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The Preservation of Historical Areas

By Wilfrid A. Schroder

I. INTRODUCTION

Both governmental and private agencies are becoming aware that cities and counties of the future can serve foreseeable requirements only if adequate city plans and state programs are developed to insure that the public interest in recreational outlets and in the protection of the remaining vestiges of our history and culture is satisfied. As studies are made and plans evolve, it also becomes more evident every day that our country faces a future of historical and architectural sterility unless means can be found to retain those buildings and areas in existing urban complexes which form a valuable part of our cultural heritage.

Under the banner of “progress”, buildings of historical significance are destroyed every day. Advocates of progress maintain that new buildings more effectively and more efficiently utilize our land and resources, while critics argue that modern glass and steel buildings are poorly constructed, lack character, and are simply ugly. This article does not focus upon the abstract merits of either view. Instead, it is directed at an alternative thesis: That historical buildings and areas can be important to communities for aesthetic, economic, educational, and social, as well as historical reasons.

In 1966 Congress stated that, “the spirit and direction of the

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2 The Municipal Art Society of New York City conducted a survey from 1951 to 1957 and found 300 buildings in the city to be worthy of preservation as examples of particular architectural styles and periods from 1661 to 1930. When the study was finally completed, 20% of these buildings had been destroyed. See Municipal Art Society, New York Landmarks (1957).
Historical Areas

Nation are founded upon and reflected in its historic past; and that "the historical and cultural foundations of the Nation should be preserved. . . ." Effecting such preservation, however, is a matter of state, no less than national, concern for

Kentucky, like all other states, faces the homogenizing pressures of mass communications and rapid transportation. [In response to this pressure,] particular attention must be given to retaining the rich cultural patterns of each region... [It] is especially important that efforts be made to preserve vestiges of our past as reminders of whence we came and perhaps as indicators of where we are going.

For those who wish to see historic buildings in Kentucky protected and restored, this article will develop various methods that may be used for preservation, emphasizing zoning and its legal justifications. Obviously there is no universal preservation technique; rather the method chosen will depend on the peculiar economic, social, and political characteristics of the particular community. And, while this paper is primarily devoted to Kentucky law, the material presented has relevance to other jurisdictions.

II. INDIVIDUAL PARTICIPATION

The easiest way to restore and preserve historic buildings or districts may be the hardest. This apparent contradiction stems from the fact that although the easiest method constitutionally, politically, and socially is private purchase, restoration, and preservation, practical economics will often make private participation impossible. Although every year scores of private individuals purchase older buildings which they restore to serve their individual dwelling, business, or entertainment needs, as well as the purely educational and historic needs of the community, such scattered action does little toward accomplishing comprehensive restoration and preservation goals.

In many communities one can see a trend to buy and restore in a particular area, but operations on a grander scale are usually

4 Id. at (6).
5 KY. HERITAGE COMMISSION, KENTUCKY'S PLAN FOR HISTORIC PROTECTION 3 (1971).
lacking. Williamsburg, Virginia is the perfect exception.\(^6\) This project, unlike many others, is primarily one of restoration by private groups; in fact one individual, John D. Rockefeller, Jr., purportedly donated forty-eight million dollars to the restoration project. The privately restored section, known as "Colonial Williamsburg," represents approximately eight percent of the city and involved the complete rebuilding or restoration of many buildings to their original form to achieve historical accuracy.\(^7\) The land on which the restored eighteenth century city is situated was ultimately deeded to a non-profit corporation, Colonial Williamsburg, Inc., whereas the adjacent surrounding properties are owned by a profit-making corporation to accommodate the tourist trade.\(^8\)

III. STATE AND MUNICIPAL PARTICIPATION

Private investors react negatively to the restoration of buildings on a large scale to serve as museums. With the exception of Williamsburg, it is rarely, if ever, practicable or desirable for private investors to undertake this type of project.\(^9\) For this reason it is apparent that if we want a viable program for the restoration and preservation of historic areas, we will need government assistance. Generally, government assistance can be divided into two categories: (1) direct governmental intervention (eminent domain) to force the desired result; and (2) indirect intervention (zoning regulation through use of the police power) to encourage preservation.

The first significant conflict involving the exercise of governmental eminent domain powers for the preservation of historical property concerned a plan to condemn land for the Gettysburg National Military Reservation. The Supreme Court approved the plan and found that the federal government has such powers, concluding that the inspiration of patriotic love of country is a justifiable public use:

Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of

\(^6\) President's Report, Colonial Williamsburg 24 (1951).
\(^8\) Id. at 738.
his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. The proposed use comes within such description. . . .

Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. . . .

. . . .

. . . [T]he determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land.10

The "public use" concept relied upon by the Supreme Court had been defined earlier as a "use or right of use on the part of the public, . . . a public benefit, utility, or advantage."11 The Kansas Supreme Court in Smith v. Kemp upheld a state condemnation proposal for a site of historical interest, declaring:

The meaning of the statute is clear enough, that places invested with unusual historical interest may be acquired by the state by gift, devise, or condemnation, for the use and benefit of the state, as places of that character.12

Basing its decision on the public use doctrine, the court expounded upon the benefits of historical preservation:

The end to be subserved by state promotion of intellectual and moral improvement is better citizenship; and good citizenship is inculcated by giving attention to history as history is now conceived. History is no longer a record of past events. It is an illuminating account of the expanding life of man in all its manifestations, revealing how each stage of civilization grows out of preceding stages, revealing how the past still lives in us and still dominates us, and enabling us to profit by what has gone before. So considered, history is inspirational.13

11 Id. at 674.
13 Id. at 558.
Even when it is accepted that there is a valid public use in the preservation of historic buildings and sites and that they may be constitutionally protected through eminent domain proceedings, there are still several fiscal problems attendant upon taking absolute ownership of the property. Local authorities, in some situations, may only want to preserve the outside architectural character of a structure; thus, a condemnation of the entire fee would be costly as well as unnecessary. Not only are the initial expenditures costly, but substantial sums must be provided by taxpayers for maintenance. In addition, when property is removed from the tax rolls the taxpayer must make up the loss in revenue. This can be dangerous politically as well as economically.

One alternative is to take only a limited interest in the property, such as a scenic easement. This approach offers numerous benefits:

Easements generally are far less costly than outright purchase, a situation that permits the effective spreading of scarce preservation dollars over a much larger area and increasing the likelihood of easement donations. Easements also generally leave the cost of maintenance with the property owner, and that is another important economic factor. Finally, easements allow the property to remain in productive use. People may continue to live in it. And the property remains on the tax rolls, although usually at a lower assessment value.\(^{14}\)

There are, however, legal technicalities involved with such easements. A scenic easement is an easement in gross,\(^{15}\) which is the type most commonly used in historic preservation efforts. In several jurisdictions, which still follow English common law on the subject, such easements do not run with the land and are not assignable. However, only a minority of the states still follow this rule.\(^{16}\) Furthermore, the problem of nonassignability is lessened considerably if the easement is granted to an agency of the city or state which has a perpetual existence.

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\(^{15}\) Easement in gross is for one other than the adjacent landowner; whereas an easement appurtenant is an easement for the adjacent landowner.

\(^{16}\) See C. Clark, *Real Covenants and Other Interests Which Run With Land* 69 (2d. ed. 1947).
The Development of Zoning

Eminent domain cases, such as those discussed above, involve an actual taking and compensation by government. More troublesome litigation arises where the "taking" is effected indirectly by restrictions imposed on the property by zoning regulations. This application of the police power may be good economics, but it creates obvious constitutional problems, and since zoning ordinances normally impose restrictions without compensation, they are perhaps more difficult to justify than eminent domain actions.

The purposes of zoning ordinances are to promote the public health, safety, morals, and general welfare of the community; to facilitate orderly and harmonious development and the visual or historical character of the community; to regulate the density of population and intensity of land use in order to provide for adequate light and air; to provide for vehicle parking and loading space; to facilitate fire and police protection; to prevent the overcrowding of land, blight, danger, and congestion in the circulation of people and commodities, and the loss of life, health, or property from fire, flood, or other dangers; and to protect airports, highways, and other transportation facilities, public facilities, including schools and public grounds, historical districts, central business districts, natural resources, and other specific areas of the community which need special protection.7

Zoning regulations shall be made with reasonable consideration among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.8

Hagman9 discusses additional uses of zoning, such as maintaining the value of land and buildings in the area, stabilizing the character of neighborhoods, providing equal protection of the laws to all in a particular zone, moving traffic rapidly and safely, regulating competition to an extent, controlling aesthetics and archi-

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8 U.S. Dep't of Commerce, Standard State Zoning Enabling Act § 3 (1926).
tectural design, preserving cultural, historic, natural and govern-
mental areas, increasing the tax base, and promoting morals. Some
of these factors alone would not justify particular zoning regula-
tions, but if several of them come into play at once, the resulting
regulation will ordinarily be upheld. For example, controlling
or restraining business competition is not a valid purpose for
zoning; however, it is often a result, whether originally desired
or not, when the zoning is based on prevention of overcrowded
street traffic, protection from fire hazards, or aesthetics.20

Land-use regulation by public bodies or agencies was a direct
result of the growth of cities. The problems that developed when
large numbers of people moved to a relatively small land area
necessitated regulation of some type and ultimately led to zoning.
The first modern zoning ordinance, enacted in New York City in
1916,21 classified land uses, created zones for all uses, established
height and bulk limits, and mapped the individual zones. Later
zoning ordinances were primarily based on this one.

Early zoning ordinances were challenged in the courts of a
number of states, with conflicting results. The confusion thus
generated did not subside until the United States Supreme Court
decided several zoning cases, between 1926 and 1928, beginning
with Village of Euclid v. Ambler Realty Co.22 In this landmark
decision the Court upheld comprehensive zoning regulations as
valid exercises of police power for the public welfare, citing better
access for fire protection, traffic safety, prevention of accidents,
decrease of noise and other nuisances, and better environments
for raising children as proper considerations in promulgating such
ordinances. This case opened the door for zoning as a regulatory
method, and as a result all the states now have zoning statutes.23
After Euclid, zoning enabling acts and ordinances based on police
power regulation for the public interest, safety, health, morals, or
general welfare,24 usually were upheld unless they were unreason-
able or arbitrary.25

20 For a discussion of this issue see Mandelker, Control of Competition as a
Proper Purpose in Zoning, 14 ZONING DIGEST 33 (1962).
21 D. Hagman, supra note 13, § 28.
22 272 U.S. 365 (1926).
23 See R. Anderson and R. Roswig, Planning, Zoning, and Subdivision: A
Summary of Statutory Law in the 50 States (1966).
24 See KRS § 100.201; Lexington-Fayette Co. Zoning Ord. art. I, § 1.3.
Aesthetic Considerations in Zoning and Eminent Domain

The *Euclid* case and the many state decisions which followed led to the protection of aesthetics through zoning. This practice has generated much litigation and many conflicting decisions concerning its validity. Generally, whether the ordinance is upheld or not, the courts have avoided the specific question of aesthetics, basing their decisions instead on one of the traditional areas of public health, safety, morals, or general welfare. As one court candidly stated, "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."\(^2\)

Several courts, on the other hand, view aesthetic zoning as an improper exercise of police power to restrain an individual in the use of his private property. They contend that a community cannot justify the luxury of viewing pleasant surroundings under the guise of police power.\(^2\) Most courts that have recognized the issue, however, view aesthetics as a valid basis for regulation of land use, but base their decisions on the conclusion that aesthetic zoning inures to the general welfare of the public.\(^2\)

The earliest cases were generally in strong opposition to zoning on the basis of aesthetics:

> There must be an essential public need for the exercise of the [police] power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of police power. The world would be at a continual seesaw if aesthetic considerations were permitted to govern the use of the police power.\(^2\)

One court went so far as conceding that "[a]esthetic considerations are, fortunately, not wholly without weight in a practical world,"\(^3\) while concluding that a zoning ordinance based on such factors was "patently unreasonable."\(^3\)

The case of *Gunning Advertising Co. v. St. Louis*\(^2\) was one

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\(^2\) Perlmutter v. Greene, 182 N.E. 5, 6 (N.Y. 1932).
\(^2\) See, e.g., Wineburgh Advertising Co. v. Murphy, 88 N.E. 17, 20 (N.Y. 1909).
\(^3\) Dowsey v. Village of Kensington, 177 N.E. 427, 430 (N.Y. 1931).
\(^3\) Id.
\(^3\) 137 S.W. 929 (Mo. 1911).
of the first in support of aesthetic zoning; however, the decision was clearly based on several illusory considerations as well as on aesthetics. The court upheld an ordinance prohibiting billboards on vacant lots in the city, explaining:

In cases of fire they [billboards] often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure, and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine, and air, which are so conducive to health and comfort.3

This avoidance technique is still used, to an extent, by courts in upholding aesthetic zoning. Later decisions more often directly considered aesthetics as a valid basis for zoning, though still placing it within the public welfare aspect of the police power.34 "There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations; such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions."35 The first ordinance upheld for purely aesthetic reasons was in Florida36 where the court concluded: "It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveller."37 This argument for the maintenance of the tourist industry and the resulting business protection and eco-

33 Id. at 942.
35 Ware v. Wichita, 214 P. 99, 101 (Kan. 1923).
36 Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941).
37 Id. at 367.
Economic encouragement became the primary justification for zoning for the protection of historical areas.\textsuperscript{38}

In \textit{Berman v. Parker},\textsuperscript{39} the United States Supreme Court expanded the concept of aesthetic zoning. In this case, the Court established aesthetics, in light of its contribution to the public welfare, as a valid basis for the exercise of eminent domain:\textsuperscript{40}

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 . . . clean . . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.\textsuperscript{41}

Since this decision several courts\textsuperscript{42} have found ordinances based solely on aesthetics to be valid. In the strongest of these cases\textsuperscript{43} the court upheld a city ordinance prohibiting hanging clothes in front yards, basing its decision solely on aesthetic reasons:

If zoning restrictions which implement a policy of neighborhood amenity are to be stricken as invalid, it should be . . . not because they seek to promote "aesthetic objectives", but solely because the restrictions constitute "unreasonable devices of implementing community policy."\textsuperscript{44}

Now, property owners, prospective purchasers, and land developers must fully consider aesthetic factors before making decisions affecting their property.\textsuperscript{45} State and city legislative bodies and the courts which review the legislation frankly state that aesthetic values are to be considered as a basis for zoning, and in some areas aesthetics can be the sole basis for particular zoning regulations.

\textsuperscript{38}See, \textit{e.g.}, \textit{New Orleans v. Levy}, 65 So. 2d 798 (La. 1953).
\textsuperscript{39}348 U.S. 26 (1954).
\textsuperscript{40}For a discussion of aesthetics as applied in eminent domain and in zoning see \textit{Aesthetic Control of Land Use: A House Built Upon the Sand?} 59 Nw. L. Rev. 372, 378 (1965).
\textsuperscript{41}348 U.S. at 33.
\textsuperscript{44}Id. at 274.
\textsuperscript{45}See, \textit{e.g.}, \textit{Bus. Week}, July 28, 1973, at 78.
The general acceptance of aesthetic zoning led directly to legislation and court opinions upholding zoning for protection of historical buildings and areas. The basic factors justifying zoning for aesthetic reasons are applied in the same way to justify zoning for historical purposes. All zoning must be based on some aspect of the police power; the basis generally used to uphold historical zoning is that it is economically advantageous and therefore promotes the general welfare. The preservation of historical buildings, especially when located near other such buildings, helps spur tourism which results in a rise in property value and, consequently, in property taxes. Furthermore, tourists spend money at or near the historical attraction, thus helping local business and resulting in increased sales and income taxes. The irony of this relationship is that while the basis for the zoning is the advancement of business, the original purpose of historical zoning was to prevent businesses from encroaching into historical areas.

Where a legislature decides to include historical preservation within a zoning enabling act, as long as the historical zoning pursuant to the act is a part of the comprehensive municipal plan or policy, it is generally upheld when challenged in the courts. As explained by one author:

Zoning is simply the regulation of land use in accordance with a general plan and does not preclude restrictions on the use of particular lots within one district. As long as the restriction is not arbitrary and is based on reasonable distinctions, there is no 14th Amendment problem. The presence of a building of unusual historical or architectural interest would seem to reasonably distinguish one lot from others.

The case of In re Russell was the first to uphold a special district ordinance. The city of Niagra Falls, New York, prohibited factories within a prescribed area of the city unless two-thirds of the property owners within 200 feet consented. The ordinance

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50 158 N.Y.S. 162 (1916).
sought to protect the scenic beauty and the historical interest of the Niagara Falls area. The court held that this was a proper exercise of the police power by the city, citing the large investment by property owners and the State of New York, and stating that the sure result of a factory there would be to greatly decrease the value of the property in the area and to interfere with the proper enjoyment of a nearby park area. The court considered the detrimental effect upon the health and comfort of the community to be the controlling factor in its decision.

The courts are just beginning to recognize a new era in the use of police power for historic zoning purposes. Preservation of the French Quarter of New Orleans (the Vieux Carre) is one of the best known examples of the use of the police power to preserve the exterior design of buildings in a cultural-historical area. New Orleans, rich in French and Spanish tradition, has become a fantastic tourist attraction. The French Quarter is today the focal point of that attraction as it was in 1936 when statewide concern for the protection of the area led to the adoption of a state constitutional amendment. The amendment authorized the Commission Council of the City of New Orleans to create the "Vieux Carre Commission" for the expressed purpose of preserving those buildings in the Vieux Carre section of the city that the Commission deemed of historic or architectural value, for the benefit of New Orleans and Louisiana. With this constitutional mandate the Commission adopted the Vieux Carre Ordinance whereunder any change in appearance, color, material, or architectural design, and all demolitions, new construction, and even repairs required approval by the Vieux Carre Commission. In sustaining the ordinance in City of New Orleans v. Pergament, the court held that the ordinance was a proper exercise of the police power both to preserve the district and to maintain the commercial value of the area as a tourist attraction.

The New Orleans Ordinance, in attempting to place an area of cultural-historical value in a special zone district singled out

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51 Comment, supra note 47, at 734.
52 La. Const. art. 14, § 22A.
53 New Orleans, La., Vieux Carre Ordinance 14538, March 3, 1937, as amended, Ordinance 15085, June 13, 1940.
54 5 So. 2d 129 (La. 1941).
55 Id.
for preferential treatment, was similar to special zoning ordinances used in other areas throughout the country. In the case of *Rebman v. City of Springfield*, for example, the court discussed the validity of an historical zoning ordinance passed under the Illinois statute:

Springfield, by this ordinance and under the zoning legislation and legislation for the preservation of historical and other special areas, has done that which has been done in some fifty-six other communities in America located in nineteen different states. . . .

Cases cited to us which have considered this issue are persuasive, though admittedly not determinative cases. [cases cited from five different states].

We see no useful purpose in discussing the details of these cases or distinguishing one from the other because of a municipal ordinance under a constitutional provision authorizing city preservation of historical areas, or state statutes contemplating the same result. The common denominator to all of those cases and to this case, it seems to us, is the fact that the preservation of historical areas under reasonable limitations as to use is within the concept of public welfare and may be effected by the exercise of the usual police power attendant upon zoning.

The result of this decision was to lend a presumption of validity to any zoning ordinance enacted for the preservation of historical areas if it was within reasonable limitations and if the city had such power from the state enabling act.

Another approach to historic preservation that relies on the use of the police power through zoning ordinances is exemplified by the program currently in force in the city of Lexington and Fayette County, Kentucky. There, as will be discussed in more detail later, the Urban-County Planning Commission's Zoning Ordinance Resolution [hereinafter ZOR] now in effect zones the entire urban county. In addition, the ordinance sets up an "historic" designation which overlaps the general provisions of
the zoning ordinance, and creates additional requirements that seek to preserve the atmosphere of the historic (H) districts. The general provisions of the ZOR are still applicable and are enforced by the building inspector, but the specific provisions which relate to historic districts are administered by the Board of Architectural Review. This Board makes recommendations to:

The Planning Commission and the Lexington-Fayette Urban County Council on all matters relating to the preservation, conservation, and enhancement of structures, premises, and areas of substantial historic or architectural significance and matters relating to the establishment of Historic Districts and regulations to be enforced thereunder. The Board of Architectural Review shall inspect and designate such structures, premises and areas in the City of Lexington and Fayette County as it considers having substantial historic or architectural significance.

**Governmental Incentives to Private Action**

Manipulation of various taxes can be an effective incentive for preserving historical buildings. For example, certain private organizations can be made tax exempt by the legislature upon the condition that they acquire and preserve historic property.

A reduction of state or local property taxes on realty considered to have sufficient historical characteristics, and which is adequately restored and maintained, is a particularly effective inducement to preservation. Granting an easement to a governmental body will also result in a reduction of taxes because the value of the property is reduced by the amount paid for the easement. Moreover, if the easement is donated the person may qualify for a charitable donation deduction from income taxes.

Allowing tax reductions for restored historic property often results in an actual saving to the city. By maintaining private ownership, the city continues to receive a large percentage of the property tax, whereas if the property were purchased by the state or by some non-profit organization, the result would be the total

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59 Id. art. 11, Historic District (H).
60 Id.
61 Id. § 11.32.
62 N.Y. GEN. MUN. LAW § 96-A.
63 See generally INT. REV. CODE of 1954, § 501(c)(3).
elimination of taxes received from the property. Furthermore, tax incentives should encourage owners to restore their property, which would raise property values and thus increase property tax revenues in the long run. Owners faced with a large tax increase upon improvement of their property, however, may feel that the financial loss is not worth the benefits derived from the restoration.

Various non-tax incentives can also be employed to encourage the preservation of historic areas. Every burden imposed by historic zoning can be counterbalanced by a benefit that is not enjoyed in those areas not having the historic classification. This idea is not new. Planned unit development, cluster zoning,64 contract zoning,65 and bonus, or incentive zoning66 are all concepts under which normal zoning standards regarding such matters as use, area, density, and height can be relaxed for the benefit of developers who are willing to give something to the community in return—historic preservation. In cluster zoning, the buildings are grouped to increase dwelling density in some portion of the development area in order to create free space in the rest.67 Contract zoning occurs when the developer agrees to place certain restrictions on the property in return for having it rezoned.68 Bonus, or incentive zoning, allows the landowner more floor area, height, and density upon the condition that he provide needed public improvements or specified public uses.69

Chicago has effectively used one type of incentive zoning plan to preserve historic and cultural landmarks.70 The Chicago plan works with a lot-area limitation of the zoning ordinance.71 Once

65 D. Hagman, supra note 19, § 94.
67 D. Hagman, supra note 19, § 236.
68 Id. § 94.
69 Comment, Bonus or Incentive Zoning-Legal Implications, supra note 66.
70 The Chicago plan, discussed in an article by Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 HARV. L. REV. 574 (1972), is much like the plan used in New York City to preserve such areas as the Fifth Avenue Retail District, the Greenwich Street Development District, and the Special Theater District. For a review of the incentive zoning programs adopted in New York, see Gilbert, Saving Landmarks, 13 HISTORICAL PRESERVATION (July-Sept., 1970).
71 The plan was devised after the following characteristics were found to be common among urban landmarks:
First, most utilize only a fraction of the floor area authorized for their (Continued on next page)
the city council establishes a "development right transfer district" (which roughly coincides with the landmark concentrations), the owners of the landmarks are allowed, within guidelines, to transfer their development rights to other lots within the transfer district. The property is reduced in value to the extent it is not developed, taxes are lowered, and, at the same time, another parcel is enhanced in value by adding the development rights of the landmark loss to the amount of the development used for the landmark. Thus, taxes on the improved parcel or parcels will rise. The preserved property must be maintained by the owner or future owners and cannot be demolished without the city's permission.\footnote{Wilson & Winkler, Responses of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329 (1971).}

The Chicago plan also provides for condemnation of any development rights not used by the landmark if the landmark owner does not wish to transfer the unused development rights to another parcel. After condemnation and payment of just compensation, the development rights can be sold by the city to other developers within the transfer district.\footnote{Id.}

The Society for the Preservation of New England Antiquities pursues a different method of preservation of historic property. This organization encourages private participation by acquiring and restoring historic property and then leasing it to worthy and reliable persons who agree to open the premises to the public once or twice a year.\footnote{Id.}

IV. THE SITUATION IN KENTUCKY

For cities where historic areas are not protected by zoning ordinances the Kentucky General Assembly has provided and suggested alternatives for the preservation of historic buildings. For example, although the Kentucky Historical Society is pri-
marily concerned with preserving historical books, paper, tools, weapons, and other similar personalty it may also receive real property of historical interest by donation or devise. The Kentucky Department of State Parks likewise is directly responsible for the maintenance and preservation of several buildings and sites of historical significance. A third agency with a great potential to preserve historical buildings and areas is the Kentucky Heritage Commission, which was created for the purpose and with the power to identify and conserve buildings, structures, sites, and other landmarks associated with the archeological, cultural, economic, military, natural, political, or social aspects of Kentucky's history. The Commission can accept funds or property from any public or private source, associate with any other public or private agencies to accomplish appropriate goals, and acquire property by gift, devise, or purchase. One of the biggest limitations on the effectiveness the Heritage Commission is the difficulty it faces in obtaining funds. In order to purchase and restore historical structures it is forced to depend largely on private donations. There is a proposal for a $200,000 revolving fund to be used by the Commission to purchase and renovate historical buildings, then resell the buildings with restrictions on their use or alteration, but this is still merely a proposal. At the present time, the Commission spends most of its time, and funds, in identifying historical buildings, giving advice, and informing the public of the need for and purposes of preservation of historical buildings. The only property which it thus far has acquired and restored is the old Vest-Lindsey House, now the Kentucky Heritage House—the headquarters of the Commission.

To encourage more individual involvement in restoration and preservation of historic buildings in Kentucky there was a proposal to exempt historically designated property from a portion of city, county, and school property taxes. Although unsuccessful in this state, this method has been used elsewhere and

75 KRS § 171.311(1).
76 KRS § 171.381(2).
77 KRS § 171.381(4), (5).
78 See KY. HERITAGE COMMISSION, KENTUCKY'S PLAN FOR HISTORIC PRESERVATION (1971).
79 Id. at 58; see also, Legal Methods of Historical Preservation, 19 BUFFALO L. REV. 611 (1970).
should be considered as an alternative when funds to purchase or renovate a building are not available in the public treasury.

The case of *South Hill Neighborhood Association v. Romney*\(^{80}\) involved attempts by several private citizens and preservation groups to save 14 historic buildings from destruction by the Lexington Urban Renewal Agency. Although the plaintiff's arguments were perhaps raised too late, the court's rationale for refusing protection shows the problems involved in trying to preserve historic buildings. The court held that the plaintiffs lacked standing to sue because none of them had any real interest in the litigation, owned any of the buildings, had legal control of title, nor submitted formal proposals to the Urban Renewal Agency for redevelopment of the area. Several of the plaintiffs lived within one block of these buildings and all showed an interest in preserving a part of their city's historical past by having the buildings placed on the National Register of Historic Places. However, this was not considered to be a sufficient "real interest".

Although there are over 125 Kentucky entries in the National Register of Historic Places, only nine *areas* in Kentucky have the distinction of being listed: Gratz Park Historic District and the West High Street Historic District in Lexington, Corner of Celebrities Historic District in Frankfort, St. James-Belgravia Historic District and the Old Louisville Historic District in Louisville, Riverside Drive Historic District in Covington, Perryville Historic District in Perryville, Shakertown at Pleasant Hill, and the Washington Historic District in Washington near Maysville.\(^{81}\) This is not a guarantee that the historical significance of these buildings or areas will be preserved, but it is a step in that direction.

Probably the most feasible solution to preservation of historical areas in Kentucky is zoning. Frankfort and Lexington were among the first 20 cities in the nation to enact zoning ordinances to protect historical areas. Most of the other cities in Kentucky, however, have avoided the issue even though many historical


\(^{81}\) See the National Register of Historic Places as supplemented by the *Federal Register*, most recently 39 Fed. Reg. 6402 et seq. (Feb. 19, 1974).
buildings have been destroyed and the cities have had zoning powers for a sufficient length of time. The Kentucky legislature first gave the power to cities to regulate by zoning in 1922. The first major case upholding that power, *Fowler v. Obier*, confirmed the police power of cities to regulate the health, safety, morals and general welfare of the people. The Kentucky Court of Appeals, furthermore, has specifically included aesthetics as an important factor to consider in zoning decisions. Kentucky zoning statutes now authorize zoning based on preservation of historic districts and areas of scenic or historic character. Cities and counties are given the power to protect these areas, including historical districts, as special interest districts.

Lexington has many old buildings with historic and architectural charm worthy of protection. The Lexington Zoning Ordinance, as noted above, provides for the creation of historic districts to protect areas or buildings "having substantial historic or architectural significance." A Board of Architectural Review has advisory power in all matters relating to these districts and has responsibility for processing original applications for "historic district" classification, applications for building permits or certificates of occupancy in such a district, and applications for demolition permits. If an application is approved, the Board forwards it to the Urban County Planning Commission which must then issue a certificate of appropriateness. When an application is denied, the Board may make recommendations to attempt to conform the application to zoning regulations. If it is still non-conforming, the Board will recommend disapproval to the Commission; however, the applicant can appeal this recom-

82 Kentucky Acts, ch. 99 (1922) (repealed 1924).
83 7 S.W.2d 219 (Ky. 1928); see also, Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960 (Ky. 1932), where the Court discussed a zoning ordinance which included protection of economic values in the general welfare clause and Bosworth v. City of Lexington, 125 S.W.2d 995 (Ky. 1939), upholding a "Building Zone Ordinance" based on Ky. Acts, ch. 80, (1928).
84 Wells v. Fiscal Court of Jefferson County, 457 S.W.2d 498 (Ky. 1970); Moore v. Ward, 377 S.W.2d 881 (Ky. 1964); and Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).
85 KRS § 100.201.
86 KRS § 100.205(1)(e).
87 See CITY-COUNTY PLANNING COMM’N, HISTORICAL SURVEY AND PLAN FOR LEXINGTON AND FAYETTE COUNTY, KY. (1969).
88 ZONING ORDINANCE-RESOLUTION FOR LEXINGTON AND FAYETTE COUNTY, KY., art. 11, Historic District (H) (1969).
89 Id. art. 11-1.
mendment at a public hearing before the Commission. If the Commission also disapproves the applicant must wait six months before the demolition permit, building permit, or certificate of occupancy will be granted. This waiting period is designed to give the city or private individuals time to offer the applicant alternative solutions to the possible destruction of the historical environment. Similar ordinances are in effect in cities throughout the country and provide a good model for other communities to follow. With such ordinances as examples and with the power provided by statutes in Kentucky, the cities in this state should not be reluctant to enact zoning ordinances to protect their historical structures, unless for some reason they legitimately believe it is better not to protect the structures from decay and destruction. In fact, several more cities in the state now have definite proposals for the creation of historical district zones which will probably be passed sometime in 1974.

V. The Federal Role

It would be inexpedient to devise techniques for the preservation of our cultural-historic past without some cooperation from all levels of government. The federal government has evidenced its intent to encourage the protection of our national heritage since 1935. In that year Congress passed the Historic Sites Act which declared the preservation of historic sites, buildings, and objects of national significance for the use, inspiration, and benefit of the people of the United States to be a national policy. In conjunction with this Act the National Park Service was assigned the responsibility for the general supervision of the nation's historic preservation efforts, a duty which has continued to the present time. Included in this responsibility is the collection and compilation of data on national historic sites and buildings.

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90 KRS §§ 100.201, 203.

91 The city of Covington intends to enact an ordinance creating a historical zone district in 1974. The area under consideration, Riverside Drive, is already included in the National Register of Historic Places. A proposal and a report of the historical qualities of Covington are set out in C. Eilerman, Historic Covington (1973).

92 Much of this section is taken from a paper submitted by Michael L. Williams, as part of the course requirement for the Land Use Planning Seminar, at Northern Kentucky State College's Salmon P. Chase College of Law.

In 1949 the National Trust for Preservation in the United States was created. The National Trust is authorized to receive donations in the form of sites, buildings, and objects significant in American history and culture. Further, section 470b-1 of the Act authorizes the Secretary of Housing and Urban Development to make grants to the National Trust of up to $90,000 per structure for the acquisition and restoration of buildings which it will own and maintain.

More recently the federal government’s interest in preserving our national heritage was evidenced by the passage of the National Preservation Act of 1966. The purpose of the bill was threefold. First, it was to expand and improve the 1935 Act and to establish a national register of sites and structures significant in American history, architecture, archeology, and culture. Second, since federal action alone would not be sufficient to sustain such a movement, the bill encouraged programs at the state and local levels to preserve and protect such properties. Finally, the bill established an Advisory Council on Historic Preservation, charging it with the duty of advising the President and Congress on matters relating to preservation of such properties. An important part of this advisory council’s duty is the coordination of public and private preservation efforts. Further, the Council reviews plans for federal undertaking and those involving federal assistance or requiring federal licenses which might affect sites or structures listed in the National Register.

Although the National Register listing may protect outstanding structures from demolition by federal agencies, it has no effect on private individuals or state or local governments. In Miltenberger v. Chesapeake & Ohio Railway Co. an old railroad station and hotel, said to be landmarks, were scheduled to be demolished by the railway company. Since no federal agency was involved, the court held that the demolition could not be prevented.

The prevention of destruction under this Act depends upon the structure being placed in the National Register. Injunctive

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98 450 F.2d 971 (4th Cir. 1971).
relief cannot be obtained if a building was not placed on the Register until after the final approval of legitimate development plans.  

The Preservation Act authorizes the Secretary of the Interior to provide a program of matching grants-in-aid to states for projects involving historic-cultural preservation. This money is to be used for the preparation of statewide comprehensive surveys and plans for the preservation, acquisition, and development of such properties, as well as for the cost of the state preservation activities.

The Demonstration Cities and Metropolitan Development Act of 1966 can be used to protect many structures in urban renewal areas that would otherwise be scheduled for demolition. Titles VI and VII of the act provide that local urban renewal agencies can, as a part of renewal projects, acquire and restore in place historically or architecturally significant structures or relocate them within or outside the project area. The local planning agencies are also permitted to sell restored structures to the general public, with architectural restrictions. The Department of Housing and Urban Development is authorized under this Act to grant to the National Trust for Historic Preservation or to any participating city or county up to two thirds of the cost of a survey to identify the structures and sites within a locality having historic or architectural value, to determine the cost of their restoration and maintenance, and to ascertain other information relative thereto. The Secretary is further authorized to make grants to states, municipalities, and other local authorities of up to 50 percent of the cost of the acquisition, restoration, or improvement of areas, sites, and structures of historic or architectural value in urban areas. The remainder of the cost must come from non-federal sources. This Act also provides $90,000 per structure of the cost incurred by the National Trust for

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Historic Preservation in renovating or restoring structures accepted by the Trust to be maintained for historic purposes. This does not require matching funds to be provided by another agency. The federal government has made these funds available for use by states, cities, counties, and private individuals who own or acquire qualifying historical property. The burden falls on these state and local agencies and individuals to update their plans in order to take advantage of the federal offers.

The 1966 Department of Transportation Act provides further protection for historical areas:

> It is hereby declared to be the national policy that special effort should be made to preserve ... historic sites. The Secretary of Transportation ... shall not approve any program or project which requires the use of ... any land from an historic site of national, state, or local significance ... unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such ... historic site resulting from such use.

The Act has been used several times in fights for historical preservation, but most often for the preservation of parks and open space areas. It at least provides the basis for a mandatory search for a reasonable alternative route before a federally financed highway can be built where an historical building or site is located.

VI. CONCLUSION

This article has not attempted to present an exhaustive discussion of the various programs available to the public for the preservation of historic places. On the contrary, it merely provides an outline for a program to prevent the destruction of local historical sites and structures that should be helpful to any national, state, or local agency or private individual interested in historical preservation. Reviewing the various techniques available, it will be noted this goal can be achieved not only by

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preservation of historic areas, but also by revitalizing the areas through encouragement of permanent individual involvement and investment.

In its best sense preservation does not mean merely the setting aside of thousands of buildings as museum pieces. It means returning the culturally valuable structures as artful objects; homes in which human beings live, buildings in the service of some commercial or community purpose.\textsuperscript{110}

Individual participation indeed is essential because public agencies are limited by other pressing duties, conflicting purposes, political and bureaucratic problems, and lack of available funds.

The results of preserving historic areas are beneficial, both as reminders of the past and as indicators of the future. "Such preservation insures structural integrity, relates the preserved object to the life of the people around it, and not least, makes preservation a source of positive financial gain rather than another expense."\textsuperscript{111}

\textsuperscript{110} U.S. Conference of Mayors, With Heritage So Rich (1969).

\textsuperscript{111} Id.