

**KENDALL COUNTY**  
**Historic Preservation Commission**  
*Kendall County Office Building*  
*Rooms 209 & 210*  
*111 W. Fox Street, Yorkville, Illinois*  
**6:30 p.m.**  
**Meeting Minutes of September 18, 2017**

**CALL TO ORDER**

The meeting was called to order at 6:40 p.m.

**ROLL CALL**

Present: Elizabeth Flowers, Kristine Heiman, Melissa Maye and Jeff Wehrli

Absent: None

Also present: Matt Asselmeier, Senior Planner

In the audience: Alex Finke, Government Affair Director at Realtor Association of the Fox Valley, Inc.

**APPROVAL OF AGENDA**

Ms. Flowers made a motion, seconded by Mr. Wehrli, to approve the agenda. With a voice vote of four ayes, the motion carried.

**APPROVAL OF MINUTES**

Mr. Wehrli made a motion, seconded by Ms. Maye, to approve the minutes from the August 21, 2017 meeting. With a voice vote of four ayes, the motion carried.

**CHAIRMAN'S REPORT**

Chairman Heiman reported that the Oswego Historic Preservation Commission does not have enough members for a quorum. They are looking for individuals to serve on their Historic Preservation Commission. Interested parties must be residents of Oswego or living within 1.5 miles of the Village limits. The Commission requested a roster of members of the Oswego Historic Preservation Commission.

**PUBLIC COMMENT**

Alex Finke, Realtor Association of Fox Valley, Inc., expressed his opinion of the Historic Preservation Ordinance. Mr. Finke distributed a memorandum on the subject. He would like the third party nomination of properties and districts to be removed; he would like owner consent only for nominations because of the Fifth Amendment's Takings Clause. He would like the criteria for evaluation of properties for designation to be more specific to avoid the Void of Vagueness Doctrine as it relates to property designation. He also requested standards for determinations made by the Historic Preservation Commission. Lastly, he wanted ambiguous language related to the age of structures, transfer of development rights, objections to designation and construction approval. Discussion occurred regarding the definition of supermajority. Mr. Finke would like to work with the Commission on proposed changes to the Ordinance. He liked Geneva's Historic Preservation Ordinance. The Commission will forward proposed changes to Mr. Finke.

**NEW BUSINESS**

None

## **OLD BUSINESS**

### **Review and Recommendation on Historic Preservation Ordinance**

Based on Mr. Finke's suggestion, Ms. Maye requested additional time to review the Historic Preservation Ordinance in relation to Geneva's Ordinance, Mr. Finke's memo and State law. The Commission would like to get certified in order to receive grant funding. Discussion occurred about setting a fee; the fee would apply to third party nominations.

### **Centennial Farm Mapping Project**

Mr. Asselmeier reported no update exists at this time. We are waiting for the leaves to fall from the trees.

### **Potential Meeting with other Historic Preservation Organizations**

The save-the-date cards have been mailed. To date, we have received three (3) responses and all three (3) will be attending. The RSVPs were from Oswego, Joliet and the Plano Library. At the October meeting, Commissioners will discuss the agenda for the meeting.

### **Selecting Homes for Plaques**

Commissioners will wait until next month for more discussion on plaques. Mr. Asselmeier will draft a letter for Chairwoman Heiman to sign for the Dickson-Murst Farm.

### **Millbrook Bridge Update**

No update on the Millbrook Bridge, waiting on word from the Corps of Engineers.

## **PUBLIC COMMENT**

None

## **ADJOURNMENT**

Ms. Flowers made a motion, seconded by Mr. Wehrli, to adjourn. With a voice vote of four ayes, the motion carried. The Historic Preservation Commission adjourned at 7:18 p.m.

Respectfully Submitted,  
Matthew H. Asselmeier, AICP  
Senior Planner

Enc.

**KENDALL COUNTY  
HISTORIC PRESERVATION COMMISSION  
SEPTEMBER 18, 2017**

NAME	ADDRESS	EMAIL ADDRESS
Alex Finke	433 Williamsburg Geneva, IL 60134	



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## Memorandum

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**To:** Kendall County Historic Preservation Commission  
**From:** Alex Finke (Government Affairs Director)  
**Subject:** Historic Preservation Ordinance  
**Date:** 9/18/2017

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**Issue:** The third party landmarking nomination of properties by individuals or groups should be removed.

*The potential for involuntary Landmark or Historic District nomination and designation may, in some circumstances, result in a taking of private property without just compensation.*

Property ownership in the United States is often expressed metaphorically as consisting of a “bundle of rights” or a “bundle of sticks.”<sup>1</sup> Each stick in the metaphorical bundle consists of a subsidiary right of ownership, such as the right to possess and use the property, the right to exclude others from the property, and the right to gain income from the property.<sup>2</sup> In some respects, historic notions of property rights have been scaled back by modern experience. Zoning and environmental regulations, for example, represent commonly imposed limitations on the “absolute” nature of property ownership. Few property owners would understand or expect the ownership of a property to encompass the absolute right to use it or develop it in whatever fashion they choose. Today, it is commonly understood and generally accepted that some degree of such regulation is a condition of owning property under our American system. Historic preservation ordinances are, in general, an accepted form of regulation, when tempered within constitutional limits.<sup>3</sup>

The United States Constitution guarantees that no “private property be taken for public use without just compensation.”<sup>4</sup> The Illinois Constitution states: “Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.”<sup>5</sup> The Illinois Supreme Court has interpreted the Illinois provision as synonymous with the federal constitution.<sup>6</sup> Therefore, this analysis is based on federal law. Where there has been no physical taking and the regulation in question does not deprive the property of all of its economic value, a court will apply a balancing test to determine whether application of the regulation to an individual’s land constitutes a regulatory

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<sup>1</sup> See Denise R. Johnson, Reflections on the Bundle of Rights, 32 VERMONT L. REV. 247 (2007) (hereinafter “Bundle of Rights”)

<sup>2</sup> Bundle of Rights at 253.

<sup>3</sup> See e.g. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

<sup>4</sup> U.S. Const., amend. V.

<sup>5</sup> Ill. Const. 1970, art. I, § 15.

<sup>6</sup> Hampton v. Metropolitan Water Reclamation District of Greater Chicago, 57 N.E. 3d 1229 (Ill. 2016).



taking.<sup>7</sup> Courts will make an ad hoc inquiry into (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the distinct investment-backed expectations of the claimant; and (3) the character of the governmental action, i.e. whether it is similar to a physical invasion or affects property interests through a program altering benefits and burdens for the promotion of the common good.<sup>8</sup> This inquiry is applied to the specific facts and circumstances of the claimant to determine if the regulation results in a taking.

According to HPO, Article III (3), "any person" may propose that a property be designated as a Landmark or that a group of properties be designated a Historic District. Designation may be made over an owner's objections.<sup>9</sup> Such designation can significantly impact an owner's ability to alter, modify, or even demolish her own property. An owner who has a designation thrust upon them in this way may find that it precludes her from improving her property, or imposes such costly requirements on improvements that, after weighing the factors of a takings analysis described above, a court could find a regulatory taking.

The HPO provisions allowing an owner to apply for a Certificate of Economic Hardship are intended to avoid potential takings claims in such cases by allowing the owner to seek relief from the Certificate of Appropriateness requirement. Under the doctrine requiring litigants to exhaust administrative remedies, any property owner claiming a taking of private property without just compensation will have to first seek a Certificate of Economic Hardship under the provisions of HPO, Article V (3), before resorting to litigation. A Certificate of Economic Hardship appears to only provide the minimum amount of relief necessary for a property owner to put the property to reasonable beneficial use or obtain a reasonable economic return from the property. It is not fair, or good public policy for the County to place all the burdens of preserving a historic property on an unwilling owner.

*Involuntary Landmarking or Historic District nomination and designation impose an unfair burden on owners, which may negatively impact the real estate market.*

Generally, voluntary landmark designation processes permit property owners to accept limitations on what they can do with their property in order to obtain tax advantages and the prestige associated with historic properties. In exchange, the Landmark status permits local governments to exercise control over the demolition and alteration of properties considered to be historic resources. When this is a truly voluntary process, it allows the property owner to evaluate whether the benefits associated with the designation outweigh the burdens and costs resulting from the restrictions, and decide whether to seek landmark status accordingly. In contrast, where a jurisdiction designates a property as a landmark over the owner's objection, and the burdens of that status outweigh the benefits perceived by the property owner, the

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<sup>7</sup> See Brian W. Blaesser and Alan C. Weinstein, FEDERAL LAND USE LAW & LITIGATION, § 3.8 (2017 ed.).

<sup>8</sup> Id.

<sup>9</sup> HPO, Article III (8).



owner has no say in the matter. This is unfair. As one court has said:

It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense. Requiring private parties to spend substantial sums of money to preserve landmark structures with little or no public assistance could rise to the level of an unconstitutional taking. Moreover, development so vital to a city's growth could be stymied irreparably. By placing the costs of architectural preservation squarely on the landmark owner, design and demolition controls may actually discourage private citizens from purchasing and maintaining landmark property. Failure to offset the economic burdens of landmark designation will create a class of buildings which will be shunned like lepers.<sup>10</sup>

Another reason it is unfair to allow landmark status or historic district designation and resulting restrictions to be imposed on property owners involuntarily is because owners and prospective purchasers cannot determine in advance whether a property will be subject to regulation, and make purchase and other decisions about the property accordingly. This is unlike zoning regulations and building code requirements, which any prospective purchaser will be aware of, and which typically contain grandfathering provisions protecting existing properties from changes in the regulations. Landmark designation ordinances can impose new and burdensome requirements on individual properties that are not imposed on the community as a whole.

To the extent that the Proposed Revisions are viewed within the County as a signal that the County is looking to increase the number of Landmark properties or Historic Districts, future purchasers of older buildings that might not have been concerned with the HPO and potential designation before, may now be aware of the potential consequences of doing so. They may be reluctant to subject themselves to the possibility of having the property designated as a Landmark or even nominated for Landmark status—a Certificate of Appropriateness is “required before any significant alteration, construction, demolition or removal that affects pending or designated landmarks or historic districts is undertaken.”<sup>11</sup> The County may see a softening of the real estate market for older homes and for redevelopment of older properties due to this increased awareness.

Further, because the HPO permits any single individual to nominate a property for Landmark designation, there is a significant potential for the Landmark designation procedures to be used as a tactic for delay and harassment either when a property owner proposes redevelopment of a property or simply when neighbors have a personal dispute.

**Issue: The criteria used to evaluate properties for Landmark or Historic District designation are vulnerable to challenge under the “void of vagueness” doctrine.**

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<sup>10</sup> Citizens Comm. to Save Historic Rhodes Tavern v. D.C. Dep't of Hous. & Cmty. Dev., 432 A.2d 710, 718 (D.C. 1981)(internal quotations and citations omitted).

<sup>11</sup> HPO, Article IV (2)(A).



Under the “void for vagueness” doctrine, an ordinance can be held invalid if its language lacks sufficient clarity or certainty, making it subject to arbitrary interpretation, application, and enforcement. The “void for vagueness” doctrine is a constitutional doctrine rooted in the procedural due process clause of the Fourteenth Amendment to the U.S. Constitution.<sup>12</sup> The U.S. Supreme Court has stated that “[a]n ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning.”<sup>13</sup> A lack of precision and clarity in an ordinance can lead to uncertainty on the part of property owners as to what is required or desired and can make it difficult for local officials and boards to provide guidance and apply the provisions consistently.

The HPO criteria used to evaluate a property for Landmark or Historic District designation rely on numerous vague terms that are not defined or otherwise given clear meaning. For example, Criteria A: “It has character, interest, or value which is part of the development, heritage, or cultural characteristics ....” Criterion B: “Its location is a site of a significant local, County, State, or National event.” Criterion C: “It is identified with a person or persons who significantly contributed to the development of the local community, the County, the State of Illinois, or the Nation.” Criterion H: “It has a unique location or singular physical characteristics that make it an established or familiar visual feature.” Criterion J: “It is suitable for preservation or restoration.”

Additionally, some of the guidelines used by the Commission to evaluate an application for a Certificate of Appropriateness are vague or seemingly unrelated to the historical significance of properties. For example: Criterion (i): suggests that the use of a property should not change from “its originally intended purpose.” As long as the historic architectural elements of a regulated property are preserved, there is no justification for regulating the use of a property in this fashion. Criterion (iii) is also vague: Alterations with “no historical basis” should be discouraged. It is, likewise, unclear how the Commission would apply Criterion (viii): Efforts should be made to protect and preserve resources adjacent to any project.

Because the guidelines and landmarking criteria themselves can be interpreted so broadly, an overzealous Commission could determine properties to be worthy of Landmark or Historic District designation that, viewed more objectively, may have little real historic value. The County could provide clearer guidance for Property owners as well as Commission members if it defined or otherwise imparted more meaning to these terms, either through HPO revisions or the adoption of guidance documents.

A number of lawsuits have been brought challenging the constitutionality of ordinances protecting historical landmarks. Most of the challenged ordinances have ultimately been upheld over vagueness challenges.<sup>14</sup> One Illinois Appellate Court, in an unpublished decision, upheld the City

<sup>12</sup> See BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:18 (THOMSON-REUTERS/WEST: 2017).

<sup>13</sup> Id. (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 868 (1973)).

<sup>14</sup> See *Validity and Construction of Statute or Ordinance Protecting Historical Landmarks*, 18 A.L.R.4th 990; see also *Hanna v. City* 433 Williamsburg Avenue | Geneva, IL 60134 | 630.232.2360 | rafv.realtor



of Chicago's landmark designation ordinance over a vagueness challenge by construing similar terms in the designation criteria as having their plain meaning and not required to have "mathematical" precision, particularly when understood in the context of the whole ordinance.<sup>15</sup> However, it is noteworthy that the same court, in an earlier ruling in the same case, stated:

We believe that the terms "value," "important," "significant," and "unique" are vague, ambiguous, and overly broad.... The City has offered no criteria by which a person of common intelligence may determine from the face of the Ordinance whether a building or district will be deemed to have value or importance...<sup>16</sup>

In the later decision, the court backpedaled from this statement, noting that this earlier decision did not enter any judgment with regard to the constitutionality of the ordinance as it only considered the issue on appeal from a motion to dismiss.<sup>17</sup> It stated:

Admittedly, we did allude in our discussion that the portions of the Ordinance challenged by plaintiffs in counts I through III could be seen as vague or as an improper delegation of authority to the Commission ...Yet, we did so only in the ultimate context of an appeal from the grant of ... dismissal to show that plaintiffs had some sort of legal and factual basis for their claims that ... survived dismissal...<sup>18</sup>

Although neither decision would control any court's determination regarding a vagueness challenge to the County's HPO because each is based on the specific facts of the ordinance under consideration by the court,<sup>19</sup> the earlier decision provides important language and reasoning, notwithstanding the later decision's determination that the terms were given meaning by their context. Nonetheless, the court's later decision indicates the difficulty of challenging vague language in the specialized context of a landmarking ordinance.

**Issue: The HPO grants the Commission authority to make several important determinations under the HPO without providing standards for doing so.**

The HPO raises issues under the nondelegation doctrine. Standardless grants of discretionary authority to an administrative official can potentially violate this constitutional principle, which prohibits a local legislative body from delegating its legislative or policy-making power to administrative boards or officials.<sup>20</sup> A local legislative body can, however, delegate to an

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of Chicago, 2013 IL App (1st) 121701-U (Sept. 26, 2013) (hereinafter HANNA II) (citing to various cases where landmark designation criteria have been upheld over vagueness challenges).

<sup>15</sup> HANNA II at ¶¶ 20-21.

<sup>16</sup> O Hanna v. City of Chicago, 907 N.E.2d 390, 398 (Ill. App. 2009)(reversing the lower court's grant of a motion to dismiss and remanding for further proceedings).

<sup>17</sup> HANNA II at ¶¶ 20-21.

<sup>18</sup> Id. at ¶ 20.

<sup>19</sup> The Hanna II decision is also is an unreported case without weight as precedent in the Illinois courts. See Illinois Supreme Court Rule 23.

<sup>20</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:18





administrative body the authority to exercise discretion in carrying out public policy, provided that the delegation is accompanied by standards and specific procedural guidelines.<sup>21</sup> The delegation of standardless authority can also result in arbitrary decision-making, which is unfair to property owners, and may expose the County to claims based on the constitutional rights to due process and equal protection.<sup>22</sup>

The provisions of Article IV(6), in particular, raise nondelegation concerns. This section requires the Commission to periodically

survey the exterior of each designated landmark and each property within a historic district to ensure that the property is not suffering from demolition by neglect.... Any owner who fails to maintain their building or structure in compliance with this section shall be subject to remedial procedures.

If the Commission makes a finding "that a historic landmark or a contributing building or structure within a historic district is threatened by demolition by neglect" it must notify "the County Board so that they or the appropriate county agency will require the owner to repair all conditions contributing to demolition by neglect." (emphasis added) The HPO does not provide sufficient guidance to the Commission regarding how to conduct the annual "neglect" survey. The only guidance is the definition of "demolition by neglect," which is:

neglect in the maintenance of any landmark and/or building or structure within a preservation district resulting in the deterioration of that building to the extent that it creates a hazardous or unsafe condition as determined by the Kendall County Building and Zoning Department or the Kendall County Department of Health.

Based on this definition, it appears that the Commission is required to make determinations that Building and Zoning Department or Health Department employees are better equipped and better trained to make. Additionally, it is unclear how Commission members could determine the existence of a hazardous or unsafe condition based solely on an exterior examination of the property.

There also are no standards in the HPO to guide the Commission in deciding whether to (1) conduct a public hearing on a Certificate of Appropriateness application; (2) consider the complete application at the next regularly scheduled meeting of the Commission;<sup>23</sup> or (3) "designate support staff to be responsible for reviewing routine applications for Certificates of Appropriateness when the proposed work is clearly appropriate."<sup>24</sup> Regarding the last option, the HPO does not define a "routine" application. It also does not indicate when an application would

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(THOMSON-REUTERS/WEST: 2017).

<sup>21</sup> 5 See id.

<sup>22</sup> See id. §§ 1:44, 1:54

<sup>23</sup> HPO, Article IV (2)(B)(ii) & (iii).

<sup>24</sup> HPO, Article IV (2)(B)(iii).



be considered “clearly appropriate.” Additionally, it is not clear whether there is a difference between the procedure or considerations applied to a noticed “public hearing” and the Commission’s regularly scheduled meeting.

**Issue: The HPO contains ambiguous language, making it difficult to interpret and apply.**

In addition to having vague standards and criteria the HPO also contains several instances of ambiguous language that makes it more difficult to interpret and apply the HPO to particular properties and situations. Some examples are:

**50 years or older buildings:** Article II (2)(M) states that “any application for demolition of any structure which is more than 50 years old shall be reviewed by support staff and forwarded to the Preservation Commission for review within seven (7) working days.” Article II (2)(M) is part of the HPO that provides the Commission’s “Powers & Authorities.” No provision in the HPO explains the purpose of this review or what the outcome may be. Does it imply that the Commission has authority to delay the demolition of buildings, merely because they are 50-years or older? What is the purpose of staff review?

**Transfer of Development Rights:** Article I (2)(M) defines a “Development Rights Bank” as “[a] reserve for the deposit of development rights as defined in Section 11-48.2-1A of the Illinois Municipal Code.” “Development Rights” are defined as “[t]he development rights of a landmark or of a property within a historic district as defined in Section 11-48.2-1A of the Illinois Municipal Code.” The HPO does not mention again the use or transfer of Development Rights, and it is not clear whether the HPO actually authorizes such programs. As discussed below, development rights transfer programs may be helpful in achieving the County’s goals.

**Objections to designation:** According to Article IV (8), if there is a property owner objection “to Landmark designation or [a] historic district, the nomination would require the affirmative vote of a super majority of the full County Board.” Is a super majority required if just one owner within a proposed district objects to designation? Compare this to Article II (3), which only requires that 51% of the owners impacted by district nomination receive notice of such nomination.

**Constructive Approval:** If the Commission fails to act on an application for a Certificate of Appropriateness within 90 days, the application is deemed approved.<sup>25</sup> The HPO does not specify when the 90-day period begins to run. Does it start when an application is filed with the Department, when the application is forwarded to the Commission for review, or on some other date? See Article IV (2)(B).

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<sup>25</sup> HPO, Article IV(2)(H).