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City of Louisville, Kentucky v. The Women's Club of Louisville

Amicus Brief 1976-SC-0298

AMICUS BRIEF

35/c

SUPREME COURT OF KENTUCKY

No. 76-298

CITY OF LOUISVILLE, KENTUCKY - Appellant

versus

THE WOMAN'S CLUB OF LOUISVILLE - Appellee

Appeal from Jefferson Circuit Court

BRIEF AMICUS CURIAE

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This is to certify that a copy of this Brief has been served on the adverse parties, W. Scott Miller, Jr., and Burt J. Deutsch and the trial judge, Hon. Thomas A. Ballantine, Jr. pursuant to RAP 1.250.

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PURPOSE OF THE BRIEF

The purpose of the National Trust For Historic Preservation, the Neighborhood Development Corporation and the Preservation Alliance of Louisville and Jefferson County, Inc. in presenting this brief amicus curiae is to compare the City of Louisville Ordinance No. 58, Series 1973 with other historic district ordinances both in Kentucky and elsewhere; to compare this ordinance with other types of regulations on land use; to discuss the historic, architectural and aesthetic significance of these two houses and their importance to the Old Louisville neighborhood and the City of Louisville; and to discuss whether the power of eminent domain may be used by the City of Louisville to effect the purposes of the Ordinance.

QUESTIONS TO WHICH BRIEF ADDRESSED

I. Is Historic Preservation a Valid Public Purpose Such as to Sustain the Exercise of Police Power?

Answer: Yes.

II. Is the Ordinance Constitutional?

Answer: Yes.

(a) Is it necessary for an Historic District Ordinance to have specific appeal procedure?

Answer: No.

(b) Are the standards contained in the ordinance so vague as to render the ordinance unconstitutional?

Answer: No.

(c) Does the mere delay of demolition constitute a taking such as to render an Historic District Ordinance unconstitutional?

Answer: No.

III. Was the Application of the Louisville Historic District Ordinance to the Woman's Club Property an Unconstitutional Appropriation Without Compensation?

Answer: No.

(a) Was the action arbitrary?

Answer: No.

(b) Was the action confiscatory?

Answer: No.

IV. Is Historic Preservation a Valid Public Purpose Such as to Sustain the Exercise of Eminent Domain?

Answer: Yes.

(a) Does the City have the authority to condemn these houses for historic preservation?

Answer: Yes.

(b) Is condemnation for historic preservation a public purpose?

Answer: Yes.

SUPREME COURT OF KENTUCKY

No. 76-298

CITY OF LOUISVILLE, KENTUCKY - - *Appellant*

v.

THE WOMAN'S CLUB OF LOUISVILLE - - *Appellee*

BRIEF AMICUS CURIAE

ARGUMENT

I. IS HISTORIC PRESERVATION A VALID PUBLIC PURPOSE SUCH AS TO SUSTAIN THE EXERCISE OF POLICE POWER?

It has been well established for almost a half century that the City of Louisville has the authority to enact zoning ordinances in order to promote public health, safety, morals, or general welfare. *Fowler* v. *Obier,* 224 Ky. 742, 7 S. W. 2d 219 (1928). In enacting City of Louisville Ordinance No. 58, Series 1973 (the "Ordinance"), the Board of Aldermen made a legislative decision that the preservation of structures and neighborhoods having either historic, architectural or cultural significance, would promote the general welfare of the inhabitants of Louisville. This decision is paralleled by both national and state legislation.

In 1966, the United States Congress enacted the "National Historic Preservation Act of 1966", 16 USC, Section 470 *et seq.* (1970), which states:

> . . . that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and developed in order to give a sense of orientation to the American people; Section 470 (b).

Also in 1966, the Kentucky legislature specifically endorsed the concept of historic district ordinances as a valid exercise of the police power. See KRS 100.201 "Zoning may also be employed to protect . . . historic districts", Section 100.203 "Cities and counties may exercise the power to zone through zoning regulations which shall contain: . . . (e) Districts of special interest to the proper development of the community including, . . . historical districts . . ."; and KRS 100.127 which allows for the creation of special boards to advise zoning administrators on the issuance of permits in historic districts.

Like most zoning ordinances, the Ordinance was designed to improve property values and the overall local economy, Ordinance Section 1c, (3), (4). There is ample support that this was a reasonable expectation. Thomas J. Reed, "Land Use Controls in Historic Areas", 44 *Notre Dame Lawyer,* 379 (1969) notes:

> Sufficient data has been compiled in the past ten years from those communities which have adopted historic district ordinances to confirm what preservationists have surmised in the past, i.e., that the restoration of a group of related early struc-

> tures in a neighborhood can materially raise property values. A good example of this is the old Church Hill area of Richmond, Virginia, which has been systematically developed as a restored residential community since 1958. By 1963, forty-one early homes in the area had been restored. As a representative example, the assessed valuation of a two block area of Grace Street was $85,290 in 1958. By 1963 eight old houses in the area had been restored. The restored property had risen 136% in assessed value, while the unrestored property in the same area had increased only 30%. *Id.* at 387.

Reed also quotes studies which have shown that "thirty percent of all vacationers list 'visit to historic sites' as a prime factor in choosing their vacation plans," *Id.* at 387. In view of the fact that in 1975 alone, tourists added 893 million dollars to the Kentucky economy and 298 million dollars to the Louisville economy, the preservation of historic areas becomes quite important. Dr. Lewis C. Copeland, *1975 Survey of Travel in Kentucky* (Department of Statistics, College of Business Administration, University of Tennessee, February, 1976).

In furtherance of this public purpose, the Ordinance provides for the creation of the Louisville Historic Landmarks and Preservation Districts Commission ("Commission") whose eleven members must include at least one architect, historian, real estate broker and attorney. The first major function of the Commission is that of designating historic landmarks and districts. In so doing, the Commission employed much of the same criteria which is used by the Kentucky Herit-

age Commission and the federal Advisory Council on Historic Preservation in ruling on nominations to the National Register of Historic Landmarks.

Once an area has been designated an historic district, a five man Architectural Review Committee ("Committee"), of which at least two members must be local property owning residents, is created. This Committee is charged with the responsibility of reviewing all proposed construction, alteration and demolition within the historic district.

Most requests are handled within a matter of days and a large amount of activity is specifically exempted by regulation. "Guide For Preservation Districts and Landmarks", City of Louisville Resolution No. 22, Series 1975 ("Guidelines"). A property owner who requests permission to make major changes in a structure has the opportunity to present his case at a full public hearing and is guaranteed the right of full Commission review.

Throughout the entire process, both the Committee and the Commission attempt to negotiate with the applicant in order to reach a mutually satisfactory solution. In the rare instance where a solution is not readily reached and where both the Committee and the Commission have found that the proposed work would have a major adverse effect, a three month waiting period may be imposed. During that three month period, every effort is made to reach an acceptable settlement. At the end of this waiting period, which may be extended an additional three months, the applicant is automatically given the right to proceed with

his work. During the delay period, the applicant is free to sell, occupy and completely alter the interior of his property. The only restriction is that he cannot alter or destroy the exterior. Furthermore, it should be emphasized that the three month delay period is rarely invoked. As of April 28, 1976, out of a total of 743 applications, the three month delay period had been invoked in only 14 instances (see Appendix A).

Ordinances similar to Louisville's have been in existence since 1931 ("Zoning Ordinance of the City of Charleston [S.C.] Sections 42-46 Article X") and are currently found in over 450 American cities and towns. Today, a total of six Kentucky cities have historic preservation ordinances: Louisville Ordinance, Covington Commissioners Ordinance No. 0-65-72, Sections 7, 40; Paducah Zoning—1971, Section 62; Maysville Commissioners Ordinance No. 785 (1974); Lexington Zoning Ordinance—Resolution for Lexington and Fayette County, Kentucky, Article 11, Historic District (H) (1969) and Frankfort Zoning Ordinance Article 27 H, Historic District.

The Frankfort ordinance, which dates back to 1955, was the subject of a recent Franklin Circuit Court decision, *Church of the Ascension, Frankfort, Kentucky* v. *David W. Clark, et al.,* Civil Action No. 84253 (March 6, 1974). The property owners were enjoined from any further construction on the rear of their property ". . . until such times as Defendants have made proper application for a building permit and have followed procedures as required by Article 27 of the Zoning Ordinance and obtained proper Certificate

of Appropriateness and further obtained a building permit pursuant thereto." There, the church filed suit to require the Architectural Review Board to apply the ordinance to a building located just inside the historic district. The court obviously found the ordinance to be constitutional as it specifically ordered that no work commence without prior Board approval.

A review of the Frankfort and other historic district ordinances will demonstrate that the court below was incorrect in finding the ordinance to be unconstitutional.

II. IS THE ORDINANCE CONSTITUTIONAL?

The Honorable Thomas A. Ballantine, Jr. dismissed the action below on the ground that the Ordinance was unconstitutional. Upon reading his Opinion and Order (TR 122 & 123), one may make the following inferences: He regards the ordinance as being unconstitutional because (a) there is no appeal procedure enunciated therein, (b) there are insufficient standards set out in the ordinance to prevent the Commission from making arbitrary and capricious decisions and (c) the procedures set out in the ordinance for regulating construction, reconstruction, alterations and demolition amount to a taking without compensation.

It is interesting to note that the Judge, rather than limiting his order to the narrow limits required in such a condemnation action by KRS 416.470(a)(b) and (c), chose to consider the broader question of the constitutionality of the entire ordinance. Since this ques-

tion is of vital importance to the Neighborhood Development Corporation, The Preservation Alliance of Louisville and Jefferson County, Inc. and The National Trust for Historic Preservation, we shall discuss this issue first.

(a) Is It Necessary for an Historic District Ordinance to Have a Specific Appeal Procedure?

In support of his ruling that the ordinance is unconstitutional, Judge Ballantine cites the fact that "nowhere else does the ordinance grant any right of appeal from what may be an arbitrary or capricious denial of the certificate" (TR 122). Although the matter has never been raised specifically in other litigation, it should be noted that numerous historic district ordinances including those challenged in *Church of the Ascension* v. *David W. Clark, supra; Maher* v. *City of New Orleans,* 516 F. 2d 1051 (5th Cir. 1975); *First Presbyterian Church of York, Pennsylvania* v. *City Council of York,* Civil Action No. 127 (Court of Common Pleas of York County, Pennsylvania, June, 1975); and *City of Santa Fe* v. *Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P. 13 (1964), do not specifically provide for judicial review.

Jacob H. Morrison in his treatise *Historic Preservation Law* (1965) notes that most ordinances allow for appeals not to judicial bodies, but to administrative boards or the city council. *Historic Preservation Law* at 19. Of the six Kentucky historic district ordinances only Covington's specifically provides for the right of judicial review.

Furthermore, as so ably pointed out in the Appellant's brief, there is an inherent right to seek judicial review of any alleged unconstitutional action. The Ordinance in no way prevents the Woman's Club or any other group from challenging the constitutionality of an order temporarily suspending the right to demolish the property. Finally, it should be noted there exists a check for arbitrary action by the Committee, as all of its actions are subject to review by the full Commission.

(b) Are the Standards Contained in the Ordinance So Vague as to Render the Ordinance Unconstitutional?

Appellee contended below that the:

> . . . Commission and/or its committees have the most arbitrary power imaginable, [even rivaling 'The Third Reich'] and unlimited discretion based upon criteria of which the mere perusal leads one to the inescapable conclusion that such criteria are extremely indefinitive, vague and subject to the whim and caprice of the commission and/or its committees (TR 53).

In *Maher* v. *City of New Orleans, supra,* the plaintiff also sought to attack the denial of his application to demolish on the grounds that the absence of specific standards in the ordinance constituted a violation of due process. The court rejected this argument stating:

> While concerns of an aesthetic or historical preservation do not admit to precise quantification, certain firm steps have been undertaken here to assure

> that the Commission would not be adrift to act without standards in an impermissible fashion. 516 F. 2d at 1062.

The checks on the New Orleans Commission included the following:

1. The geographical area of the historic district was precisely defined.

2. The ordinance set out what alterations required approval.

3. The specific requirement of membership on the commission guaranteed that the ". . . city is assured that the Commission includes architects, historians and business persons offering complementary skills, experience and interests." 516 F. 2d at 1062.

4. The commission had the benefit of a ". . . . recent impartial architectural and historic study of the structures in the area." 516 F. 2d at 1063.

Each of the four checks found so important by the 5th Circuit is present in the Ordinance. (1) there is a definite boundary for the Old Louisville district. (2) The Ordinance and the Guidelines precisely set out the types of construction, alteration or demolition which require approval. (3) The Ordinance specifies that the Commission members will have the necessary expertise in the field of architecture, history, real estate and law. Finally, (4) as discussed below, there have been numerous impartial architectural and historical studies made of the Old Louisville area, which assess the importance of the Woman's Club houses.

(c) Does the Mere Delay of Demolition Constitute a Taking Such as to Render an Historic District Ordinance Unconstitutional?

In contrast to Louisville's rather mild ordinance, many cities, including Covington and Paducah, Kentucky,[1] have adopted provisions which give the local landmarks commission the power to permanently ban any demolition within the historic district. In at least five instances in other jurisdictions this total control of demolition has been challenged as an unconstitutional taking of property. In each case the constitutionality of the historic district ordinance has been upheld.

In *Maher* v. *City of New Orleans, supra,* a property owner, who had unsuccessfully sought a demolition permit, brought suit to declare the Vieux Carre historic district ordinance unconstitutional. This ordinance is considerably tougher than Louisville's. It imposes upon the property owner an affirmative legal duty to take all steps necessary to preserve his building as well as requiring him to obtain a permit prior to making any alterations.

The court, however, found that this historic district ordinance imposed no greater restriction than did standard zoning regulations:

> An ordinance forbidding the demolition of certain structures, if it serves a permissible goal in an otherwise reasonable fashion, does not seem on its face constitutionally distinguishable from ordi-

[1]Although the Maysville, Lexington and Frankfort Historic District Commissions do not have the power to permanently ban demolition, they possess more power than the Louisville Commission. The Maysville Commission can delay demolition for two years, while in Lexington and Frankfort, a six month delay period may be imposed immediately.

> nances regulating other aspects of land ownership, such as building height, set back or limitations on use. We conclude that the provison requiring a permit before demolition and the fact in some cases permits may not be obtained does not alone make out a case for taking. 516 F. 2d at 1066.

It also specifically rejected Maher's claim that the City's action prevented the most profitable use of the property noting that a taking would occur only if he was able to show that ". . . the ordinance so diminished the property value as to leave Maher in effect nothing." 516 F. 2d at 1066.

It should be noted that unlike the case at bar there had never been a finding that Maher's cottage was architecturally significant. Maher was prevented from demolishing the cottage because the cottage was found to be a part of the *tout ensemble* of the historic district. 516 F. 2d at 1063.

In *Mayor and Aldermen of the City of Annapolis* v. *Ann Arundel County,* 271 Md. 265, 315 A. 2d 807 (1974), the court held that the city's refusal to allow the county to demolish a building within the historic district did not constitute an unconstitutional taking of property. As in the case at bar, the county proposed to replace an historically significant structure with a parking facility. Also as in the case at bar, the historic district commission found:

> . . . the structure, Mt. Moriah Church . . . to have significant, historical and architectural value in and of itself and in relation to the surrounding area . . . [and that] the applicant, Anne Arundel

> County, did not indicate or show any serious consideration for any suggested alternative plans or proposals to preserve the structure. 315 A. 2d at 811.

Although the ordinance gave the commission the power to permanently ban demolition, the court had no problem finding it constitutional. This holding in large part was based on the fact that the applicant, like the Woman's Club, was not deprived of all reasonable use, but was merely prevented from destroying or changing the exterior of the building:

> So far as a taking without the payment of just compensation is concerned, in the posture in which this case reaches us, there most certainly is no confiscation in the present case. Indeed, the enabling statute and the ordinance do not limit the use of Mt. Moriah, but only provide that the Commission may prevent the destruction or change in *the exterior* of the building. Not only is the County not deprived of *all reasonable use* of the site and Mt. Moriah—the requirement for a finding of confiscation by the traditional zoning laws, [citations omitted]—but its *use* is not disturbed at all. In sum, the rather mild limitation in regard to Mt. Moriah's exterior is far removed from unconstitutional confiscation. 316 A. 2d at 822.

In the *First Presbyterian Church of York, Pennsylvania* v. *City Council of York, supra,* a local church, which wanted to demolish a building within the historic district in order to build a parking lot, had been denied the necessary permit. As in the New Orleans and Annapolis situation the local historic district ordinance

made it possible for the commission to permanently ban demolition of any structure. The court found that:

> . . . the general constitutionality of this type of legislation is no longer open to question. Opinion at 3.

The court noted that the only issue was whether the historic district ordinance *"in its application* to this particular set of facts constitutes an unconstitutional appropriation of property without compensation." Opinion at 4. The court found that it did not, as the church like the Woman's Club had offered no proof that the existing property could not be used for the organization's purposes. It dismissed any claim of hardship noting:

> The evidence here shows that the appellant had made no attempt to rent the premises since 1971, it has performed no maintenance or repairs since that time, it has not used $10,000 of fire insurance proceeds to repair damage caused by an accidental fire in the meantime, and it has declined to consider any offer to purchase the premises or to enter into a cooperative arrangement with others to restore, maintain and use it. Opinion at 5.

In *Figarsky* v. *Historic District Commission of the City of Norwich,* No. 23529 (Court of Common Pleas, New London County, Connecticut, March 6, 1974) the plainitffs sought to overturn the historic district commission's refusal to grant a permit to demolish their building on the grounds that the historic district ordinance was an unconstitutional taking of property for public use without just compensation. The court found

the Norwich ordinance which gave the historic district commission the power to permanently restrain the demolition of property to be a "valid and proper exercise of the police power" (Opinion at 6) and held its specific application in this case also to be constitutional noting that there was evidence to show that "If proper repairs were made, this property could continue to be used as residential property." Opinion at 7.

In *Owen E. Hall* v. *Village of Franklin*, No. 69-5259 (Oakland County, Michigan, Circuit Court, February 10, 1972) the plaintiff challenged the enactment of an historic district ordinance as an unconstitutional taking of his property. The court found the ordinance, which gave the historic district commission the power to permanently prevent demolition, constitutional stating:

> The history of the State as found in writing and in display of ancient objects, is essential to a full and adequate education of the people. Education is surely of greatest concern to the community. It follows and this court finds that the creation and preservation of historic districts does contribute to the public welfare and violates no constitutional restraint. Opinion at 3.

Prior to the adoption of legislation creating an historic district for Nantucket, the Massachusetts State Senate asked the State Supreme Court to give its opinion of the constitutionality of the proposed legislation. Among other things, the legislature asked the court to comment on the constitutionality of Section 5 which provided that no building within the historic district:

> . . . shall be razed without first obtaining a permit approved by the Historic Districts Commission and said commission be empowered to refuse such permit for any building or structure of such architectural or historic interest, the removal of which in the opinion of said commission would be detrimental to the public interest of the town of Nantucket . . . Chapter 601, Acts and Resolves of Massachusetts 1955.

In *Opinion of the Justices to the Senate,* 128 N. E. 2d 557 (Mass. 1955), the court found this provision to be constitutional, stating:

> We are of the opinion that the proposed act is not a taking. There is no provision for a formal taking, and title will remain in the owner as will also the possession and usufruct for nearly all purposes, even though restricted in ways that conceivably may in occasional instances bear down heavily. 128 N. E. 2d at 560.

See also *Opinion of the Justices to the Senate,* 128 N. E. 2d 563 (Mass. 1955), where the same court commented favorably on the constitutionality of a similar historic district ordinance for the Beacon Hill section of Boston.

In *City of Dallas* v. *Crownrich,* 506 S. W. 2d 654 (Ct. of Civ. App. Tex., Tyler, 1974), the court held that the City of Dallas could properly impose a moratorium on all building permits pending action on a proposal to create an historic district.

In *City of Ithaca* v. *County of Tompkins,* 77 Misc. 2d 882, 335 NYS 2d 275 (Supreme Ct., Tompkins County, 1974), the court held the importance of historic preservation was so great that even a governmental unit

such as the county could not demolish a structure without prior approval from the local historic district commission.

For other cases where the constitutionality of historic district ordinances have been affirmed see *Bohannan* v. *City of San Diego,* 30 Cal. App. 3d 416, 106 Cal. Rptr. 33 (1973); *Rebman* v. *City of Springfield,* 111 Ill. App. 2d 430, 250 N. E. 2d 282 (1969); *M & N Enterprises, Inc.* v. *City of Springfield,* 111 Ill. App. 2d 444, 250 N. E. 2d 289 (1969); and *City of Santa Fe* v. *Gamble-Skogomo, Inc., supra.*

In view of the fact that courts have consistently sustained the constitutionality of ordinances which give historic district commissions the power to permanently enjoin the demolition of property, it is submitted the Ordinance which prevents the demolition of structures for a maximum period of six months is a constitutional exercise of the police power.

III. WAS THE APPLICATION OF THE LOUISVILLE HISTORIC DISTRICT ORDINANCE TO THE WOMAN'S CLUB PROPERTY AN UNCONSTITUTIONAL APPROPRIATION WITHOUT COMPENSATION?

(a) Was the Action Arbitrary?

A review of the record will demonstrate that the Committee's recommendation to delay the demolition of the Woman's Club Fourth Street property was not an arbitrary one. The decision was unanimous and was based on the criteria set out in Section 8 of the Ordi-

nance. As set out in the September 4, 1974 letter to the Chairman of the Commission (TR 85 & 86), the Committee found:

1. That the demolition of these houses will destroy a part of the district's and city's historical aesthetic and architectural heritage, as "Indeed, these two houses in their own right, meet the criteria for 'landmark' status";

2. That the two houses play a significant part in the overall atmosphere of the area and are especially important as they anchor Central Park;

3. That the houses are in basically sound condition and with a little renovation may be profitably used; and

4. That the six months delay will work little hardship upon the Woman's Club.

The Committee's statement that the houses in and of themselves meet the criteria for landmark status is well supported by numerous independent studies which have been made of the Old Louisville area. The National Register nomination for the Old Louisville residential district which was adopted by the Kentucky Heritage Commission on December 4, 1973 and by the United States Department of Interior on February 7, 1975, made specific mention of the two Woman's Club houses. Page three of the report describes the structures as "two great houses" which "illustrate the extraordinary diversity yet harmony of urban integration achieved by Old Louisville architects in its heyday." A recent book by Samuel W. Thomas and William Morgan, *Old Louisville: The Victorian Era* (1975) describes the two houses as "Among the finest

Richardsonian Romanesque revival houses extant in this country." 72.

In the 1800's the two houses, which were featured in the 1889 edition of *Louisville Illustrated,* were a symbol of the new Louisville. In the 1970's these two houses are once again a symbol of a new Louisville, a Louisville dedicated to making historic preservation work. Preservation in Louisville has been favorably reported both nationally and locally. The entire January, 1976 issue of *Louisville Magazine* was devoted to preservation with substantial portions discussing the Old Louisville district. The September 9, 1974, issue of *New Yorker* featured a long article on Louisville with three pages devoted exclusively to preservation in the Old Louisville district. It should come as little surprise that the fate of the two houses has also attracted national attention, including a fifteen minute segment on the CBS program, *Magazine,* aired nationally on January 28, 1976.

As well as robbing Louisville of two architectural treasures, the demolition of the Woman's Club property would have an adverse effect upon the entire Old Louisville historic district. The Old Louisville district, which is only one of 186 areas in Kentucky which have been deemed worthy of National Register designation, has been compared favorably with Georgetown in Washington, D.C., Beacon Hill in Boston, portions of Charleston, South Carolina and Savannah, Georgia, (Statement of Mrs. Cole, Chief of National Register's Review Unit in Washington, D.C. in February 12, 1975, *Courier-Journal* at A-14). The Old Louisville historic district has become one of the most significant tourist

attractions in the city. The current edition of the American Automobile Association Tour Book tells the visitor that "Fine examples of Victorian residences can be seen on 3rd and 4th Sts., south of Broadway." 73. The official tour of Louisville which goes by the Woman's Club houses features a stop in Central Park and the official Louisville sight-seeing pamphlet has on the cover a sketch not of Churchill Downs, but of the fountain in St. James Court. Finally, the annual St. James-Belgravia Court Art Fair is the third largest attended activity in the State of Kentucky, exceeded only by the Kentucky Derby and the State Fair.

The Committee and Commission also had ample evidence to find that destruction of the houses would adversely affect the entire Old Louisville area. Numerous local residents including Dan Marshall, Dave Salyers and Mayor Harvey Sloane have publicly expressed their opposition to the demolition. The common theme of all the opposition is that demolition will create a missing tooth effect on Fourth Street, destroy a strong visual anchor to Central Park and generally discourage local residents from investing time and money in restoration.

(b) Was the Action Confiscatory?

A review of the record also demonstrates that the burden imposed on the Woman's Club by the six month's delay was minimal and cannot in any sense of the word be considered a taking. While realizing that this forum is not the proper place to have an evi-

dentiary hearing, the following observations can easily be verified and are germane to the issue of whether the Woman's Club has suffered such a loss as to result in a confiscation of its property.

First, the Woman's Club had knowledge that such a delay might be imposed well before April 22, 1974 when it purchased the two houses. The attendance records of the January 16, 1974 Old Louisville Designation Hearing show that the Club's realtor as well as several of its members were there. Several prominent preservationists, including members of the Woman's Club, tried to dissuade the Club from making the purchase.

Second, there was evidence presented at the hearings that the houses were "sound" and that it would be economically feasible to develop the houses, either for commercial purposes or as private residences.

It should also be noted that the Woman's Club voluntarily boarded up the property and evicted the existing rent-paying tenants. It is interesting to note that while in this boarded up state, the value of the houses increased by $15,000.00, from $125,000.00, which was the purchase price (see deeds recorded in the Office of the Clerk of the County Court of Jefferson County, Kentucky, in Deed Book 4723, Pages 137 and 139) to $140,000.00; Report of Commissioners (TR 42).

Finally, as the property is listed on the National Register, there is a good chance that the Woman's Club could obtain financial aid to restore the houses. Matching restoration grants are available both through the Department of Housing and Urban Development

and the National Trust for Historic Preservation. The Emergency Home Purchase Assistance Act of 1974, P.L. 93-449, 88 Stat. 1364, provides low interest loans for the rehabilitation of historic structures. House Bill No. 583, passed in the 1976 regular session of the Kentucky General Assembly provides that no sales tax is to be imposed on the sale of material, supplies and services to be used by a non-profit organization such as the Woman's Club "to restore, maintain or operate" properties which are listed on the National Register.

The Woman's Club has made little or no attempt to argue that the houses are incapable of being used for Club purposes. Instead, it has constantly pointed to the Club's need for the fifty odd parking spaces that demolition would provide. It should be noted that the Club currently only needs the parking spaces for a mere 78 hours a year, as it meets bi-weekly for three hours at a time. The Woman's Club, furthermore, has no assurance that this parking lot will ever be available, as the present zoning does not allow for such use. Jefferson County Zoning District Regulations, Section 30—1 and 8. To put a parking lot there would require a Conditional Use Permit which can be granted only after a public hearing and which could be subject to such conditions as the Commission in its discretion might impose, in addition to the normal ones requiring plantings and set backs. If set backs in line with Fourth Street and Park Avenue were imposed, very little property indeed could be used for parking.

Finally, the Woman's Club rejected numerous alternatives to demolition. Offers by the City and other

groups to provide over 70 additional temporary parking spaces—free—were rejected as non-permanent. An option to purchase one of the houses for $62,500.00 was rejected, as was the suggestion that the Club purchase a 32-space parking lot immediately behind its property, for $40,000.00.

It is submitted that the two houses are important works of architecture and are worth preserving. Furthermore, the Ordinance imposes no significant hardship on the Woman's Club, which remains free to sell, lease or otherwise use the buildings.

IV. IS HISTORIC PRESERVATION A VALID PUBLIC PURPOSE SUCH AS TO SUSTAIN THE EXERCISE OF EMINENT DOMAIN?

(a) Does the City Have the Authority to Condemn These Houses for Historic Preservation?

This Action was brought in accordance with KRS 416.410, *et seq.* which is an alternate method of condemning property, available to all condemnors. It is useful to look at the definitions set out in KRS 416.410 in order to bring the subject matter of this action into focus.

"Condemnor" is defined as "mean(ing) and includ(ing) any person, corporation or entity, including . . . (a) municipality . . . authorized and empowered by law to exercise the right of eminent domain". The first question to be answered is whether the City of Louisville has been authorized and empowered by law to exercise the right of eminent domain.

This Court, in *Foley Construction Co.* v. *Ward,* Ky., 375 S. W. 2d 392 (1963) stated that the right of eminent domain is the right of the sovereign to use property of its members for the public good or necessity. There is no constitutional grant to the Commonwealth of the right of eminent domain. Rather, the right is seen to be an attribute of sovereignty. The constitutional provisions relating thereto serve as limitations on the power already resting in the sovereign rather than as grants of the power to the sovereign, *Eminent Domain in Kentucky,* Research Report No. 101, Legislative Research Commission, 1973, p. 1.

The sovereign's right of eminent domain has been delegated in part to agencies of government, to cities, to private corporations and even to private individuals, with the result that there are fifteen procedures for condemnation authorized by statute in Kentucky today. If Louisville has the authority to bring this action, it is either under KRS 58.010, *et seq.* or KRS 93.100.

Arguably the instant action is authorized by KRS 58.010, *et seq.,* which provides for acquisition by a city of (KRS 58.010) ". . . buildings . . . suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related business facilities of a community . . . together with related and appurtenant . . . dwelling units . . .". The findings and declaration of public policy and purpose contained in Section 1 of the Ordinance contain the same key concepts as found in the deffinition of "public projects" in KRS 58.010:

The purpose of the Ordinance is to:

(1) ". . . accomplish the preservation, protection, perpetuation and *use* of historic landmarks, . . . and neighborhoods, . . . structures and improvements having a special or historical, aesthetic, architectural, archaeological or *cultural* interest or value to this City, Commonwealth or Nation;

(2) Promote the educational, *cultural, economic* and general welfare of the people and safeguard the City's history and heritages embodied and reflected in such landmarks, sites and districts; . . .

(5) Strengthen the *economy* of the City;

(6) Protect and enhance the City's attractions to residents, *tourists and visitors* and serve as a *support and stimulus to business and industry;* . . . (emphasis added).

In a real sense, the preservation of these two historic buildings is a "public project" as defined in KRS 58.010.

KRS 93.100 is a grant of power from the legislature to cities of the first class to condemn property which is needed for appropriate "municipal purposes". This court has considered what constitutes municipal purpose several times. In *Miller* v. *City of Georgetown,* 301 Ky. 241, 191 S. W. 2d 403 (1945), the question was whether the acquisition and use of land by the city for a parking lot was a municipal purpose. It was pointed out that the power of eminent domain is not inherent in municipalities, but that when that power is granted, the power may be exercised for every necessary municipal purpose. This court also went

further to say, quoting from *Herd* v. *City of Middlesboro,* 166 Ky. 488, 99 S. W. 2d 458, that "one of the powers indispensable to the purposes of a municipal corporation is the power to provide for the protection of the health, safety and welfare of its inhabitants". As discussed above, historic preservation has been found by numerous courts to be a valid exercise of the police power. Following the reasoning of this court in the *Herd* case, it would seem that preservation of historic buildings and districts is well within the limits of a city's municipal purposes.

Although this court, in the past, has considered what are and what are not legitimate municipal purposes, KRS 83.410 grants to the "citizens living within a city of the first class the authority to govern themselves to the full extent required by local government and not in conflict with the constitution or laws of this state or by the United States." Given this statute, it seems reasonable to assume that cities of the first class may decide for themselves what are appropriate municipal purposes. Accordingly, it would seem that the determination of policy set out in the Ordinance is solely for the city to make. Even if this honorable court determines that the Ordinance is unconstitutional in its entirety, it still could be regarded as containing a valid statement of public policy and municipal purpose such as to sustain the exercise of the right of eminent domain.

(b) Is Condemnation for Historic Preservation a Public Purpose?

As to the necessity or propriety of a given taking, this court has held that it will not question the legislative determination that such action is necessary, *Henderson* v. *City of Lexington,* 132 Ky. 390, 111 S. W. 318 (1909), *Louisville & Nashville R. R. Co.* v. *City of Louisville,* 131 Ky. 108, 114 S. W. 743 (1908). Thus, the determination by the Board of Aldermen of the City of Louisville that the City should condemn these two houses is not open to question. But, regardless of whether the condemnor is the Commonwealth, an agency or a municipality, this court has determined that whether a taking is for public use or purpose is a question to be decided by the court. *Howard Realty Co.* v. *Paducah,* 182 Ky. 494, 206 S. W. 774 (1918); *Chesapeake Stone Co. v. Moreland,* 126 Ky. 656, 104 S. W. 762 (1907); *Spahn* v. *Stewart,* 268 Ky. 97, 103 S. W. 2d 651 (1937).

We have attempted to show above that historic preservation is a valid exercise of the police power. The legislature has recognized this by creating the Kentucky Heritage Commission, by enabling cities to zone for historic preservation and by creating local development authorities for the purpose of preserving and revitalizing historically significant areas (KRS 99.610, *et seq.*). In light of this enunciated policy, there can be little doubt that any effort on the part of cities, be it by creation of a development authority, by historic zoning or by an ordinance such as Louisville's

is in furtherance of a valid municipal purpose. The only question remaining is whether the exercise of eminent domain in furtherance of this policy is for a public purpose.

There can be little doubt that a property owner does not have the right to do exactly as he pleases with his property. He may not use his property for purposes other than those allowed within the zoning classification where his property is located. He may not build closer to the street than the minimum building limit. He may not build closer to his side line than the minimum side yard requirement. He may not build a building higher than the maximum building height, and on and on.

The remedy for violation of zoning regulations is abatement. In the case of *Selligman, et al.* v. *Von Allmen Bros., Inc.,* 297 Ky. 121, 179 S. W. 2d 207 (1944), this court held that the refusal of the Louisville and Jefferson County Board of Zoning Adjustment and Appeals to grant a variance for structural alterations did not constitute a taking, saying:

> This question was definitely determined in Village of Euclid v. Amber Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1030. It was there held that a zoning ordinance which was not created arbitrarily and unreasonably and had some substantial relation to the public health, safety, morals and general welfare did not violate the Fourteenth Amendment, although the value of certain unimproved real estate was reduced 25% by reason of being restricted to residential property and manufacturing concerns were excluded

> from the restricted area. If the police power acting through a proper zoning ordinance may deprive the owner of the valuable use of unimproved real estate without making compensation, there is no reason why it may not deprive him of the use of a building or improved property without making compensation. 179 S. W. 2d at 210.

In *Selligman,* the Building Inspector ordered Von Allmen Bros. to stop work on their structural alteration. If an Old Louisville resident wishes to make an inappropriate structural alteration, the Committee and Commission will not and may not order abatement but will try to dissuade him. Only as a last resort, where the City has made a determination to exercise eminent domain, will the owner be "bought out" in order to further the public purpose of historic preservation. Had Louisville enacted historic district zoning, the demolition could have been prohibited and there could be no question that such a prohibition was constitutional (see Paducah and Covington ordinances, *supra*). It is difficult to see how the exercise of eminent domain, which allows a property owner to get rid of his property and be compensated therefor, rather than live under the strictures of historic preservation regulations, can be struck down as an unconstitutional taking.

Increasing numbers of homeowners in America today live subject to private regulation of land use. Restrictive covenants often prescribe what may or not be built on one's property, what activities may or may not be carried on, how big one's house must be, to what extent one must protect his neighbor's lot and so on.

They typically provide for enforcement by injunction and action for damages. In its Handbook 4140.1, Land Planning Principles for Home Mortgage Insurance, the Department of Housing and Urban Development states:

> Protective covenants are essential to the sound development of proposed residential areas since they regulate the use of the land and provide a basis for the development of harmonious, attractive neighborhoods suitable and desirable to the user groups . . . Strict enforcement of suitable protective covenants give best assurance . . . that values and neighborhood character will be maintained and that nuisance will not be created . . . (Pages 8-11)

This agency, which has been charged with bettering the housing stock in this country, has recognized the necessity of restrictions on the use of property in order to preserve neighborhood chacteristics. How much more important is it that City government protect the residential character of its historic neighborhoods?

Counsel for Appellee in the court below stated that this action constituted a taking of private property for private use (TR 49-51). His basis for that statement seems to be that the City plans to resell the houses to private individuals. This has not by any means been admitted by the City; but if it is true, one is constrained to compare such a procedure with Urban Renewal. If one reads the declaration of necessity and of purpose in the Urban Renewal statute (KRS 99.020) and compares it with the findings and policy of Section 1 of the Ordinance, one is struck by their

similarity. Urban Renewal agencies are empowered to condemn property, clear it and resell to private individuals for the benefit of the public health, safety and welfare. Indeed, the Federal Urban Renewal statute has been amended to make historic preservation an urban renewal function. As Wilfrid A. Schroeder points out:

> 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 Preservation of Historic Areas* 62 *Ky. LJ* 940, 961 (1974)).

Any questions as to the right to use eminent domain for renewal purposes have been put to rest long ago. *Dinwiddie* v. *Urban Renewal and Community Development Agency of Louisville,* Ky., 393 S. W. 2d 872 (1965).

As the public purpose of the Urban Renewal statute is effected by selling cleared land to private individuals, so may the public purpose of the Ordinance be effected by selling historic structures, subject to restrictive covenants, to persons who are willing to preserve them, on the theory that it is better to have willing participants in the preservation effort than unwilling ones. Indeed, this court held in *Coke* v. *Commonwealth of*

Kentucky, Department of Finance, Ky., 502 S. W. 2d 57 (1973), that it didn't matter that private funds were being used to purchase the property being condemned, as long as the public purpose of making the Mary Todd Lincoln home a shrine was effected.

Had the City of Louisville enacted historic zoning, demolition could have been proscribed. Had it condemned a restrictive easement over the exteriors of the buildings (see discussion of acquisition of facade easements in Wilson and Winkler, "The Response of State Legislation to Historic Preservation", 36 *Law and Contemporary Problems,* 329, 339-341 (1971)), the Appellee would have been compensated but would have been forced to use the building subject to the easement.

If a private developer may restrict land use so that the character of a neighborhood is preserved, if Urban Renewal can clear slums and sell to private individuals who will build new structures in accordance with Urban Renewal's plans and subject to their restrictions, why can not the City of Louisville enact an ordinance designed to persuade citizens to preserve historic neighborhoods for the common good? And when a property owner threatens to jeopardize the stability of a whole preservation district, why should not the City be able to condemn that property rather than risk the loss of priceless treasures?

CONCLUSION

In this bicentennial year, there should be absolutely no question that historic preservation is a valid public purpose such as to sustain the use of the police power and eminent domain. The Ordinance is not unconstitutionally vague, arbitrary or confiscatory. The Ordinance in no way forecloses a property owner's constitutional right of appeal. A review of cases involving similar historic district ordinances in Kentucky and elsewhere has revealed strong judicial support for the constitutionality of such regulation. Finally, a review of the facts in the case at bar will reveal that the Woman's Club has not been harmed to any significant extent.

For these and other reasons discussed above, the amicus urges that the lower court's opinion and order be reversed and that it be ordered to enter an interlocutory order in conformity with KRS 416.420.

Respectfully submitted,

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APPENDIX

APPENDIX A

LANDMARKS COMMISSION APPLICATIONS

Districts		Applications								
		Certificate of Appropriateness	No Exterior Effect	Committee Paint Approval	Staff Approval	Fire Escapes	3-Month Waiting Period ⊕	3-Month Extension ⊕	Notice of Right to Proceed	
	West Main Street	11	2	3	5		1	1	1	
	Old Louisville	167	61	15	242	52	10	7	7	
	Cherokee Triangle	96	11	6	87	1	3	2	2	
	Landmarks		A.							
	Total	274	58	24	334	53	14	10	10	

This is the up to date listing of the total number of application received by the Landmarks Commission prior to April 28, 1976. The total number of all applications is 743.