rights protected by the federal constitution or usurp a function exclusively federal in nature.⁹ States have delegated power to local governments, both counties and cities. The Florida Constitution gives cities broad home rule powers.¹⁰ Cities in Florida may act in any area where they are not forbidden to act by state law.¹¹

⁹ *See, e.g., Lawton v. Steele*, 152 U.S. 133 (1894); *Coca-Cola Co., Food Div., Polk Cty. v. Department of Citrus*, 406 So. 2d 1079 (Fla. 1981), *appeal dismissed*, 456 U.S. 1002 (1982) (state may regulate in protected areas where there is a reasonable relationship to public safety, health, morals and the general welfare); *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433, 437 (Fla. 1942) (private property rights are subject to the sovereign police power of the state to protect the safety, health, morals and general welfare of the public).

¹⁰ Fla. Const. art. VIII, § 2. Municipalities. -
(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

¹¹ Section 166.021, Florida Statutes, provides in relevant part:
(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
Cf. Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) (municipalities may exercise any govt. or proprietary power for municipal purpose except those prohibited by law and municipalities may legislate on any matter appropriate, except for those specifically excluded by the Municipal Home Rule Act); *Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992) (broad authorization for cities to legislate on any “valid municipal purpose”); *Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 766 (Fla. 1974) (Chapter 166 of the Florida Statutes is a “broad grant of power to municipalities in recognition and implementation of Art. VIII, § 2(b), Fla. Const.”); *Lakeland v. State ex rel. Harris*, 197 So. 470 (Fla. 1940) (“municipal functions” are those granted for benefit of the community which promote comfort, convenience, safety, and happiness of citizens of the

Florida counties are either charter or noncharter counties. Charter counties “have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.” Fla. Const. art. VIII, § 1(g). Noncharter counties have “such power of self-government as is provided by general or special law.” Fla. Const. art. VIII, § 1(f). The distinction between charter and noncharter counties is for the most part an academic one, for Florida law clearly gives cities and both charter and noncharter counties the power to adopt regulations designating districts and structures as historic and protecting them accordingly.¹² One further distinction between charter and noncharter counties is the status of county ordinances within incorporated municipalities inside the county. In a noncharter county, a conflicting municipal ordinance will prevail over a county ordinance within the municipality. Fla. Const. art. VIII, § 1(f). However, the county charter may specify that the ordinances of the county prevail in the event of a conflict with a municipal ordinance. Fla. Const. art. VIII, § 1(g).

municipality, including proper care of streets, parks and public places, erection and maintenance of public utilities and improvements); *cf. Florida Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 262-63 (Fla. 2005) (distinguishing “municipal purpose” under Article VIII, § 2(b) from the term as used in the tax provisions under Article VII, § 3(a)).

¹² For example, Section 125.01(1), Florida Statutes, delegates broad powers to all county governments. The act states:

The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:

- (f) Provide parks, preserves, playgrounds, recreation areas, libraries, museums, historical commissions, and other recreation and cultural facilities programs.
- (g) Prepare and enforce comprehensive plans for the development of the county.
- (h) Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.
- (i) Adopt, by reference or in full, and enforce building, housing, and related technical codes and regulations.

The Florida Supreme Court, in *Speer v. Olson*, 367 So. 2d 207, 211-13 (Fla. 1978), suggested, in the face of lower court precedent to the contrary, that Chapter 125, Florida Statutes, operated as a complete grant of power to non-charter counties in the area of taxation. The Local Government Comprehensive Planning Act (§§ 163.3161 - .3217, Fla. Stat.), also empowers local governments to enact land use regulations, including historic preservation controls within the context of Florida’s comprehensive planning structure.

2. HISTORIC PRESERVATION AND THE POLICE POWER

Zoning and other land use regulations by local government are a function of the police power. The “police power,” in its broadest sense, includes all legislation and almost every function of civil government. *Hunter v. Green*, 194 So. 379, 380 (Fla. 1940). Under the police power, the government may restrict the use of property in the interests of public health, morals, safety and public welfare. *Miami Beach v. Ocean & Inland*, 3 So. 2d 364, 366 (Fla. 1941); *Ehinger v. State ex rel. Gottesman*, 2 So. 2d 357, 359 (Fla. 1941) (any regulation under the police power must be done in a constitutional manner). Courts have found that zoning regulations are a valid use of the police power if they have some “substantial relationship” to the promotion of public health, safety, morals, or the general welfare of the community. *E.g.*, *Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926); *Gulf & Eastern Dev. v. Ft. Lauderdale*, 354 So. 2d 57, 59 (Fla. 1978); *State ex rel. Landis v. Valz*, 157 So. 651 (Fla. 1934) (comprehensive zoning falls within the constitutional scope of the police power); *Davis v. Sails*, 318 So. 2d 214, 218 (Fla. 1st DCA 1975) (“It is well settled that a zoning ordinance to be valid must bear a substantial relation to the public health, safety, morals or general welfare”) (quoting *Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428, 430 (Fla. 1953)); *South Miami v. Hillbauer*, 312 So. 2d 241, 242 (Fla. 3d DCA 1975). Historic preservation has been explicitly recognized by the United States Supreme Court, *Penn Central Transp. v. New York City*, 438 U.S. 104, 107-08 (1978); *cf. Berman v. Parker*, 348 U.S. 26 (1954),¹³ and many state courts as a valid use of the police power. *See, e.g.*, *P. J. Birds*, 654 So. 2d at 176; *Bohannon v. San Diego*, 106 Cal. Rptr. 333 (Ct. App. 1973); *Opinion of the Justices to the Senate*, 128 N.E.2d 557 (Mass. 1955).

B. Historic Preservation and the Comprehensive Planning Process

Section 163.3177, Florida Statutes, lists required and optional elements of comprehensive plans. Historic resources must be addressed in the Future Land Use and Housing Elements,¹⁴ which are

¹³ Upholding aesthetic zoning in *Berman*, the Court made the following oft-quoted statement describing the breadth of the police power:

The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully controlled.

Id. at 33. As to aesthetic controls generally, *see* CHRISTOPHER J. DUERKSEN, AESTHETICS AND LAND-USE CONTROLS: BEYOND ECOLOGY AND ECONOMICS (American Planning Ass’n Planning Advisory Serv. Rep. No. 399, 1986); Russell P. Schropp, *The Reasonableness of Aesthetic Zoning in Florida; A Look Beyond the Police Power*, 10 FLA. ST. U. L. REV. 441, 445-53 (1982).

¹⁴ For the Future Land Use Element, Section 163.3177(6)(a), Florida Statutes, requires that “land use maps or map series shall generally identify and depict historic district boundaries and shall designate historically significant properties meriting protection.” Expanding on this, rule 9J-5.006 of the Florida Administrative Code mandates, as a requirement for Future Land Use Goals, Objectives and Policies, that “[t]he element shall contain one or more specific objectives for each goal statement which address the requirements of paragraph 163.3177(6)(a), Florida Statutes, and which . . . 4. Ensure the protection of natural resources and historic resources.”

For the Housing Element, Section 163.3177(6)(f), Florida Statutes, provides that element should consist of

mandatory in all comprehensive plans, and the Coastal Management Element,¹⁵ required for coastal cities and counties. Historic preservation is also included as an additional optional element in its own right. § 163.3177(7)(i), Fla. Stat. (2008). This element, if included, should set out “plans and programs for those structures or lands in the area having historical, archaeological, scenic, or similar significance.” Although this is an optional element in a local comprehensive plan, if it is included, it must be based on appropriate data, such as a survey or study of historical resources in the community. § 163.3177(8), Fla. Stat. (2008).

Thus, within Florida’s Comprehensive Planning structure, every local government is required by law to address historic preservation in the comprehensive planning process even if they do not choose to have a separate historic preservation element. The community’s policies and objectives with regard to historic resources are further required to be based upon a survey of those resources. This survey, if expanded to address all aspects of historic resources, is the proper basis for a historic preservation ordinance.

The statutory law requires that historic resources be addressed in the comprehensive planning stage by local governments. Yet, recent case law has also shown that courts view with favor the top-down planning structure imposed by comprehensive plans. A reviewing court will accord great weight to the factor that a particular ordinance or administrative action taken pursuant to an ordinance is consistent with a comprehensive plan. *See, e.g., Board of Cty. Comm’rs v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *Machado v. Musgrove*, 519 So. 2d 629, 633 (3d DCA 1987), *rev. denied*, 529 So. 2d 693 (Fla. 1988); *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So.2d 204, 208-09 (Fla. 2001). A comprehensive plan provides legitimacy and further standards for an administrative body, such as a preservation commission.

In these circumstances, it is anomalous for historic preservation law in Florida to stand outside the comprehensive planning structure already favored by the courts and the legislature.

“standards, plans, and principles to be followed in . . . e. Provision for relocation housing and identification of historically significant and other housing for purposes of conservation, rehabilitation, or replacement.” *See* Fla. Admin. Code R. 9J-5.010(1)(g) which requires that the Housing element be based on, among other factors, “[a]n inventory of historically significant housing listed on the Florida Master Site File, National Register of Historic Places or designated as historically significant by or in accordance with local ordinance, and shall include their generalized locations.”

¹⁵ The Coastal Management Element includes a requirement that the local government set forth policies “that shall guide the local government’s decisions and program implementation with respect to the following objectives: . . . 10. Preservation, including sensitive adaptive use of historic and archaeological resources.” § 163.3177(6)(g)1.j, Fla. Stat. (2008). The Coastal Management Element is required for all those cities and counties identified in Section 380.24, Florida Statutes, as coastal. *Id.* Implementing this section, administrative regulations require that “[a]n inventory and analysis of the impacts of development and redevelopment proposed in the future land use element on historic resources and sites in the coastal planning area shall be included along with a map of areas designated for historic preservation.” Fla. Admin. Code R. 9J-5.012(2)(c).

This is especially so given the tendency of Florida courts to view all forms of land regulation similarly in terms of procedural requirements. A historic preservation element within the local comprehensive plan will not save an otherwise unjustifiable action, but where local governments can show that decisions are consistent within the framework of a properly adopted comprehensive plan, these decisions are less likely to be struck down by a reviewing court.

C. *Local Historic Preservation Ordinances*

Though significant variations exist within historic preservation ordinances, there are some features common to all. Commentator Richard J. Roddewig identifies ten basic components contained in most ordinances: (1) A statement of purpose for the ordinance; (2) A statement of powers and authorities; (3) Creation of a historic preservation commission; (4) Criteria for designation of landmarks and/or historic districts; (5) Procedures and criteria for nomination and designation of landmarks; (6) Types of actions that are reviewable by the preservation commission and the legal effect of the review; (7) The criteria applied by the commission to the action reviewed; (8) Consideration of the economic effect of designation or review of an action; (9) Procedures for appeals from a preservation commission decision; and (10) Fines and penalties for violation of ordinance provisions. *See* Richard J. Roddewig, *Preparing a Historic Preservation Ordinance 7* (American Planning Ass'n Planning Advisory Serv. Rep. No. 374, 1983); Constance Epton Beaumont, *A Citizen's Guide to Protecting Historic Places: Local Preservation Ordinances* (Nat'l Trust, 1992).

There are reasons for the similarities. General requirements for certification of local historic preservation programs are contained in 36 C.F.R. § 61.5(c). More explicit criteria are found in Section B of *Florida Certified Local Government Guidelines*, promulgated by the Bureau of Historic Preservation.¹⁶

¹⁶ Incorporated by reference in Fla. Admin. Code R. 1A-38.007 (1997). According to these requirements, any local government seeking to certify its historic preservation program must adopt an historic preservation ordinance which includes the following provisions:

- A purpose clause which authorizes a preservation commission to designate and protect historic properties.
- Criteria for designation which are the same as or similar to those contained in NHPA for designation of Properties to the National Register.
- Clear boundaries for any historic districts or landmarks, or establishment of a mechanism to do this.
- Authority for review of all alterations, relocations, demolitions or new construction within a historic district or of historic landmarks, and procedures for that review. However, the ordinance shall provide only for a delay of demolition, **not** an indefinite stay of proposed demolition.
- 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*.
- Enforcement and penalty provisions, along with an appeals process.
- A time frame for the review of proposals and the consideration of alternatives by the local commission.

These guidelines also include some requirements applicable to the historic preservation commissions established by local ordinances. An appointed commission should contain at least five members with skills in architecture, history, architectural history, planning, archaeology, urban planning or other historic preservation-related fields.¹⁷ *Florida Certified Local Government Guidelines* Pt. B.2.c. (2002) (available from the Bureau of Historic Preservation). The commissions are responsible for reviewing proposed alterations or demolitions, as well as nominations to the National Register within a set time frame. The commissions should be provided with sufficient staff to enable them to carry out their work, and should survey local resources.¹⁸

D. *Administrative Review Boards*

Article II, Section 3, Florida Constitution, provides for the division of state government into legislative, executive and judicial branches, and further provides that, “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Accordingly, courts are vigilant to guard against unlawful delegation of powers by one branch of government to another branch, and likewise against any encroachment by one branch on the powers rightfully exercised by another branch. In historic preservation, as in most local land use regulations, the separation of powers usually involves possible unlawful delegation of powers by the legislative body or usurpation of powers deemed judicial in nature.

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- Public and owner notification, and public hearings regarding designation of historic properties and review of applications.

Florida Certified Local Government Guidelines Pt. B.1. (2002) (available from the Bureau of Historic Preservation). The Certified Local Governments may be eligible for a number of federal and state grants and technical assistance, as well as participation in the National Register nomination process. See 36 C.F.R. 61. For an excellent recent review of Florida’s Certified Local Government Program, and a comparison with non-certified ordinances, see George B. Abney, *Florida’s Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims*, 25 FLA. ST. U. L. REV. 1017, 1032-38 (1998).

¹⁷ The importance of expertise on administrative boards has been frequently noted by courts. See, e.g., *Maher v. New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); *Estate of Tippett v. Miami*, 645 So. 2d 533, 537 (Fla. 3d DCA 1994) (Gersten, J., concurring) (approving the inclusion of experts such as an architect, landscape architect, historian, architectural historian, real estate broker as an important procedural safeguard on Miami’s historic preservation board). The Guidelines provide that smaller communities (those with a population of less than 10,000) may employ a three member commission. Where possible, commission members should be residents of the community. See *Florida Certified Local Government Guidelines*, at Pt. B.2.

¹⁸ See *Florida Certified Local Government Guidelines*, at Pt. B.2. Preservation commissions must meet publicly, at least four times a year, and records must be available to the public. *Id.* Pt. B.4. Preservation commissions must also comply with the notification standards contained in 36 C.F.R. §§ 60.6(c)-(d) for nominations to the National Register. *Id.*

This issue of unlawful delegation may arise whenever a local government delegates its discretionary, legislative authority. *See* Julian Conrad Juergensmeyer, Florida Land Use Law: Development, Growth Management, Subdivisions, and Zoning § 2.05(D) (1999). Legislative authority may be lawfully delegated to an appropriate entity if adequate standards are provided.¹⁹ *Askew v. Cross Keys Waterway*, 372 So. 2d 913, 924 (Fla. 1978); *P.J. Birds*, 654 So. 2d at 175-76; *cf. Chiles v. Children*, 589 So. 2d 260, 268 (Fla. 1991) (“The Legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed. . . . What the Legislature cannot do is delegate the policy-making responsibility.”); *see also State ex rel. Palm Beach Jockey Club v. Florida State Racing Comm’n*, 28 So. 2d 330 (Fla. 1946). *P. J. Birds, supra*, is important for upholding Dade County’s historic preservation ordinance against an unconstitutional delegation attack. The Third District Court of Appeal, in *P.J. Birds*, found that Dade County’s use of the National Register Criteria for historic landmark designation provided sufficient guidance to a preservation board, and upheld use of these criteria, finding that the generally recognized standards in the field of historic preservation provide sufficient basis for a case-by-case application of preservation laws. *Id.* at 177-78.

Traditionally, a zoning or land use ordinance which applies to the community as a whole is a legislative action. *Snyder*, 627 So. 2d at 474; *Gulf & E. Dev. Corp.*, 354 So. 2d at 59; *Josephson v. Autrey*, 96 So. 2d 784, 788 (Fla. 1957); *D.R. Horton, Inc.-Jacksonville v. Peyton*, 959 So.2d 390, 393-94 (Fla. 1st DCA 2007) (distinguishing legislative from other quasi-judicial acts). These legislative decisions will not be overturned by a court absent a showing that the legislative body has exceeded its powers or acted in an arbitrary and unreasonable manner.²⁰ Quasi-judicial, or adjudicative, actions apply general law to specific cases.²¹ Full due process requirements apply to these adjudicative actions.

¹⁹ A local board or commission, may exercise quasi-judicial powers, but will be prohibited from usurping powers truly judicial in nature. Thus, courts have found that an executive board or a commission has powers to hold hearings, make factual determinations, and impose certain quantifiable damages. They do not have the power to impose nonquantifiable damages or injunctions, which are fundamentally judicial in nature. *Laborers’ Int’l Union v. Burroughs*, 541 So. 2d 1160, 1163-64 (Fla. 1989); *Broward County v. LaRosa*, 505 So. 2d 422, 424 (Fla. 1987).

²⁰ Courts presume the validity of legislative actions. *Executive 100 v. Martin Cty.*, 922 F.2d 1536, 1541 (11th Cir. 1991); *Town of Indialantic v. McNulty*, 400 So. 2d 1227, 1230 (Fla. 5th DCA 1981); *see Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 366 (Fla. 1941), where the Florida Supreme Court stated:

We will determine the reasonableness of the regulations as applied to the factual situation meanwhile keeping before us the accepted rules that the court will not substitute its judgment for that of the city council; that the ordinance is presumed valid . . . and that the legislative intent will be sustained if “fairly debatable.”

²¹ One commentator provided the following helpful test to distinguish quasi-judicial from legislative actions: Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest[s], or situations, or whether it entails the application of a general rule or policy to specific

The increasing importance of comprehensive planning has given a broader context to all zoning decisions. The Florida Supreme Court, in *Snyder*, 627 So. 2d at 474, while recognizing that large-scale or comprehensive rezonings were legislative functions entitled to the traditional high degree of deference, found small-scale rezonings to be quasi-judicial actions. “Rezoning” has been broadly interpreted by Florida courts, such that the due process requirements for rezoning apply whenever the use of property is “substantially restricted” by local government action. *Gainesville v. GNV Inv.*, 413 So. 2d 770, 771 (Fla. 1st DCA 1982); *Sanibel v. Buntrock*, 409 So. 2d 1073, 1075 (Fla. 2d DCA 1981).

This is relevant to historic preservation because most such programs involve the establishment by the local government of an administrative board to implement the preservation ordinance passed by the legislative body. The preservation board acts as a quasi-judicial body.²² Thus, zoning ordinances implementing comprehensive zoning, and by extension, historic preservation ordinances establishing historic preservation commissions are legislative functions. Small-scale rezonings, the designation of historic landmarks or districts by a preservation commission, or the denial or approval of applications to alter or demolish listed buildings are usually quasi-judicial functions.

E. *Designation of Historic Districts and Individual Landmarks*

1. *PREDESIGNATION SURVEYS*

Historic preservation needs to be more than a vague community wish. It needs to reflect community priorities in order to be effective. A better understanding of historic resources can be achieved through the sort of survey required for the historic preservation element of a comprehensive plan, and for the future land use, housing and coastal management elements of the comprehensive plan, all of which require local government to address historic resources. The

individuals, interests or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.

Michael S. Holman, Comment, *Zoning Amendments - The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L. J. 130, 137 (1972). This passage was quoted in the important land use decision *Fasano v. Board of Cty. Comm’rs*, 507 P.2d 23, 27 (Or. 1973) (en banc), which first applied this distinction to land use rezonings. Cf. *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441, 445 (1915) (often considered the source of the legislative-judicial distinction); *Snyder*, 627 So. 2d at 474 (quoting *West Flagler Amusement Co. v. State Racing Comm’n*, 165 So. 64, 65 (Fla. 1935)); *Machado v. Musgrove*, 519 So. 2d 629 (3d DCA 1987), *rev. denied*, 529 So. 2d 693 (Fla. 1988); see also *Fasano*, 507 P.2d at 30.

²² This is also the case with many zoning functions, which are often delegated to an independent zoning or planning board. See *Gulf & E. Dev. Co.*, 354 So. 2d at 59-60 (city ordinance invested the zoning and planning board with interim zoning authority, subject to approval by the city commission, and the zoning and planning board was responsible for factfinding for matters ultimately decided by the city commission).

survey forms a basis for the designation of individual buildings or particular districts as historic, and is a useful tool to support designation should this be challenged in court. *See, e.g., Bohannon v. San Diego*, 106 Cal. Rptr. 333 (Ct. App. 1973) *A-S-P Assoc. v. Raleigh*, 258 S.E.2d 444, 458 (N.C. 1979); *Maher v. New Orleans*, 516 F.2d 1051, 1063 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); 1063. The survey of historic resources is also required for participation in the Certified Local Government Program. *See Florida Certified Local Government Guidelines Pt. B.3.b.*

2. STANDARDS AND CRITERIA FOR DESIGNATION

Many ordinances rely on the criteria promulgated by the National Park Service for inclusion in the National Register as the basis for historic designation in their ordinances.²³ These criteria are substantially the same as those included in Dade County's historic preservation ordinance, recently upheld by the Florida Third District Court of Appeals in *P.J. Birds*, 654 So. 2d at 170. This positive review by a Florida court makes a local adaptation of the National Register criteria, like that used in Dade County, very attractive.

As an interim measure, a historic preservation ordinance should also provide protection for properties pending designation as landmarks or within a likely historic district. This will prevent an owner from preempting the local protection by seeking a demolition permit. The interim prohibition should set a time period for review during which demolition permits will not

²³ The National Register criteria are:

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) 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

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

be granted.²⁴ See *Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974) (upholding authority of city to impose a moratorium on building permits pending the designation of a historic district).

3. HISTORIC DISTRICT ISSUES

Historic districts may be formed either as a traditional zoning district or as a special overlay district. If formed as a zoning district, it regulates uses permitted within the historic district, as well as controlling alteration or demolition of structures. An overlay district, by contrast, sits over an existing zoning district.²⁵ Thus, where land is otherwise zoned residential or commercial, it retains its permitted usage with the additional criteria imposed for the alteration or demolition of structures within the district.

Either of these two forms of historic preservation is acceptable in Florida. Note, however, that where a special zoning district is established which also controls land usage, the designation of land usage is held to be a legislative function that cannot be delegated to an administrative body, but must be reserved to the local governing body. *Josephson*, 96 So. 2d 784

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- (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
 - (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
 - (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life; or
 - (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
 - (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as a part of a restoration master plan, and when no other building or structure with the same association has survived; or
 - (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
 - (g) A property achieving significance within the past 50 years if it is of exceptional importance.

36 C.F.R. § 60.4.

²⁴ In other land use matters, Florida courts have upheld moratoria on building permits when land use decisions are pending. See, e.g., *Franklin County v. Leisure Properties*, 430 So. 2d 475 (1st DCA), *pet. denied*, 440 So. 2d 352 (Fla. 1983); *GNV Inv.*, 413 So. 2d at 771-72 (requiring notice for proposed moratoria); *Sanibel v. Buntrock*, 409 So. 2d 1073 (2d DCA 1981), *rev. denied*, 417 So. 2d 328 (Fla. 1982).

²⁵ The preservation ordinance may also regulate non-historic structures within the historic district. See *Faulkner v. Town of Chestertown*, 428 A.2d 879 (Md 1981) (upholding regulation of non-historic properties within Annapolis historic district); *A-S-P Assoc.*, 258 S.E.2d at 451.

(Fla. 1957). For this reason, the overlay district, which permits designation and administration by a preservation board, may be preferable.

4. *LANDMARK DESIGNATION*

In addition to historic districts, courts have upheld the designation of individual structures as historic landmarks. *See, e.g., Penn Central*, 438 U.S. 104 (1978); *St. Bartholomew's Church v. New York City*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. (1991). Historic preservation ordinances commonly provide for the protection of both historic districts and isolated structures deemed historically significant.

The risk, in designating a single structure as a landmark, is the avoidance of “spot zoning.” Spot zoning involves the arbitrary zoning or rezoning of a single parcel of land in a way that is inconsistent with the comprehensive land use plan and in a way that either uniquely burdens or unfairly benefits the individual landowner whose parcel is rezoned.²⁶ If, however, the local government can show that the rezoning action with regard to the individual property is in accord with the comprehensive plan and otherwise in the public interest, the rezoning action, including landmark designation, is not an improper spot zoning. *Penn Central*, 438 U.S. at 132; *see also Miles v. Dade County*, 260 So. 2d 553 (Fla. 3d DCA 1972). Thus, especially in the case of individual landmarks, both a historic preservation element in the comprehensive plan and a thorough survey of local historic resources is important to protect the government action.

5. *AFFIRMATIVE MAINTENANCE REQUIREMENTS*

Demolition by neglect may occur if a landowner deliberately neglects a protected structure in the hope of obtaining a permit for demolition when the structure finally reaches a state where it jeopardizes public safety. A well drafted historic preservation ordinance should prohibit owners from allowing protected structures to so deteriorate as to endanger the building or even detrimentally affect the surrounding historic district. Courts have upheld reasonable requirements for landowners to maintain their property.²⁷ *See, e.g., Maher*, 516 F.2d at 1066-67. The

²⁶. In *Penn Central*, the Court rejected a charge that the New York City landmark ordinance amounted to improper spot zoning, noting:

In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they may be found in the city.

438 U.S. at 132.

²⁷. In *Maher*, the Fifth Circuit Court of Appeals noted that:

Once it has been determined that the purpose of the Vieux Carre legislation is a proper one, upkeep of buildings appears reasonably necessary to the accomplishment of the goals of the ordinance The fact that an owner may incidentally be

ordinance should empower the preservation board, in the event of a listed property being dangerously neglected, to order necessary repairs and charge these to the landowner or charge them as a lien upon the property.

F. *Permit Reviews*

1. *REGULATION OF NEW CONSTRUCTION, ALTERATION OR DEMOLITION*

Any historic preservation ordinance should establish a permitting process for alteration or modification of listed properties.²⁸ This permitting should be coordinated with other local authorities so that other permits are only given when the preservation board has issued a “certificate of appropriateness,” signifying its approval of the requested action. A similar procedure should require the preservation board to review requests to demolish listed properties, and contributing structures within historic districts. The preservation board should ideally have the power to prevent, not merely delay, demolition of listed properties.

2. *ECONOMIC HARDSHIP PROVISIONS*

Local governments can help avoid constitutional takings challenges to the application of their historic preservation ordinances through economic hardship and variance provisions. *See Nance v. Indiatlantic*, 419 So. 2d 1041 (Fla. 1982) (prerequisite for granting a zoning variance is the presence of an exceptional and unique hardship to the individual landowner); *Miami-Dade County v. Brennan*, 802 So. 2d 1154, 1155-56 (Fla. 3d DCA 2001) (Fletcher, J., concurring) (discussing the “unnecessary hardship” standard for variances). These will allow local officials to examine whether the application of the ordinance will allow the owners of property some “reasonable return” on their investment.²⁹

required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking.

Id.; *cf. Buttnick v. Seattle*, 105 Wash. 2d 857, 719 P.2d 93 (1986) (upholding minimum maintenance requirement). *See also* the related article by John McPherson, discussing constitutional issues and historic preservation. *See generally Note, Affirmative Maintenance Provisions in Historic Preservation: A Taking of Property*, 34 S.C. L. REV. 713 (1983).

²⁸ Many communities use the *Secretary of the Interior’s Standards for Rehabilitation* as a starting point for providing criteria to guide both landowners and commissions in approving renovations. This should be supplemented by locally applicable design guidelines, taking into account local history and architecture. *See, e.g., Society for Ethical Culture v. Spatt*, 416 N.Y.S.2d 246, 249-50 (N.Y. App. Div. 1979), *aff’d*, 415 N.E.2d 922 (N.Y. 1980); *A-S-P Associates*, 258 S.E.2d at 453-54.

²⁹ Matters for consideration in economic hardship cases may include: (1) Past and current use of the property; (2) Original purchase price; (3) Assessed value; (4) Recent appraised value; (5) Current mortgage principal balance and interest rate; (6) Past income and expenses; (7) Ownership structure (partnership, corporation, etc.); and (8) Tax

3. *PENALTIES*

As with any land use law, a historic preservation ordinance must be enforced if it is to effectively protect local historic resources. Courts have upheld penalties properly imposed for violating historic preservation ordinances, including fines, requirements to restore landmarks altered without permission, and denial of permits to build or rebuild. *See, e.g., Parker v. Beacon Hill Architectural Comm'n*, 27 Mass. App. Ct. 211, 536 N.E.2d 1108 (1989) (upholding requirement that owner remove a partially completed fifth story addition constructed in violation of Boston preservation ordinance).

IV. **Incentives and Alternative Tools for Historic Preservation**

Landowners in historic districts should be informed that the listing of historic buildings, along with the requirements of maintenance for neighboring buildings, often works to raise the value of land in the district. Accompanying sweeteners, in the form of local *ad valorem* tax incentives and, where practical, transferrable development rights, will give property owners reasons to accept historic preservation. The possibility of federal tax credits for rehabilitation of income-producing property is another incentive, one which may soon also be available to homeowners. These benefits conferred by historic designation may be important should the ordinance or its application be challenged either as a confiscatory taking, or under the Florida Property Rights Protection Act.

A. *Tax Relief*

1. *FEDERAL TAX EXEMPTIONS FOR HISTORIC PRESERVATION*

A further federal contribution to historic preservation is tax relief for the rehabilitation of historic properties,³⁰ and for the establishment of conservation easements.³¹ Federal tax benefits remains

bracket of ownership. RICHARD J. RODDEWIG & CHRISTOPHER J. DUERKSEN, RESPONDING TO THE TAKINGS CHALLENGE: A GUIDE FOR OFFICIALS AND PLANNERS 34 (American Planning Ass'n Planning Advisory Serv. Report No. 416, 1989). This report also contains a useful administrative procedure guide to help avoid takings challenges. *See also Zaruba v. Village of Oak Park*, 695 N.E.2d 510 (Ill. App. 1998) (upholding denial of demolition permit where owner of house in historic district failed to demonstrate economic hardship).

³⁰ Rehabilitation tax credit is allowed for "qualified rehabilitation expenditures" on qualified buildings. I.R.C., 26 U.S.C. § 47(a) (2008). *See generally* STEPHEN L. KASS ET AL., REHABILITATING OLDER AND HISTORIC BUILDINGS 4-15 (1993).

³¹ I.R.C., 26 U.S.C. § 170(h) allows a federal income, gift and estate tax deduction for a "Qualified Conservation Contribution." A "Qualified Conservation Contribution" means a gift (A) of a qualified real property interest; (B) to a qualified organization; made (C) exclusively for conservation purposes. *Id.*; *see* KASS, *supra*, at 24-33.

a factor in encouraging property owners to preserve and renovate rather than to destroy and rebuild. The rehabilitation tax credit is of two types: 1) a 20% credit for qualified expenditures on rehabilitating certified historic structures; or 2) a 10% credit for qualified expenditures on rehabilitating non-historic structures placed in service prior to 1936.³² Although the 1986 tax code revisions substantially lessened the federal tax benefits for rehabilitation, both rehabilitation tax credits continue to be a significant incentive and reward for rehabilitation of mainly non-residential properties. Likewise, the federal tax code allows a federal income, gift or estate tax deduction for “qualified conservation contributions” toward the establishment of conservation easements.³³ The conservation easement deduction is another factor in encouraging property owners to preserve and renovate rather than destroy and rebuild.

2. LOCAL AD VALOREM TAX EXEMPTIONS FOR HISTORIC PRESERVATION

An amendment to the Florida Constitution, approved by Florida voters in November 1992, allowed counties or municipalities to enact ordinances allowing ad valorem tax exemptions “to owners of historic properties.” Fla. Const. art. VII, § 3(e). A requirement that the owners be actively engaged in renovation in order to receive the tax exemption was removed by an amendment to Article VII, Section 3(e), adopted by the voters in November 1998, and became effective January 1, 1999. Legislation enacted since 1992 provides for these tax exemptions. *See* §§ 196.1961, 196.1997, 196.1998, Fla. Stat. (2008).

There are three types of local tax exemptions for historic preservation. Section 196.1961, Florida Statutes, authorizes local governments to enact an ordinance providing exemptions from property taxes for up to 50% of the assessed value of property that is: 1) used for commercial purposes or by a non-profit organization; 2) listed in the National Register, designated as a local landmark or part of a National Register or local historic district; and 3) regularly open to the public.

Section 196.1997, Florida Statutes, is the main law governing these tax exemptions. The statute is not self-executing, but requires counties or municipalities to enact a specific ordinance

³² I.R.C., 26 U.S.C. § 47(a) (2008). The “historic building” for which the 20% rehabilitation credit applies, include structures on or eligible for inclusion on the National Register, contributing structures within a National Register District, or is part of a substantially equivalent local district (*e.g.*, one which meets CLG Guidelines). I.R.C., 26 U.S.C. § 47(c)(3) (2008). The rehabilitation must be certified as consistent with the *Secretary of the Interior’s Standards for Rehabilitation* by the State Preservation Officer and the Department of the Interior. I.R.C., 26 U.S.C. § 47(c)(2). Both the 20% historic rehabilitation credit and the 10% rehabilitation credit apply only for property held for investment or trade, or residential rental property. I.R.C., 26 U.S.C. § 47(c)(2) (2008). For more on the Federal rehabilitation tax credits, see KASS, *supra* at 4-15.

³³ A “Qualified Conservation Contribution” means a gift (A) of a qualified real property interest; (B) to a qualified organization; made (C) exclusively for conservation purposes. I.R.C., 26 U.S.C. § 170(h) (2008); *see* KASS, *supra*, at 24-33.

allowing the tax exemption. § 196.1997(1), Fla. Stat. (2008). Exemptions apply to improvements to the property resulting from "restoration, renovation, or rehabilitation" of the property. § 196.1997(2), Fla. Stat. (2008). These "improvements" must be carried out in accordance with the *Secretary of the Interior's Standards for Rehabilitation of Historic Properties*, and be so certified by the local preservation board. § 196.1997(12), Fla. Stat. (2008). The exemption may apply only to improvements made on or after the day on which the tax exemption ordinance is adopted.

The ordinance must state the type and location of properties which qualify for the exemption. § 196.1997(3), Fla. Stat.. Property which may qualify includes National Register property, contributing property within a National Register district, or property designated historic or contributing under a local preservation ordinance. § 196.1997(11), Fla. Stat. (2008). The ordinance may limit the application of the exemption only to particular locations within the county or municipality. § 196.1997(3), Fla. Stat. (2008).

The exemption applies only to those *ad valorem* taxes imposed by the governmental unit which actually enacts the ordinance. § 196.1997(4), Fla. Stat. (2008). Thus, where the county, but not the city, enacts such an exemption, a property owner would receive the exemption with regard to county taxes, but not property taxes levied by the city or school board. The exemption lasts for up to ten years, and the property must retain its historic character and the improvements for this ten-year period. § 196.1997(5), Fla. Stat. (2008).

The local preservation board (or the State Division of Historic Resources depending on the terms of the ordinance) must review applications for the exemptions and recommend granting or denying the application, and must provide reasons for the recommendation. § 196.1997(6), Fla. Stat. (2008). The preservation board reports to the local government, which must enact the specific exemption in the form of a resolution or ordinance by majority vote. § 196.1997(10), Fla. Stat. (2008). Applicants for the exemption must covenant with the local government for the term of the exemption to maintain the historic character of the property and the qualifying improvements. An owner who subsequently violates this covenant will be liable for the amount of the exemption for each of the previous years in which it was in effect plus interest. § 196.1997(7), Fla. Stat. (2008).

If the local government votes to approve an *ad valorem* tax exemption, it takes effect on January 1 of the following year. § 196.1997(10), Fla. Stat. (2008). The resolution approving the tax exemption must include the name of the owner, the location of the property, the duration and expiration date of the exemption, and a finding that the property qualifies for the exemption under the statute.

Section 196.1998, Florida Statutes, provides additional tax exemptions for historic properties that are open to the public. The property must qualify for the exemption under Section 196.1997. There are additional requirements: (1) the property must be used for non-

profit or governmental purposes;³⁴ (2) the property must be "regularly and frequently open for the public's visitation, use, and benefit";³⁵ and (3) the improvements to the property must be made by or for the use of the current owner of the property. § 196.1998(1), Fla. Stat. (2008). If these additional requirements are met, and if the assessed value of the improvements to the property as a result of rehabilitation or restoration equals fifty percent of the total assessed value of the property, the local government may authorize an exemption equal to 100% of the property's improved, total assessed value.³⁶

B. *Conservation Easements*

Conservation easements have become a useful tool in historic preservation.³⁷ Although easements developed under common law, conservation easements for environmental and historic preservation purposes are statutory creations.³⁸ The interest created is not a possessory or usage right, but rather the right of the easement holder to require the owner to maintain the historic character of the property.³⁹

³⁴ "[A] property is being used for government or nonprofit purposes if the occupant or user of at least 65 percent of the useable space of a historic building or of the upland component of an archaeological site is an agency of the federal, state, or local government, or a [registered] nonprofit corporation." Fla. Admin. Code r. 1A-38.004(4).

³⁵ Regularly open for public use is defined by the regulations as being available for public access for at least 52 days in the year. Owners are allowed to charge an entrance fee. Fla. Admin. Code r. 1A-38.004(5).

³⁶ *Id.* As with the regular historic property tax exemption, this additional exemption applies only to improvements made on or after the day on which the exemption is granted.

³⁷ See generally Thomas A. Coughlin, *Easements and Other Legal Techniques to Protect Historic Property in Private Ownership*, 6 PRES. L. REP. 2031 (1987-88).

³⁸ See § 704.06, Fla. Stat. (2008) (providing for the creation, acquisition and enforcement of conservation easements). According to Section 704.06(1), Florida Statutes, a conservation easement means:

a right or interest in real property which is appropriate to . . . retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses and which prohibits or limits any of the following:

(h) Acts or uses detrimental to the preservation of the structural integrity or physical appearance of [historic sites].

³⁹ § 704.06(4), Fla. Stat. (2008). The easement holder has the right to enter and inspect the subject property at reasonable times to ensure that the terms of the easement are complied with. The statute provides that the conservation easements run with the land, which means they are retained in the event the land is sold. Conservation easements may be "created or stated in the form of a restriction, easement, covenant, or condition in any deed, will or other instrument . . . or in any order of taking," but because they are real property interests they must be recorded in the county records office to give notice of the restrictions. The owner of the easement, which may be the local government or a charitable organization, can enforce the easement in court. The statute also provides for third-party

As a minimum, a conservation easement should ensure that the exterior is maintained and allow the holder of the easement to review and approve changes. They may also provide for the preservation of a historic interior. The easement should provide for compatible usage and control further development. By way of an incentive, Florida law allows dedicated properties to benefit by assessing them at a lower rate for tax purposes. *See* §§ 193.501, 193.503, 193.505, Fla. Stat. (2008). This reduces the property taxes due for these subject properties. Additional valuable incentives for the use of conservation easements are provided by the federal government. Donors of conservation easements may be eligible to take a charitable contribution deduction on federal income, estate or gift taxes for the value of easements donated to a tax-exempt charitable organization for “conservation purposes.” I.R.C., 26 U.S.C. § 170(h) (2008); *see also* Harwell E. Coale, III, *Conservation Easements as Qualified Conservation Contributions*, 79 Fla. Bar J. 16 (Oct. 2005) (discussing qualified organizations and qualified conservation purposes under the Internal Revenue Code).⁴⁰

C. *Transferable Development Rights*

Transferable development rights (TDRs) are an increasingly popular means of mitigating the effects of land use regulations upon single owners. *See* § 163.3202(3), Fla. Stat. (2008) (specifically encouraging communities to make use of “innovative land development regulations” such as TDRs). The purpose of TDRs is to lessen “wipeouts” caused by government regulations. A wipeout is “any decrease in the value of real estate other than one caused by the owner or by general deflation.” Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning & Development Regulation Law* § 9.10 (2nd ed., 2007). A TDR program seeks to shift a community’s development from areas of the community sensitive to development pressures to other receiving areas. The property in the sending area may be part of a historic district. In return for leaving the historic property intact, an owner receives rights to develop land within the receiving area more intensely, or alternatively, to transfer these rights to more intense development to landowners within the receiving area. *See id.* § 11.6; *see also* Richard J. Roddewig & Cheryl A. Inghram, *Transferable Development Rights Programs: TDRs*

enforcement, which would allow for the private enforcement of easements by interested groups held by local government. *Id.*

⁴⁰ Protective covenants are a preservation tool similar in intent and use to conservation easements. Creation of such covenants usually occurs at the time property is transferred with the inclusion of the covenant in the deed of transfer. Section 193.505, Florida Statutes, provides property tax benefits to owners who covenant with local governments to maintain their historic properties. The covenants must be for a term of at least ten years. Covenants and restrictions on use of the land are taken into account when assessing the property for tax purposes.. § 193.505(3), Fla. Stat. (2008). However, because covenants do not transfer a property interest, they do not entitle the landowner or donor to any federal tax benefits. Note that if the restriction is recorded under Section 704.06(5), Florida Statutes, it becomes a statutory conservation easement, and thus a property interest entitled to accompanying tax benefits. *See generally* Coughlin, *supra* at 2035.

and the Real Estate Market (American Planning Ass'n Planning Advisory Serv. Rep. No. 401, 1986); KASS, *supra* at § 5.3.

In *Penn Central*, *supra* at 137, the Supreme Court noted the existence of a TDR program in New York City as useful in mitigating the application of the landmarks ordinance. The owners of Grand Central Station were not permitted to build the desired office block over the station, but the local ordinance allowed them to transfer the rights to building to other nearby properties with the same owner. *Id.* at 120-22. The existence of a viable TDR program was a factor in the Court's decision that the application of New York's landmark preservation law to the station was not a confiscatory taking. *Penn Central*, 438 U.S. at 137 ("While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.") (citation omitted).

The imprimatur of the Supreme Court in *Penn Central* legitimized TDRs, and since then they have been incorporated into many land use programs, both for historic preservation and environmental purposes. See Juergensmeyer & Roberts, *supra* at § 9.10; Roddewig & Inghram, *supra* at 5, 13 (including a discussion of the use of TDRs in Collier County, Florida). The use of a TDR program was approved by a Florida court in *Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (4th DCA), *rev. denied*, 441 So. 2d 632 (Fla. 1983). In *Hollywood*, when the seaside portion of property was downzoned to single-family status, the owner was allowed in return to transfer the extra development to inland property, and develop this at a higher density. *Id.* 432 So. 2d at 1333. The owner could trade the right to build 79 single family homes for development rights to 368 additional multi-family units on the receiving property. *Id.* at 1338. The result was the preservation of open space on the beach and prevention of high-rise construction, and was upheld as a valid exercise of the police power. *Id.* at 1337-38; see also *Glisson v. Alachua County*, 558 So. 2d 1030, 1037 (Fla. 1st DCA 1990) (approving inclusion of a TDR program enacted to protect wildlife habitat).

Section 193.505(1)(a), Florida Statutes, provides that if the owner transfers the development rights to this land to the local government, the property will only be assessed at the value of its actual usage for property tax purposes.⁴¹ By reducing the property tax bill for landowners who transfer development rights, this law provides an additional incentive for the use of TDRs.

⁴¹ § 193.505(1)(a), Fla. Stat. (2008). The section allows a similar lower tax assessment for owners who enter into limited covenants to maintain properties in their historic condition. § 193.505(1)(b), Fla. Stat. (2008). The covenant runs with the land, and the lower tax assessment lasts for the term of the covenant, which must be at least ten years. *Id.*; cf. § 193.501(1)(a), Fla. Stat. (2008) (providing for reduced assessments when development rights are transferred to state agencies or charitable corporations).

The effective use of TDR's presupposes that there is an area in which to transfer the development rights. Regulation should determine which properties are eligible for TDRs, designate a receiving area for the development rights, determine how much may be transferred, and to transfer. Kass, *supra* at §§ 5.3. & 5.3.1 (describing TDR programs in New York City, Dallas, San Francisco and Seattle). There should also be a means of demonstrating a calculable monetary value for the rights. See Juergensmeyer & Roberts, *supra* at § 9.10. Although TDRs alone will not save an otherwise confiscatory regulation, by helping to reduce the economic impact of regulation, they can prevent valid regulation from rising to the level of a taking. See *Penn Central*, 438 U.S. at 137; *Hollywood*, 432 So. 2d at 1338.⁴² Florida's new property rights laws also mention TDRs specifically as a means of settlement and mitigation which may prevent a government regulation from "inordinately burdening" private property. By preventing wipeout of economic value through regulation, TDRs can be an effective additional support to a historic preservation program.

⁴² . *But see* *Suitum v. Tahoe Reg. Planning Ag'y*, 520 U.S. 725, 747-50 (1997) (Scalia, J., concurring) (suggesting that TDR's should more properly be considered not in the context of whether a taking occurred but rather as a possible payment); *see also* Julian Conrad Juergensmeyer *et al.*, *Transferrable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 462-64 (1998) (discussing implications of the *Suitum* decision).