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April 3, 2008

Douglas R. Haynie, Esq.
HAYNIE, LITCHFIELD & CRANE, P.C.
222 Washington Avenue
Marietta, Georgia 30060

Re: Historic Preservation Ordinance of the City of Marietta

Dear Mr. Haynie:

This is in response to your letter to Attorney General Baker of May 7, 2007, in which you requested that this office consider your response as city attorney for the City of Marietta ("the City") to a certification determination made by a representative for the Division of Historic Preservation of the Georgia Department of Natural Resources. Specifically, after reviewing materials submitted by the City, the Division determined that the City did not meet the minimum requirements necessary to participate in Georgia's Certified Local Government program for historic preservation due to certain provisions of the City's Historic Preservation Ordinance. The City does not agree with that determination.

I. Statutory Background.

A. The National Historic Preservation Act.

The National Historic Preservation Act of 1966 (16 U.S.C. § 470, *et seq.*, hereinafter "the National Act") was enacted based, in part, on Congress' declarations that "historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency," and that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470 (b)(3) and (4). In order to encourage the preservation of historic properties, the National Act established a policy and program to "assist State and local governments ... to expand and accelerate their historic preservation programs and activities." 16 U.S.C. § 470-1 (6).

To accomplish this, the National Act provides for the approval of State Historic Preservation Programs. 16 U.S.C. § 470a (b). Approval under the National Act gives states access to federal aid in the form of grants and other assistance from the U.S. Department of the Interior for the

purpose of maintaining historic preservation programs. Similarly, the National Act authorizes the State Historic Preservation Officer (“SHPO”) to certify “local governments to carry out the purposes of [the National] Act.” 16 U.S.C. § 470a (c)(1). In order to qualify for certification, the local government must enforce “appropriate” local ordinances “for the designation and protection of historic properties,” and must insure that members of the local government’s historic preservation review commission “have a demonstrated interest, competence, or knowledge in historic preservation.” 36 C.F.R. § 61.6 (e). Both the state’s and the local government’s programs must allow for public participation in the historic preservation program process. 16 U.S.C. § 470a (b) and (c).

B. Georgia’s Historic Preservation Statutes.

In Georgia, the state agency designated as having responsibility for the State’s Historic Preservation Program is the Georgia Department of Natural Resources (“DNR”); specifically, DNR’s Division of Historic Preservation. O.C.G.A. §§ 12-5-50 and 12-5-58. In addition, in 1980, Georgia enacted its own Historic Preservation Act (“the State Act”). Ga. L. 1980, p. 1723. In so doing, the legislature declared that: “The General Assembly finds that the historical, cultural, and aesthetic heritage of this state is among its most valued and important assets and that the preservation of this heritage is essential to the promotion of the health, prosperity, and general welfare of the people.” O.C.G.A. § 44-10-21. The State Act authorizes Georgia’s counties and municipalities to enact “ordinances providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or esthetic interest or value.” *Id.* The State Act requires a local government desiring to enact an ordinance providing for the protection of historic properties or districts to establish a historic preservation commission. O.C.G.A. § 44-10-24. “A majority of the members of any such commission shall have demonstrated special interest, experience, or education in history or architecture” *Id.*

Among other things, such commissions are authorized to “[r]ecommend to the municipal or county local governing body specific places, districts, sites, buildings, structures, or works of art to be designated by ordinance as historic properties or historic districts,” and to “[s]ubmit to the Division of Historic Preservation of the Department of Natural Resources or its successor a list of historic properties or historic districts designated as such.” O.C.G.A. § 44-10-25 (2) and (11), respectively. Prior to adopting an ordinance designating property as historic, written notice must be given to affected property owners, and the commission and the local government are required to hold a noticed public hearing on the proposal, after which, the local government “may adopt the ordinance as prepared, adopt the ordinance with any amendments it deems necessary, or reject the proposal.” O.C.G.A. § 44-10-26 (b). The owner of property so designated, whether the designation is for a specific historic property or for properties within a designated historic district, must obtain “a certificate of appropriateness prior to undertaking any material change in

the appearance of the historic property designated or within the historic district designated.” O.C.G.A. § 44-10-26 (c).

The express legislative purpose of enacting the State Act was to “establish a *uniform* procedure for use by each county and municipality in the state in enacting ordinances providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or esthetic interest or value.” O.C.G.A. § 44-10-21 (emphasis added). Georgia’s historic preservation program created by this statutory scheme and the guidelines developed by DNR’s Division of Historic Preservation has constituted an approved program under the National Act since 1980.

II. Requirements of Georgia’s Approved Historic Preservation Program.

For a local government to become certified under the National Act, it must obtain certification from DNR’s Division of Historic Preservation (“the Division”) consistent with the Division’s certification program. The Division has developed an application procedures manual entitled “*Georgia Certified Local Government Program: Application and Procedures*,” (“the Procedures Manual”) and a “*Checklist for the Review of Local Historic Preservation Ordinances*” (“the Checklist”). The Procedures Manual identifies the two primary requirements for a local government to become certified: the appointment of a qualified historic preservation commission, and the enactment of a historic preservation ordinance. (Manual, p. 6.) The Procedures Manual identifies the various fields of expertise or special interest that commission members must possess; these include architecture, history, American studies, cultural anthropology, and folklore. (Manual, p. 9.) The commission is required to prepare and maintain an inventory of all property within its jurisdiction having the potential for designation as historic property, and is to recommend to the local governing body specific places, districts, and sites to be designated and protected as historic. *Id.* The ordinances adopted by the local government are to be consistent with the State Act. (Manual, p. 8.)

The Checklist states that the State Act contemplates a local government enacting two ordinances: one to establish the commission, and one or more designating individual properties or districts as historic. (Checklist, p. 1.) Combining the two purposes into one ordinance “means automatic failure to comply with the provisions of the [State Act].” *Id.*

III. City of Marietta’s Application and Evaluation.

In support of its application for certification, the City of Marietta submitted its Historic Preservation Ordinance, Marietta Code Section 7-8-9, (“the Ordinance”) to the Division. In addition to establishing a historic preservation commission and identifying its composition and powers, the Ordinance also provides limitations on properties that the City Council can designate by ordinance as historic under the State Act. Section 040 of the Ordinance states: “If the owner

of the private property does not consent to the proposed historic designation, the historic property cannot be listed as a historic property under this ordinance.” Section 7-8-9-040(A)(1). The Ordinance also states: “If at least 60 percent of private property owners within a proposed district do not consent to the nomination, the area cannot be designated as a historic district.” Section 7-8-9-040(a)(2). Because of these two provisions, DNR’s Division of Historic Preservation denied certification to the City¹. The Division determined that these provisions were inconsistent with the State Act and constituted an invalid delegation of legislative authority.

IV. Analysis.

Upon review of the materials and statutes applicable to this matter, it is my assessment that DNR’s Division of Historic Preservation acted properly by denying the City’s request for certification. In order to qualify for certification, a city is required to submit an ordinance adopted by the city that is consistent with the Division’s certification program, the State Act, and the National Act. The State Act and National Act are clearly intended to encourage cities and counties to pass ordinances that protect historic properties for the general good of all citizens of the community, this State, and the country based on the evaluation of such properties by experts and the vote of local elected officials. Marietta’s ordinance would allow a single individual or group of individuals to unilaterally prevent such protection notwithstanding the opinion of the commission or the significance of the historic value of the property to the community and State as a whole.

Allowing a limited number of property owners to effectively veto the historic designation of property defeats the legislative purpose of the State Act and its specific provisions, as well as the National Act under which the State Program is approved, which purpose is to provide protection of historic properties for the public as a whole. Such an ordinance is also inconsistent with the role intended by the legislature for historic preservation commissions, whose member have specific expertise in the area, to evaluate and make recommendations on such properties. Similarly, the statutory requirement that both the commission and the local government allow the “public” to be heard on a proposed designation is meaningless if the individual property owners can veto the measure notwithstanding public input.

Furthermore, such an ordinance is not consistent with the model ordinance that the State program has developed and which is a part of the program that has been approved by the federal agency. Allowing an ordinance such as that proposed by the City of Marietta could endanger Georgia’s program approval to the detriment of all the other local governments that have enacted ordinances consistent with the model ordinance. In fact, it is my understanding that DNR’s

¹ See correspondence dated December 29, 2006, from Jennifer Lewis, Certified Local Government Coordinator, University of Georgia School of Environmental Design, to Rusty Roth, Development Services Manager, City of Marietta.

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Division of Historic Preservation has never approved an ordinance containing a property owner veto provision such as that contained in the ordinance being proposed by the City of Marietta.

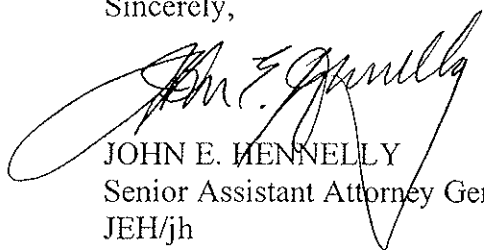
Finally, Marietta's ordinance is not consistent with the express purpose of the State Act, that being to "establish a *uniform* procedure for use by each county and municipality in the state in enacting ordinances providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or esthetic interest or value." O.C.G.A. § 44-10-21 (emphasis added). In the first place, Marietta's procedure would not be "uniform" with procedures in the other ordinances approved by DNR's Division of Historic Preservation. Additionally, approval of an ordinance of this type would clearly open the door for other municipalities or counties to propose using similarly structured ordinances which could contain provisions designating a wide variety of levels of veto powers for effected homeowners leading to less uniformity - in contradiction to the express legislative intent of the State Act.

V. Conclusion.

DNR's Division of Historic Preservation's denial of certification based on its review of the City of Marietta's proposed historic preservation ordinance was proper. Marietta's ordinance contains an owner veto provision that is inconsistent with the legislative purpose and intent of both the State Act and the National Act, and the State's approved historic preservation program, by allowing a small number of individuals, or a single individual, to nullify the statutory requirements of public notice and input, and expert review, evaluation, and recommendations regarding the protection of historic properties.

This correspondence constitutes the legal analysis of the undersigned only and is not intended to express an official opinion of the Attorney General. Nothing in this analysis should be construed as limiting, or intending to limit, the judgment of the City Council of Marietta in considering the adoption of a proposed ordinances to designate a property or properties as historic. Please let me know if you have any questions.

Sincerely,



JOHN E. HENNELLY
Senior Assistant Attorney General
JEH/jh

cc: Ray Luce, Director, DNR Historic Preservation Division
Jennifer Lewis, University of Georgia School of Environmental Design